IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

WARREN KING, Petitioner,	)))	
vs.	))	Habeas Corpus Case No. ___________
SHAWN EMMONS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, Respondent.	))))	

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Petitioner Warren King, by and through undersigned counsel, and files this Petition for a Writ of Habeas Corpus, pursuant to O.C.G.A. § 9-14-41 *et seq.* Mr. King is an indigent person currently under sentence of death. Respondent is the Warden of the Georgia Diagnostic and Classification Prison in Jackson, Georgia, where Mr. King is housed.

INTRODUCTION

Warren King was 18 years old with no history of violent crime when he and his older cousin Walter Smith were arrested for the murder of Karen Crosby, who was killed by a single gunshot wound during an attempted convenience-store robbery in the small town of Surrency.[1] Though both claimed the other was responsible for Ms. Crosby's death, it was undisputed that Walter Smith had brought

[1] Both Mr. King and Mr. Smith are Black. Ms. Crosby was white.

his uncle's gun and a mask with him while he drove around town looking for Mr. King to join him. When Mr. Smith found Mr. King, he was biking to a friend's house with snacks he had just purchased.

Mr. King's case proceeded to trial first, in September 1998. Mr. Smith testified for the State against Mr. King under a grant of use immunity. His testimony was the State's most damning, as he was their only eyewitness and claimed that Mr. King had initiated the crime, had shot and killed Ms. Crosby, and, immediately after, had made callous remarks about Ms. Crosby's death. Mr. Smith's testimony was the State's only evidence indicating that Mr. King was the more culpable defendant.

On cross-examination, Mr. Smith denied receiving any deal or "anything" from the prosecution in exchange for his testimony. Deputy Assistant District Attorney (ADA) John Johnson, a prosecutor with a long history of withholding evidence in death penalty and other serious cases,[2] had also repeatedly denied to the

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[2] *See, e.g.*, Order*, Lee v. Terry,* No. 89-v-2325 at 88-91 (Butts Cty. Sup. Ct. Apr. 28, 2008) (granting habeas relief, due to, among other things, Johnson's suppression of extensive favorable evidence and the presentation of false testimony) (order not appealed by Respondent, retrial ordered); Order, *Jenkins v. Terry*, No. 99-V-158 at 10-18 (Butts Cty. Sup. Ct. July 19, 2005) ("Overwhelming credible evidence has been presented … that the prosecution committed intentional misconduct which violated due process," due to the suppression of evidence.), *affirmed by Terry v. Jenkins*, 280 Ga. 341, 348 (2006) (affirming order, though not addressing suppression issue because habeas relief granted on other grounds). *See also* Bill Rankin, Brad Schrade and Joshua Sharpe, *Dark Legacy of Overturned Convictions Trails Longtime Prosecutor*, Atlanta Journal-Constitution (July 24, 2020), https://www.ajc.com/news/dark-legacy-of-overturned-convictions-trails-longtime-prosecutor/4SDCY5SP3FGKPJ4GVUTM4OLAMM/; Joshua Sharpe,

judge and defense counsel that any deal for Walter Smith's testimony existed, and used his closing argument during sentencing to emphasize to the jury that Mr. Smith received no deal for his testimony. Subsequent to Mr. King's trial, and after Mr. King's sentence was upheld on direct appeal, Mr. Smith was allowed to plead guilty in exchange for a sentence of life *with* the possibility of parole.[3]

Mr. King has since diligently sought evidence of a deal, and the State has continued to deny one existed. Yet, now, more than two decades after his conviction and death sentence, Mr. King has discovered that Deputy ADA Johnson had, in fact, approached Mr. Smith's attorney months before trial with a deal in exchange for his testimony against Warren King, and ultimately secured Mr. Smith's testimony against Mr. King with a promise of a life sentence to Walter Smith. ADA Johnson knew about his deal with Mr. Smith when he repeatedly denied the existence of a deal to defense counsel and the court, when Mr. Smith testified under oath at trial that he had received nothing for his testimony, and when Johnson himself repeatedly told the jury that Mr. Smith had received no deal or promises during his closing

South Georgia prosecutor with decades of misconduct accusations resigns, Atlanta Journal-Constitution (Jan. 8, 2021), https://www.ajc.com/news/crime/south-georgia-prosecutor-with-decades-of-misconduct-accusations-resigns/D7GCA3LKQNA7RCACI4RBJ5TMWM/.

[3] Mr. Smith pled guilty on September 17, 2001, almost exactly three years after his testimony at Mr. King's trial. Apart from a status conference in November 2000, nothing happened in his own case in that time.

arguments. Thus, the prosecutor not only suppressed material impeachment evidence, but then took further advantage of his misconduct to present false and misleading testimony and argument.

In addition, Mr. King has now obtained additional, previously suppressed evidence that conclusively demonstrates Deputy ADA Johnson's discriminatory intent in jury selection against Black and female jurors—evidence that, again, counsel for Mr. King diligently sought unsuccessfully for decades throughout trial and post-conviction proceedings—which was not disclosed to Mr. King until recently. This new evidence includes the prosecution's work-product identifying the race and gender of all of the prospective jurors and reflecting the prosecutor's race-consciousness throughout the voir dire process; repeated tallying of the number of Black and female prospective jurors who were being accepted or struck from the jury; and distinctly disparate note-taking on the behaviors and answers of Black qualified jurors as compared to white qualified jurors. This recently discovered evidence was not available to Mr. King at the time of his trial, appeal, or in his initial habeas proceedings before this Court.

All three of these claims undermine the fairness and reliability of Mr. King's capital proceedings and his resulting death sentence. On the basis of these new, damning revelations, which establish the constitutional violations Mr. King has sought to prove for decades, this Court should grant habeas relief.

PROCEDURAL HISTORY

Mr. King was indicted on malice murder and other charges in October 1994, in Appling County Superior Court, for the September 14, 1994, murder of Karen Crosby. The State noticed its intent to seek the death penalty against him and his co-defendant Walter Smith.

In numerous pre-trial motions, Mr. King's trial counsel sought discovery of any favorable evidence, whether for exculpatory or impeachment purposes, in the possession of the State concerning Walter Smith. These included a Motion for State's Evidence on Impeachment (R. 57-58), a Motion for Disclosure of Promises, Rewards, or Inducements Made to the Accused (R. 61-62), a Motion for Information Reflecting on Credibility of State Witnesses (R. 133-134), a Motion to Reveal the Deal (R. 140-41), and a Motion for Exculpatory and Mitigating Evidence (R. 148-54), among others.[4] *See also* R. 155-58; 167-70. In response to the motions, Deputy ADA Johnson insisted that there was no deal for favorable treatment with Mr. Smith. *See, e.g.*, PT. Dec. 5, 1995, at 136 ("I'm complying and will comply by stating to

[4] For purposes of this Petition, Mr. King will refer to the various proceedings and exhibits as: "PT." for transcripts of pretrial hearings in Appling County; "TT." for trial transcripts in Appling County; "R." for the record on direct appeal from Appling County trial proceedings; "HT." for references to the transcripts of the initial state habeas proceedings (both pre-hearing matters and the final evidentiary hearing) in this Court; and "HR." for references to the state habeas record. Citations to the district court record in federal habeas proceedings, *King v. Humphrey*, 2:12-cv-119 (S.D. Ga), will be referenced as D. with the corresponding document number.

defense counsel that [the State] knows of no such deals or considerations, or other than that which is authorized by law . . . that could conceivably influence [our witnesses'] testimony."); PT. Aug. 18, 1998, at 15 ("[I]n fact, there is no agreement in exchange for [Walter Smith's] testimony at this point and time").

With respect to jury selection, trial counsel also filed numerous pre-trial motions to seek a fair and constitutional process, including a Motion to Direct the District Attorney to Reveal the Jury Record on Jurors in Appling County (R. 289-91), a Motion to Preserve the Record as to the Race and Sex of Each Venireman at Trial (R. 309-10), a Motion to Preclude the Prosecution from Using Its Peremptory Challenges to Exclude Persons for Reasons of Race, Sex, or Other Impermissible Factors (R. 311-13), a Motion in Limine to Prohibit the State from Using Its Peremptory Challenges in a Racially Discriminatory Fashion (R. 314-15), and a Motion for the Production of Evidence Relevant to Selecting a Fair Jury (R. 328-29). Defense counsel also sought evidence that the State was conducting criminal records searches on potential Black jurors, but not potential white jurors. TT. 2055, 2060.

During jury selection at Mr. King's trial, after Deputy ADA John Johnson struck seven of the eight qualified Black jurors and one Black alternate juror (including all of the qualified Black women), and used his remaining three strikes on white women, trial counsel challenged the strikes under *Batson v. Kentucky*, 476

U.S. 79 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127 (1994). TT. 2032. The trial court found a prima facie case of discrimination and conducted a *Batson* colloquy to consider the prosecutor's purported reasons for striking each juror. TT. 2033. After reviewing the court reporter's recording with respect to two of the challenged jurors, Black male juror Alnorris Butler and Black female juror Jacqueline Alderman, the trial judge reinstated Ms. Alderman, finding that the prosecutor's proffered reasons were pretextual and that the strike was "improper." TT. 2069. Deputy ADA Johnson had said during the colloquy that his "main reason" for striking Ms. Alderman was because she was "a black female." TT. 2036.

After Ms. Alderman was reinstated, the jury consisted of 10 white people and two Black people.

At the trial, Mr. King's codefendant Walter Smith testified against him and claimed Mr. King had instigated the crime and was the one who shot Ms. Crosby and cruelly maligned her in death. TT. 2270-72. On cross-examination, Mr. Smith insisted that no one had told him he might get a deal if he testified; he was not hoping to get a deal for his testimony; and that he was not "getting anything for this." TT. 2287-88. In closing argument, ADA Johnson told the jury explicitly regarding Mr. Smith, "[t]here are no deals or he would have told you that." TT. 2693.

The jury convicted and sentenced Mr. King to death in September 1998. R. 1918-23. On November 30, 2000, the Georgia Supreme Court affirmed Mr. King's

convictions and death sentence. *King v. State*, 539 S.E.2d 783 (Ga. 2000). The prosecutor's discrimination in jury selection on the basis of race and sex was a leading issue in Mr. King's appellate brief before that court, as was the court's failure to require the State to reveal favorable information in its possession under *Brady*. *See* Brief of Appellant, No. S00P1146 (Ga. May 23, 2000), at 159-185, 269-275. After Mr. King's conviction and death sentence were affirmed, Walter Smith was allowed to plead guilty in exchange for a sentence of life with the possibility of parole, on September 17, 2001.

On October 28, 2002, Mr. King filed a habeas corpus petition in this Court, which he subsequently amended, raising multiple claims, including prosecutorial misconduct, ineffective assistance of counsel ("IAC"), and his ineligibility for the death penalty due to his intellectual disability. *See* Habeas Petition, No. 2002-v-81 (Butts Ct. Sup. Ct. Oct. 28, 2002); Amended Habeas Petition (Jan. 21, 2008). Judge Doug Pullen—who, years later, resigned from the bench after facing a Judicial Qualifications Commission investigation[5]—was assigned to preside over the case.[6]

[5] Bill Rankin, *Panel details why it investigated Columbus judge*, The Atlanta Journal-Constitution (Aug. 29, 2011), https://www.ajc.com/news/local-govt--politics/panel-details-why-investigated-columbus-judge/xVNAIE3gbzBFnki7H3B5dJ/.

[6] Judge Doug Pullen himself had his own history of discriminating against Black people in jury selection while a prosecutor in Georgia's Chattahoochee Circuit. In Timothy Foster's case, which Pullen had prosecuted along with District Attorney Stephen Lanier, the United States Supreme Court found that "the focus on

In support of his claims, counsel for Mr. King subpoenaed records from the Brunswick Circuit District Attorney's Office. *See* HT. (Dec. 17, 2007) at 4-5. John Johnson, on behalf of the District Attorney's Office, filed a Motion to Quash Portions of Subpoena to Produce Documents and refused to turn over his work-product. *See* Mtn. to Quash Portions of Subpoena to Produce Documents (Dec. 27, 2006). At a hearing before Judge Pullen, on December 17, 2007, to address Respondent's Motion to Quash, Mr. King's counsel specifically noted he was seeking any exculpatory or favorable evidence in the District Attorney's file related to Mr. Smith, who "may actually have been the shooter in this case and otherwise may have been more culpable in this case." HT. (Dec. 17, 2007) at 6. Mr. King's counsel also noted the importance of prosecution notes "pertain[ing] to jury selection issues" and specifically flagged for Judge Pullen that *Batson* had been litigated at trial and that the trial judge had found ADA Johnson to have struck one juror

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race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury." *Foster v. Chatman*, 578 U.S. 488, 514 (2016) (vacating conviction and death sentence due to *Batson* violation). Similarly, in *State v. Gates*, 840 S.E.2d 437, 457 n.22 (Ga. 2020), also prosecuted by then-ADA Pullen, the Georgia Supreme Court noted that "the record supports the trial court's very troubling findings regarding the selection of jurors in Gates' 1977 trial and the other capital murder trials held in the Chattahoochee Judicial Circuit between 1975 and 1979." *See also* Bill Rankin, *Motion: Prosecutors excluded black jurors in seven death-penalty cases*, Atlanta Journal-Constitution (Mar. 19, 2018), https://www.ajc.com/news/local/motion-prosecutors-excluded-black-jurors-seven-death-penalty-cases/dvj9X4fW4Rtz8hFDOgoQpJ/ .

improperly on the basis of race. *Id*. As a result, Mr. King's counsel informed Judge Pullen that he sought "anything [in the District Attorney's files] that reflects any kind of discriminatory bias towards jurors who are African-American, or women for example." *Id*. After the hearing, counsel provided a Memorandum Regarding Potential Brady Evidence Sought by Petitioner to the habeas court, in which he again described the type of evidence he was most interested in, which included: 1) "any notations or other references to any favorable treatment extended or potentially to be extended to co-defendant Walter Smith in exchange or in conjunction with his cooperation and testimony against Petitioner before during or after the prosecution of either co-defendant's case;" and 2) jury selection "notes which directly or indirectly reference or implicate the race of any juror . . . . Petitioner is particularly interested in notes pertaining to jurors Burkett, Maurice Vann, Sarah McCall, Dean, Ford, and Gillis." *See* Memorandum Regarding Potential Brady Evidence Sought by Petitioner (Butts Cty. Sup. Ct. Jan. 11, 2008). Judge Pullen agreed to conduct an *in camera* inspection of the files, though with respect to jury selection notes he admitted that he was "at a loss" as to how to conduct the review, and mused about his own practice as a District Attorney: "I'm just thinking back to when I tried cases. Somebody reviewing my notes might find some things I would find embarrassing because of something that I might have written down just for identification purposes" HT. (Dec.17, 2007) at 6-7—prescient observations given that Judge

Pullen's notes as a prosecutor in Timothy Foster's case grounded the U.S. Supreme Court's subsequent determination that he had intentionally discriminated against Black jurors in violation of *Batson*.

At the next hearing, on January 11, 2008, Judge Pullen conducted the *in camera* review in the courtroom, with the parties, as well as John Johnson, present, and sought their input on the records from time to time. HT. (Jan.11, 2008) at 17-47. Mr. King's counsel stressed again that he was looking for any information suggesting favorable or exculpatory treatment of Walter Smith, and any jury selection notes "which may indicate that Mr. Johnson's stated reasons for striking those jurors were not, in fact, accurate." HT. (Jan. 11, 2008) at 11-12. At both hearings, the District Attorney's Office vigorously opposed any disclosure of its work-product, and even opposed the Court keeping a sealed copy of the work-product file in the court record due to "how sacred . . . we believe that to be." HT. (Jan. 11, 2008) at 15-16.[7] Judge Pullen denied disclosure of any documents from the District Attorney's Office that he reviewed *in camera*. *Id*. at 26-27.

From December 15-17, 2008, Judge Pullen held an evidentiary hearing at which Mr. King presented evidence in support of his claims. Much of Mr. King's evidence focused on his trial attorneys' ineffectiveness at the guilt phase in preparing

[7] Judge Pullen declined to seal the file in the court record but gave it to the court reporter for "safekeeping."

and presenting evidence of Mr. King's intellectual disability and Mr. Smith's greater culpability, and at the sentencing phase in investigating and presenting Mr. King's mitigating life history. Following the hearing, the parties submitted post-hearing briefs and proposed final orders. Pet. Post-Hearing Brief (Aug. 31, 2009); Resp. Post-Hearing Brief (Oct. 30, 2009); Pet. Proposed Order (Jan. 26, 2010); Resp. Proposed Order (Nov. 18, 2009). Judge Pullen adopted Respondent's proposed order verbatim in a final order issued on April 20, 2010. The Georgia Supreme Court denied Mr. King's application for a certificate of probable cause on November 7, 2011. *King v. Upton*, No. S10E1850 (Ga. Nov. 7, 2011).

Mr. King timely filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254 in the U.S. District Court for the Southern District of Georgia on June 28, 2012, and filed an amended habeas corpus petition on May 2, 2013. D. 1, 29. Mr. King again sought the work-product files of the District Attorney's Office. Motion for Leave to Conduct Discovery and Memorandum of Law in Support. D. 41. The court conducted an *in camera* review but ruled that "the review revealed nothing material to Petitioner's claims that has not already been disclosed or made a part of the record." D. 44.[8]

[8] Counsel for Mr. King has never seen these records, so they do not know if they are the same or different than the ones he recently received. In fact, counsel has reason to believe there are additional records that he has not seen from the work-product of the District Attorney's file. For example, in the District Attorney's file, there was an empty folder labeled "JohnBIII," presumably for John B. Johnson III.

On January 24, 2020, the district court denied relief. D. 83. Mr. King appealed to the U.S. Court of Appeals for the Eleventh Circuit.

A divided panel affirmed the district court's denial of habeas relief, over a strong dissent by Judge Charles Wilson regarding the Georgia Supreme Court's resolution of the *Batson/J.E.B.* claim. Even the majority acknowledged that the "appeal presents a troubling record and a prosecutor who exercised one racially discriminatory strike and ranted against precedents of the Supreme Court of the United States," but found that the evidence was insufficient to disturb a state court judgment on federal review under the extremely deferential Anti-Terrorism and Effective Death Penalty Act (AEDPA). *King v. Warden*, 69 F.4th 856, 868 (11th Cir. 2023).

Judge Wilson, in contrast, would have granted federal habeas relief, finding the record to be "replete with evidence of racial discrimination" by prosecutor John Johnson. *Id*. at 881 (Wilson, J., dissenting).

The U.S. Supreme Court denied certiorari on July 2, 2024, with Justice Jackson, joined by Justice Sotomayor, dissenting from denial. The dissenters would have summarily reversed the decision of the Eleventh Circuit, on the basis of the strength of Mr. King's *Batson* claim. *See King v. Emmons*, 603 U.S. ___ (2024)

Upon information and belief, the sealed records reviewed by the federal district court *in camera* still remain with the district court.

(Jackson, J., joined by Sotomayor, J., dissenting from denial of certiorari) (slip. op. at 10).

With the benefit of new evidence not previously available to him, though long sought over decades, Mr. King now brings this successive petition seeking habeas relief before this Court.

CLAIMS

I. The State Violated *Brady* and Its Progeny by Failing to Disclose Critical Evidence that Would Have Significantly Impeached the Credibility of the State's Primary Witness – Mr. King's Codefendant Walter Smith.

Mr. King recently discovered that, contrary to the express representations of Deputy ADA John Johnson prior to and at the time of trial to both the defense *and* the trial court, the State had promised a life sentence to its key witness, codefendant Walter Smith, in exchange for his testimony against Mr. King. Mr. Smith was the State's only eyewitness to testify, and the only witness who named Mr. King as the shooter. His testimony was critical to the State's case against Mr. King at guilt and sentencing. Mr. King's counsel long suspected that Mr. Smith was in fact testifying in anticipation of favorable treatment, despite the State's representations to the contrary, and accordingly, diligently sought proof for years. But until was not until recently that Mr. King discovered proof of the deal.

The State suppressed critical impeachment evidence—that its star witness, an indicted co-defendant, was promised a life sentence in exchange for his testimony against Mr. King—all the while lying to defense counsel and the trial court that there was no deal in place. Had this suppressed evidence been disclosed, there is a reasonable probability that the outcome of the trial would have been different. Decades of precedent under *Brady v. Maryland,* 373 U.S. 83 (1963), establish that the State violated Mr. King's due-process rights by suppressing favorable evidence it was legally obligated to disclose to him. *See, e.g.*, *Kyles v. Whitley,* 514 U.S. 419, 454 (1995) (reversing capital murder conviction due to State's suppression of impeachment evidence); *Giglio v. United States,* 405 U.S. 150, 154-55 (1972) (reversing conviction due to State's failure to disclose impeachment evidence of a witness deal); *Schofield v. Palmer*, 279 Ga. 848, 853 (2005) (affirming habeas court's grant of a new trial based on State's suppression of impeachment evidence, namely an undisclosed $500 payment made to a key witness).

The United States Supreme Court has made clear: *Brady*'s "purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but [is required] to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley,* 473 U. S. 667, 675 (1985). Deputy ADA

Johnson's suppression of his promise of a life sentence to the State's primary witness and Mr. King's co-defendant did exactly what *Brady* was intended to prohibit—it deprived Mr. King of a fair trial and produced the ultimate miscarriage of justice: an unreliable conviction and death sentence. *See Palmer,* 279 Ga. at 853 ("We cannot countenance [the State's suppression of key evidence], and its attendant corruption of the truth-seeking process, in any case, and especially in a death penalty case.").

A. There Is a Reasonable Probability that the Outcome of Mr. King's Trial Would Have Been Different Had the Prosecution Disclosed Walter Smith's Deal.

Under *Brady*, the State has a due process obligation to disclose favorable evidence to a criminal defendant. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The duty of disclosure applies to "impeachment evidence that may be used to challenge the credibility of a witness." *State v. Thomas*, 311 Ga. 407, 413 (2021) (citing *Giglio*, 405 U.S. at 154-55); *see also Bagley,* 473 U.S. at 676 (holding that favorable evidence includes impeachment evidence that might alter the jury's judgment of the credibility of a crucial prosecution witness). Accordingly, "[t]he [S]tate is under a duty to reveal *any agreement*, even an informal one, with a witness concerning criminal charges

pending against that witness[.]" *Thomas,* 311 Ga. at 414 (citation omitted) (emphasis added).

To establish a *Brady* violation under Georgia law,[9] a defendant must show "(1) the State possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different." *Palmer*, 279 Ga. at 852.

The facts here readily meet the test. At the time of Mr. King's 1998 capital trial, the State was aware of substantial impeachment evidence implicating the credibility of Walter Smith, their star witness and Mr. King's co-defendant, as the State had actively engaged in discussions with Mr. Smith's counsel promising a life sentence in exchange for his testimony. The State never disclosed this information to trial counsel (instead denying the existence of an agreement), in violation of *Brady* and its progeny, despite being asked specifically about the existence of a deal

[9] Under federal constitutional law and U.S. Supreme Court precedent, there is no "reasonable diligence" component. Rather, prejudicial error requiring reversal is established under a three-part test: "(1) [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued." *Boyd v. Comm'r, Ala. Dept. of Corr.*, 697 F.3d 1320, 1334 (11th Cir. 2012) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Under both the state and federal standards, Mr. King prevails.

between the prosecution and Mr. Smith. The suppressed deal was material and there is a reasonable probability that the outcome of Mr. King's trial would have been different if it had been disclosed, given the critical role that Mr. Smith played in identifying Mr. King as the instigator of the crime and the actual killer, essential testimony in the State's case against Mr. King at both guilt and sentencing.

1. The State Possessed Critical Impeachment Evidence That Mr. Smith Agreed to Testify Against Mr. King in Exchange for Deputy ADA Johnson's Offer of a Lesser Sentence.

The State's key witness against Mr. King was his codefendant, Walter Smith. In preparation for Mr. King's trial, the prosecution reached out to Mr. Smith's attorneys and offered him a life sentence in exchange for his testimony at Mr. King's trial. *See* Exhibit A, attached hereto (Affidavit of John B. Brewer III), at ¶ 3. Mr. Smith and his attorneys agreed to this offer and fulfilled their end of the bargain when Mr. Smith took the stand against Mr. King at Mr. King's 1998 trial. Clearly, Deputy ADA Johnson was aware of the offer he made to Mr. Smith and knew such evidence was favorable to Mr. King. The information was textbook impeachment evidence, as it was a deal offered to a key government witness. *See, e.g., Palmer,* 279 Ga. at 852 ("Because the reliability of a particular witness may be determinative of guilt or innocence, impeachment evidence, including evidence about any deals or agreements between the State and the witness, falls within the *Brady* rule."). Any

offers, promises, or favorable treatment made to the State's key witness should be disclosed, but certainly a promise to an indictee to remove the possibility of a death sentence and a capital trial in exchange for testimony against his codefendant leaves no room to question whether it is favorable evidence which the State has a duty to disclose. *See id.* at 853 (holding deliberate suppression of *Brady* material by the State is especially corrupting in a death penalty case). Moreover, even if the prosecutor somehow failed to recognize the impeachment value of the evidence on his own (a proposition that strains credulity), Mr. King's lawyers made it clear by asking, repeatedly, whether Mr. Smith was testifying in anticipation of favorable treatment.

2. Mr. King Did Not Possess the Suppressed Evidence and Could Not Obtain It Himself, Despite His Reasonable Diligence.

For decades, Mr. King has vigorously, though unsuccessfully, sought evidence that Walter Smith testified against him in exchange for or in anticipation of a deal or favorable treatment from the prosecution. At every turn, the prosecutor repeatedly and explicitly denied a deal existed and, when cross-examined on the stand about any favorable treatment, Mr. Smith denied that he had received "anything" for his testimony. The State's repeated misrepresentations excuse any failure to find the evidence independently. *See, e.g.*, *Strickler*, 527 U.S. at 284 ("If it was reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but

also the implicit representation that such materials would be included in the open files tendered to defense counsel for their examination, we think such reliance by counsel appointed to represent petitioner in state habeas proceedings was equally reasonable."). *See also, e.g.*, *Bagley,* 473 U.S. at 682-83 ("And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.") *Cf. Thomas,* 311 Ga. at 416 ("[R]easonable diligence [does not] require[] criminal defense lawyers to cross-examine every State witness about a potential deal, just in case there is a deal that the State has improperly failed to disclose."). While the U.S. Supreme Court's decisions in *Brady* and progeny do not require diligence, Mr. King was nonetheless reasonably diligent in his attempts to investigate whether there was a deal between the State and Mr. Smith that had not been disclosed.

As detailed above, the record establishes that Mr. King filed numerous motions and repeatedly asked the State to disclose any deals or promises it offered to witnesses, particularly Mr. Smith. Prior to trial, Mr. King's counsel sought discovery of any deals the State had entered with its witnesses, including Mr. Smith. *See, e.*g., R. 57-58, 61-62, 133-34, 140-41, 148-54, 155-58, 167-70. For example, trial counsel's Motion to Reveal the Deal explicitly put both the State and trial court

on notice of Mr. King's concern with the credibility of potential witnesses. R. 140 ("[T]he credibility of the testimony of the witnesses in this action will be an important issue and the evidence of any understandings, agreements, deals or other considerations will be relevant to such witness' credibility and the trial jury is entitled to know such information."). ADA John Johnson assured counsel and the court that "[the State] knows of no deals or considerations … which have been made to any witnesses which could conceivable [sic] influence or affect the witnesses' credibility or testimony." R. 499. It was not until the final hearing before trial on August 18, 1998, that trial counsel first learned that Mr. Smith would testify against Mr. King with immunity, which had been granted by the court during an *ex parte* hearing with the District Attorney's Office, the court, and counsel for Mr. Smith. PT. 11-12 (Aug. 18, 1998); R. 1804-07. Mr. King's attorneys renewed their request for discovery relating to Mr. Smith, including "any and all exculpatory evidence," and asked additionally for the court to conduct an *in camera* inspection with regard to records related to Mr. Smith. *Id*. Despite ADA Johnson's assurances, trial counsel asked Walter Smith on the stand if he had been promised anything or expected favorable treatment as a result of his testimony. Mr. Smith testified under oath that he had not been promised anything. TT. 2288.

Following Mr. King's trial, throughout state and federal post-conviction proceedings, subsequent counsel for Mr. King continued to pursue evidence that Mr.

Smith testified in exchange for a deal or favorable treatment by the State, as discussed above. *See*, *e.g.,* Pet. Response to District Attorney's Mot. to Quash and Mot. to Compel Production of Privilege Log (Jan. 30, 2007); Pet. Memo. Regarding Potential *Brady* Evidence Sought by Petitioner (Jan. 11, 2008); Transcript of State Habeas Proceedings at 2-8 (Jan. 11, 2008), *King*, No. 2002-V-816 (Butts Ct. Sup. Ct.); Pet. Mot. for Leave to Conduct Discovery and Memo. of Law in Support, *King*, No. 2:12-cv-119 (S.D. Ga. May 22, 2014) (D. 41 at 8-11). Both the state and federal habeas court conducted *in camera* reviews, but did not produce any files related to a deal. *In Camera* Review Order (Aug. 12, 1998); *In Camera* Review Hearing (Jan. 11, 2008 at 26), *King*, No. 2002-V-816 (Butts Ct. Sup. Ct.); Order, *King*, (S.D. Ga Aug. 14, 2014) (D. 44).

It was not until recently that Mr. King was able to confirm that ADA John Johnson's repeated representations on behalf of the State that he had not promised Mr. Smith anything in exchange for his testimony against Mr. King were false. In preparation for a possible execution warrant, Mr. King's defense team began to investigate the officers involved in the investigation of Ms. Crosby's death, based on rumors of their possible sexual misconduct. This investigation, which seemed to have no connection to Walter Smith, ultimately led to proof that he had testified against Mr. King in anticipation of receiving a life sentence.

In the early fall of 2023, counsel for Mr. King submitted a request to the Georgia Bureau of Investigation (GBI) for the personnel files for agents Jerry Rowe and Jody Ponsell, who had investigated the death of Karen Crosby. In response to the request, the GBI, in late February 2024, produced a document referencing a plea deal the State had given Mr. Smith prior to Mr. Smith's testimony on behalf of the State at Mr. King's trial. The document, an internal memorandum commending two GBI agents on their work in investigating the crime, noted that "Walter Smith later pled guilty to life without parole and agreed to testify against Warren King who is the 'shooter' in this case." *See* Ex. B. The document was dated October 19, 1998, a month after Mr. King was sentenced to death and almost three years *before* Mr. Smith in fact entered into a plea deal on the record. *See* HR. 3512. Despite these discrepancies, the document suggested that the State had a deal with Walter Smith in place prior to Mr. King's trial; that law enforcement officers knew of the deal, although the defense did not; and that Mr. Smith gave false testimony at the trial when he denied the existence of any deal or expectation.

Mr. King's legal team immediately began additional investigation, including efforts to contact Mr. Smith's former counsel, in order to find proof of the pretrial deal. One of Mr. Smith's trial attorneys, Mr. John Brewer, confirmed that Deputy ADA Johnson, several months prior to Mr. King's trial, had in fact offered Walter

Smith a life sentence in exchange for his testimony against Mr. King, and that Mr. Smith had testified pursuant to that agreement. *See* Ex. A.

3. Prosecutor Johnson Repeatedly Failed to Disclose the Favorable Impeachment Evidence Concerning His Key Witness.

The prosecution has an affirmative duty to disclose evidence favorable to a defendant. *See, e.g., Brady,* 373 U.S. at 87*; Kyles,* 514 U.S. at 432. It is well established that this duty "includes evidence that would tend to impeach a government witness." *Henley v. State*, 285 Ga. 500, 506 (2009). Any evidence that "could be useful in impeaching prosecution witnesses must be disclosed under *Brady*." *Smith v. Sec'y, Dep't of Corr.,* 572 F.3d 1327, 1343 (11th Cir. 2009) (citing *Bagley,* 473 U.S. at 676). Thus "the constitutional duty [to disclose] is triggered by the potential impact of favorable but undisclosed evidence…." *Kyles,* 514 U.S. at 434.

The State violated its duty to disclose its promises to Mr. Smith, evidence that was favorable to Mr. King and would have been critical in impeaching Mr. Smith as a witness. As detailed above, the State affirmatively *denied* the existence of any deals, offers, or promises to its witnesses. Walter Smith's attorney now confirms this was false. *See generally* Ex. A.

ADA Johnson surely knew about the deal he offered for a lesser sentence in exchange for Mr. Smith's testimony and intentionally hid that deal from the defense

and court, despite numerous inquiries from Mr. King's legal team specifically about Walter Smith. Although a prosecutor need not act in bad faith to violate his due process obligations under *Brady*, *see, e.g.*, *Kyles*, 514 U.S. at 432 (citing *Brady*, 373 U.S. at 87), "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 106 (1976).

4. A Reasonable Probability Exists that the Outcome of Mr. King's Trial Would Have Been Different if the Suppressed Evidence Had Been Disclosed.

Brady instructs "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87. Evidence is "material" under *Brady,* and the failure to disclose it requires setting aside a conviction, "when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Giglio*, *supra*, at 154) (internal citation omitted). "A 'reasonable probability' of a different result is … shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Thomas,* 311 Ga. at 417 (quoting *Kyles*, 514 U.S. at 434).

The materiality of the suppressed deal with Walter Smith is beyond serious question. There can be no doubt that the suppressed impeachment evidence in

question—a promise of a non-capital, parolable sentence to Mr. King's co-defendant and the State's star witness—undermines confidence in the outcome of Mr. King's trial. At trial, ADA Johnson used Mr. Smith's testimony to further his allegation that, while both teenagers were at the scene of the crime, it was Mr. King—not Mr. Smith—who shot Karen Crosby, even though it was undisputed that Mr. Smith was the one who brought the gun and mask to the crime scene, after searching around Surrency to find Mr. King and bring him along. Mr. Smith's testimony was the State's *only* evidence that Mr. King was the more culpable co-defendant. Without Mr. Smith's critical testimony, prosecutor Johnson could not have argued that Mr. King was the one who pulled the trigger and killed Ms. Crosby and would have lacked an evidentiary basis to downplay Mr. Smith's role in the crime. *See*, *e.g.,* TT. 2695-96, 2699, 2719, 2917. If Deputy ADA Johnson had disclosed his deal with Mr. Smith, Mr. King's counsel would have been able to powerfully challenge Mr. Smith's testimony by highlighting his motive to paint Mr. King, rather than himself, as the shooter, in order to save his own life. *See*, *e.g., Palmer,* 279 Ga. at 853 (quoting habeas court opinion that suppressed evidence was material because its suppression prevented the defendant from impeaching the witness with "an age-old, logical, pecuniary argument that [he] had a motive to lie"); *see also, e.g.*, *Smith v. Cain*, 565 U.S. 73, 76 (2012) (vacating conviction and death sentence and observing that, while "evidence impeaching an eyewitness may not be material if the State's other

evidence is strong enough to sustain confidence in the verdict," "[t]hat is not the case here. [The witness's] testimony was the *only* evidence linking [the defendant] to the crime. And [the witness's] undisclosed statements directly contradict his testimony"); *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008) (vacating conviction and death sentence due to State's suppression of witness's anticipated favorable treatment and observing that "where a key witness has received consideration or potential favors in exchange for testimony and lies about those favors, the trial is not fair…. [T]he crux of a Fourteenth Amendment violation is deception").

The materiality of suppressed promises made to key State's witnesses has been extensively addressed in the law. *See, e.g., Gonnella v. State,* 286 Ga. 211, 215-216 (2009) (granting new trial where the State disclosed a plea agreement with its key witness, but withheld information that the deal was actually more favorable, and observing that "[b]y failing to provide [the defendant] with a crucial detail regarding [the] plea agreement, the State deprived [the defendant] of the ability to impeach [the witness] by demonstrating a motive for him to lie"); *Danforth v. Chapman,* 297 Ga. 29, 30 (2015) (finding *Brady* violation where defendant was deprived of his ability "to fully cross-examine" key witness and to "take advantage of favorable evidence in support of his defense"); *Dinning v. State*, 266 Ga. 694, 696 (1996) (*Brady* violated where State suppressed evidence that three key State witnesses were granted immunity for their testimony).

The violation here is clear. By repeatedly denying that Mr. Smith was testifying pursuant to a deal that not only took death off the table, but left open the possibility of parole, the State deprived Mr. King of critical impeachment information he should have been able to use in cross-examination of Mr. Smith and argument to the jury. The centrality of Mr. Smith's testimony to the State's arguments cannot be overstated. For example, the physical evidence did not implicate either of the co-defendants as the more culpable party, and the only evidence that Mr. King was the shooter was Mr. Smith's testimony. And the prosecutor, in his guilt phase closing, gave a detailed summary of Mr. Smith's testimony and then summed it up:

> Well, what does [believing Mr. Smith's testimony] do? That puts Warren King at the scene, puts the gun in Warren King's hand, puts Warren King doing the killing.

TT. 2696.

Astonishingly, ADA Johnson's closing arguments even doubled down on the lack of deal, when he knew it to be false. Speaking of Mr. Smith's testimony and lack of incentive to testify falsely, Johnson said:

> What did you hear from the stand … Well, are you going to get a different sentence? I don't know. Are you going to be tried? I don't know. Meaning to Mr. Smith what did the Court tell you about what you were going to get? I don't know. He doesn't know what he's going to get because it's very simple. . . . Nowhere [in the derivative use document] does it say that he will not be prosecuted. Nowhere does it say – and he didn't tell you – nowhere does it say that he's going to get

> a deal. Nowhere. That would be a requirement to come out in this case because it tests his credibility.

TT. 2690-91.

ADA Johnson himself admitted to both the court and the jurors that a deal would impact the credibility of Mr. Smith, but he chose to hide the deal and intentionally mislead the jury. In his closing argument during sentencing—when Mr. King's *life* was at stake—ADA Johnson doubled down, not only failing to correct Mr. Smith's false testimony but himself endorsing it, casting the defense in a negative light for even questioning whether there was a deal:

> [Walter Smith] still expects to be convicted and he can be. And he still expects to be sentenced and he can be. There are no deals or he would have told you that. And defense counsel would have made sure you heard that if there was one. When we talk about a smoke screen, that's what we're talking about. But, who brought that up? Defense attorney.

TT. 2692-93.

The suppressed deal casts substantial doubt on Mr. Smith's credibility and motivation, and consequently the version of events presented by the State, which could have led to an entirely different picture of Mr. King and the crime at both stages of his trial. *See, e.g., Napue v. Illinois,* 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend"); *Cone v. Bell,* 556 U.S. 449, 475 (2009) (noting that suppressed evidence

"may well have been material to the jury's assessment of the proper punishment" and remanding for further consideration). *See also Palmer*, 279 Ga. at 853 (finding that, despite "considerable amount of evidence incriminating [the defendant]," "[w]e cannot countenance the deliberate suppression by the State of a payment to a key witness, and its attendant corruption of the truth-seeking process, in any case, and especially in a death penalty case"). Mr. Smith's credibility was central to the entire trial. *See, e.g.*, *Tassin*, 517 F.3d at 780 (granting relief where the State suppressed evidence of sentencing deal for the "key witness – and the only witness – behind the State's felony murder case"). Because Mr. Smith's testimony was the State's only evidence that Mr. King was the more culpable defendant, there is a reasonable probability that the guilt and sentencing phase verdicts would have been different had the jury known that Mr. Smith had been promised life with parole for his testimony.[10]

As recognized in *Gonnella,* "it is the deprivation of [Mr. King's] ability to fully cross-examine [Mr. Smith] based upon the State's agreement with him that constitutes the denial of due process." *Gonnella,* 286 Ga. at 216. The United States

[10] Indeed, many jurors who served on Mr. King's capital trial and one of the alternates are troubled that Walter Smith got a life sentence and/or that he was allowed to plea bargain, when Mr. King was sentenced to death. *See* Juror R. Newsome Affidavits; Juror J. Orvin Affidavits; Juror J. Miles Affidavit; Juror K. Milton Affidavits; Juror L. Parker Affidavits Alternate juror J. Patterson Affidavit, attached as Exhibits C-H.

Supreme Court and Supreme Court of Georgia have been clear: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Palmer,* 279 Ga. at 853 (quoting *Brady,* 373 U.S. at 87-88). The materiality of ADA Johnson's intentionally undisclosed deal with Mr. Smith undermines confidence in the outcome of both the guilt and sentencing phases of Mr. King's trial, in violation of *Brady* and its progeny, and renders the outcome of the trial fundamentally unreliable.

B. This Claim Is Properly Before the Court in Mr. King's Successive Habeas Petition, as the Evidence on which It Is Based Was Not Reasonably Available to Mr. King Until Recently, Despite Diligent Efforts to Find It.

Under O.C.G.A. § 9-14-51, any ground for relief that was not raised in an initial habeas petition is waived unless (1) the claim is not waivable under the federal or state constitutions or (2) "any judge to whom the petition is assigned . . . finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition." As extensively addressed above, although Mr. King long suspected that the State had a deal with or made a promise to Mr. Smith at the time of trial, the State consistently and repeatedly denied the existence of a deal, and Mr. King had no evidence of it sufficient to bring a claim until now. Despite his persistent efforts to discover any favorable treatment by the State toward Mr.

Smith, Mr. King only recently discovered evidence that a deal, in fact, existed. He thus could not have raised this claim, supported by admissible evidence, any earlier. *See Smith v. Zant*, 250 Ga. 645, 652 (1983) ("Since the prosecution has the constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense."); *Palmer,* 279 Ga. at 851 (holding claim was "not procedurally defaulted . . . because [petitioner could] show cause and prejudice to excuse the procedural default") (citing O.C.G.A. § 9-14-48 (d)). *See also Strickler*, 527 U.S. at 289 (petitioner established cause "because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received 'everything known to the government'"); *Ballinger v. Watkins*, 315 Ga. 369, 375 (2022) (holding that claim was not procedurally defaulted, because petitioner's unsuccessful efforts to obtain the information for many years established cause to excuse the default).

Mr. King can show both cause for the failure to present the evidence earlier and prejudice from the error. Indeed, "the underlying claim and the prejudice analysis necessary to satisfy the cause-and-prejudice test are coextensive…. [T]here is no procedural default if [Petitioner] can prevail on his *Brady* claim…." *Palmer*,

279 Ga. at 851. Mr. King's counsel at all stages have attempted numerous times throughout trial, direct appeal, and state and federal habeas proceedings to ascertain whether Mr. Smith had been offered a deal or any favorable treatment which the State had not disclosed. The State *repeatedly* denied the existence of such a deal. As argued above, the State's suppression of material, favorable evidence warrants relief under *Brady* and its progeny, and accordingly it also satisfies the actual prejudice prong, as it "worked to [Mr. King's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Palmer,* 279 Ga. at 851 (internal citation omitted).

Accordingly, Mr. King's petition is properly before this Court.

II. The State Knowingly Presented False Testimony that Could Have Affected the Verdicts at Guilt and Sentencing, in Violation of *Napue* and Mr. King's Due Process Rights.

Deputy ADA John Johnson allowed Walter Smith to testify that no one had told him he might get a deal if he testified; that he was not hoping to get a deal for his testimony; and that he was not "getting anything for" his testimony, TT. Vol. 13 at 2288—testimony Johnson knew, or should have known, was false, in violation of Mr. King's due process rights. A prosecutor has an affirmative constitutional and ethical obligation to correct testimony before a tribunal which he knows, or should know, is false. *See Napue*, 360 U.S. at 269; *Smith*, 250 Ga. at 652. ADA Johnson failed to comply with this obligation when he allowed Mr. Smith's false testimony

to go uncorrected. Not only did ADA Johnson allow Mr. Smith's testimony to go uncorrected, but Johnson doubled down on the misrepresentation and repeatedly assured the jury himself that Mr. Smith was not receiving anything for his testimony and that his credibility is therefore not impugned. *See* TT. 2690-91 ("[Mr. Smith] doesn't know what [sentence] he's going to get because it's very simple. . . . Nowhere [in the derivative use document] does it say that he will not be prosecuted. Nowhere does it say – and he didn't tell you – nowhere does it say that he's going to get a deal. Nowhere. That would be a requirement to come out in this case because it tests his credibility."); TT. 2692-93 ("There are no deals or he would have told you that. And defense counsel would have made sure you heard that if there was one.")

Because Mr. Smith's false testimony "may have had an effect on the outcome of the trial," *Napue*, 360 U.S. at 272, Mr. King should receive habeas relief as to his conviction and sentence. *See, e.g.*, *Agurs*, 427 U.S. at 103 (due process violation results when prosecutor knew, or should have known, that perjured testimony was presented, and testimony "could have affected the judgment of the jury"); *Williams v. State*, 250 Ga. 463, 465 (1983) (same) (quoting *Agurs*, 427 U.S. at 103); *Al-Amin v. State*, 278 Ga. 74, 82 (2004) ("Conviction of a crime following a trial in which perjured testimony on a material point is knowingly used by the prosecution is an infringement on the accused's Fifth and Fourteenth Amendment rights to due

process of law") (citation omitted); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 (11th Cir. 1988) (conviction vacated where State failed to correct false testimony, noting that a "prosecutor's failure to correct a witness' false testimony will warrant a reversal where, as here, the 'estimate of the truthfulness and reliability of the given witness may well be determinative of guilt or innocence'") (quoting *United States v. Cole*, 755 F.2d 748, 763 (11th Cir. 1985)) (internal citations omitted). The *Napue/Agurs* standard is "[a] different and more defense-friendly standard of materiality" than applies to claims that favorable evidence was wrongfully suppressed under *Brady*. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (noting that "where the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, . . . the falsehood is deemed to be material 'if there is any reasonable likelihood that the false testimony *could have* affected the judgment of the jury'") (quoting *Agurs*, 427 U.S. at 103).

Unlike a *Brady* claim under Georgia law, relief under *Napue* does not depend on the diligence of defense counsel. *See, e.g.*, *Napue*, 360 U.S. at 269-70 ("a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."); *DeLoach v. State*, 308 Ga. 283, 292 (2020) ("To

prevail on this claim of error, [the defendant] was required to show that the prosecutor knowingly failed to correct [a witness's] false testimony, and that the falsehood was material."). ADA Johnson, as the representative of the State, had an independent, constitutional, and ethical obligation to correct Mr. Smith's false testimony. *See Agurs*, 427 U.S. at 110.

As discussed at length above in Claim I and incorporated herein, Mr. Smith's testimony that he had no deal was false. In fact, he had a deal and knew about the deal months ahead of the trial. *See* Ex. A. Deputy ADA Johnson also knew the testimony was false because he was the one who made the deal. Mr. Smith's false testimony went to the very heart of the credibility of the State's key witness against Mr. King, Walter Smith, who provided the only evidence that Mr. King was the person who instigated the crime and shot Ms. Crosby. As if the prejudice of leaving that false impression standing were not enough, ADA Johnson then opportunistically argued that false testimony to ensure that jurors credited Mr. Smith's testimony.

Finally, this claim is properly before the Court for merits review because, as with Claim I, Mr. King could not have presented it in earlier proceedings.

III. Prosecutor John Johnson Exercised His Peremptory Strikes on the Basis of Race and Gender, in Violation of *Batson v. Kentucky* and *J.E.B. v. Alabama,* thereby Denying Violating Equal

Protection and Depriving Mr. King of a Fair Trial, an Impartial Jury, and a Reliable Death Sentence.

In the fall of 2023, the Brunswick Circuit District Attorney's Office, under new leadership, allowed Mr. King's legal team access, for the first time, to at least a portion of prosecutor John Johnson's work-product from Mr. King's trial, including notes from jury selection.[11] As noted above, Mr. King had repeatedly, but unsuccessfully, sought this evidence before and during trial and continuing through state and federal habeas proceedings.

In addition to the powerful evidence of Johnson's racial discrimination that Mr. King has previously presented to the appellate courts, *see, e.g.*, *King*, 69 F.4th at 877-880 (Wilson, J., dissenting) (highlighting "some relevant facts from jury selection" that show an "abundance of racial discrimination evidence"), these newly revealed notes, which no court has ever considered, confirm what Mr. King has long sought to prove in the courts: Deputy ADA Johnson discriminated against Black and female jurors in exercising his peremptory strikes, violating longstanding precedent under *Batson* and *J.E.B.*

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[11] The District Attorney's Office told Mr. King's legal team that it was giving them access to everything it could find on the file from an initial search, though there were items clearly missing from the file, including an empty folder labeled "JohnBIII" and a large cardboard box labeled "King" that was empty. The District Attorney's Office informed Mr. King's counsel that it did not know where any additional missing items would be located.

"The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.'" *Foster v. Chatman,* 578 U.S. 488, 499 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). A prosecutor's decision to strike must be evaluated "in the context of all the facts and circumstances." *Flowers v. Mississippi,* 588 U.S. 284, 315 (2019). In cases where the U.S. Supreme Court has found *Batson* violations, it has repeatedly probed facts and circumstances outside the four corners of the trial transcript to assess whether those strikes were pretextual. *See, e.g., Flowers,* 588 U.S. at 287-92 (analyzing prosecutor's history of strikes in prior trials); *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005) ("*Miller-El II*") (considering discriminatory language in the prosecution office's manual to confirm racial discrimination in jury selection). Indeed, in *Foster*, the U.S. Supreme Court granted relief where this Court had dismissed a *Batson* claim raised in a successive habeas petition on *res judicata* grounds and the Georgia Supreme Court had denied review. *See Foster,* 578 U.S. at 497. Despite the claimed default, the U.S. Supreme Court held that newly discovered evidence (such as the prosecutor's voir dire notes reflecting, *inter alia*, that the prosecutor had put the letter "N" next to the names of prospective Black jurors and highlighted the names of the Black jurors), which augmented evidence supporting a previously rejected *Batson* claim, established that

the prosecutor, Douglas Pullen,[12] had violated *Batson*. *See Id.* at 492-514. Even a single discriminatory strike in violation of *Batson* and/or *J.E.B.* requires the grant of a new trial. *See, e.g.*, *Flowers*, 588 U.S. at 299; *Snyder,* 552 U.S. at 478. As detailed below, Deputy ADA Johnson's work product, together with the evidence already mustered, make abundantly clear that the prosecutor did so here more than once, and accordingly, relief is warranted.

A. Prosecutor John Johnson's Newly Available Work Product Provides Proof of the State's Discriminatory Peremptory Strikes.

When selecting a jury for Mr. King's trial, ADA Johnson struck seven of eight qualified black jurors—or 87.5% of the black jurors in the pool—while striking only three—or 8.8% of—white jurors, all of them women. Johnson did not strike a single white man, although they comprised 45% of the jury pool (19 of 42). A Black juror was thus 10 times more likely to be struck than a white juror, while women were four times more likely to be struck than men (40% compared to 9%).[13]

Immediately following the parties' strikes, the defense challenged ADA Johnson's strikes, citing his staggering rate of striking black and female prospective

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[12] *I.e.*, the same individual who served as the state habeas judge in Mr. King's case and denied Mr. King access to the district attorney's files. *See supra* n.6.

[13] And, at the intersection of the two targeted groups, the strike rate was 100%, as Deputy ADA Johnson struck *every* Black woman from the jury pool (5 out of 5 and one alternate).

jurors, and the trial court found that Mr. King had established a prima facie case of discrimination. When the court called on ADA Johnson to proffer explanations for the strikes, ADA Johnson, rather than denying discrimination or immediately offering explanations for his strikes, angrily ranted against *Batson* for allowing the trial court or the Supreme Court to be involved in how he conducts his strikes and insisted that the "statistical analysis" of his strikes was irrelevant. TT. 2033. Eventually, ADA Johnson did proffer reasons for his strikes, and after reviewing the voir dire tapes of only two of the ten excluded jurors, the trial court found that one of Johnson's strikes, of Black female juror Jaqueline Alderman, violated *Batson*.[14] ADA Johnson had explained he was striking Ms. Alderman "main[ly]" because "she [was] a black female." TT. 2036.[15] The trial court's finding of discrimination sent Deputy ADA Johnson into his second tirade against *Batson*, during which he became so angry the trial court had to tell him to "[c]alm down" and "[g]et yourself, your thoughts proper . . . ." TT. 2070. Deputy ADA Johnson then proceeded to tell the court that it was "improper" for the court to tell him how to strike jurors and that

[14] The trial court found that ADA Johnson's strike of Jacqueline Alderman violated *Batson* as Johnson's claim he struck Ms. Alderman because she knew Mr. King and his family was disproven by the record. Ms. Alderman had instead testified that she did not know Mr. King and hardly knew his family. TT. 566, 573, 2069.

[15] After Ms. Alderman was reinstated onto the jury, the resulting jury was comprised of two Black jurors and 10 white jurors, six of whom were white men.

Batson was unnecessary because "it was a physical impossibility if you wanted to strike every black off a jury for you to do that." TT. 2070-71. Mr. King has long maintained and sought to prove that many of the other Black and female qualified jurors who ADA Johnson struck, citing inconsistent, weak, and factually inaccurate rationales, were also impermissibly excluded from jury service.

Now that Mr. King's counsel has been granted access to some of ADA Johnson's work product from voir dire, the new evidence provides concrete proof that Johnson was indeed considering race and gender when he struck potential qualified jurors from Mr. King's capital jury. ADA Johnson's notes reveal that he was:

- identifying the race and gender of all prospective jurors in the venire, even those who were never reached or individually questioned by Johnson (Exhibit I, State's Notes on Jury Panel);
- in subsequent notes on the petit jury, explicitly noting whether potential jurors were Black or not (Exhibit J, State's Notes on Jury List), and not doing the same throughout for white jurors;
- repeatedly tallying the number of Black and female prospective jurors who were being accepted or struck from the jury (Exhibits I, J, and K, State's Misc. Notes on Jurors);
- only taking descriptive notes about the behavior of prospective Black jurors regarding their affect when they were answering questions on the death penalty, but ignoring the behaviors of white prospective jurors with similar views (Exhibit I);
- noting the criminal histories of potential Black jurors and their families, while ignoring their victimhood, while only noting the victimhood of prospective white jurors' families (Exhibits I and K); and

- observing commonalities between Black and white prospective jurors which were later used to only strike Black jurors (Exhibits I and K), such as multiple jurors who he marked as knowing King or King's family.

The "decisive question" in a *Batson* analysis is "whether [the State's] race-neutral explanation[s]. . . should be believed." *Miller-El v. Cockrell,* 537 U.S. 322, 339 (2003) ("*Miller-El I*") (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). To determine whether those explanations should be believed, "all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder,* 552 U.S. at, 478. ADA Johnson's work product, paired with the record evidence,[16] shows clear discrimination with respect to potential jurors: Lillie Burkett (a Black woman); Sarah McCall (a Black woman); Patricia McTier (a Black woman); Gwen Gillis (a Black woman); Jane Ford (a white woman); and also calls into question the strikes of potential jurors Alnorris Butler (a Black man); Peggy Tillman (a white woman); Maurice Vann (a Black man); and Vondola Barney (a Black woman). The prosecution's notes and actions from Mr. King's trial make clear that the State exercised its peremptory strikes on the basis of race and gender in violation of *Batson*. Mr. King accordingly should be granted relief. *See, e.g.*, *Miller-*

[16] Even the Eleventh Circuit panel majority, in denying relief under the AEDPA's highly deferential standard, noted that "this appeal presents a troubling record and a prosecutor who exercised one racially discriminatory strike and ranted against precedents of the Supreme Court of the United States." *King*, 69 F.4th at 868.

El II, 545 U.S. at 265 ("[W]hen this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination.")

1. The New Evidence, Reflecting Prosecutor Johnson's Focus on Race and Gender in Preparation For and Throughout Jury Selection, Evinces His Discriminatory Intent.

The U.S. Supreme Court has found that contemporaneous notes by the prosecution that reflect the prosecution's focus on the race of jurors during jury selection is highly probative of the prosecutor's intent in using peremptory challenges to remove members of a suspect class. *See, e.g., Foster*, 578 U.S. at 514; *Miller-El II*, 545 U.S. at 264-265.

Here, much as in *Foster* and the *Miller-El* decisions*,* Deputy ADA Johnson's repeated notations regarding the race and gender of both the entire venire (including jurors never reached) and the qualified jurors across multiple copies of the jury list evidence his discriminatory intent. *See* Exs. I, J, K. Deputy ADA Johnson's notes make clear that he was considering the race and gender of prospective jurors before knowing whether they would be reached and before even speaking to them individually, and that focused consideration of race and gender continued throughout voir dire.

a. Prosecutor Johnson's newly available notes indicate the race and sex of all of the prospective jurors, even those never individually questioned or reached.

Of the 218 jurors who were called to service, 168 appeared in court and were sworn in before individual voir dire questioning began. TT. 1-31. Those jurors were then divided into twelve panels to be individually questioned, first by the trial judge and then by ADA Johnson and Mr. King's counsel. TT. 320-1997. Ultimately, 42 people were qualified from which the petit jury would be selected. TT. 1997. Another 12 jurors constituted the qualified alternate juror pool from which three alternate jurors were selected.

In his notes, Deputy ADA Johnson indicated the race and sex of *every* prospective juror who appeared in court and was sworn in, using markers such as "B" for Black and "W" for White. *See* Ex. I. He did so in documents identifying the entire venire, which included dozens of jurors who were never questioned during voir dire and who were not included in the group of 42 individuals from which the petit jury would be selected or the 12 individuals from which the alternates were selected. In other words, before ADA Johnson had any idea of which jurors would be qualified to serve, he was contemplating their race and sex. He continued to identify jurors by race and gender in multiple other documents, as voir dire was conducted and the jury pool was winnowed through cause, and ultimately peremptory, challenges. *See* Exs. J, K.

In *Foster*, the prosecutor's newly found voir dire notes served to establish the *Batson* violation previously rejected on direct appeal.[17] *See, e.g.*, *Foster*, 578 U.S. at 514 (concluding that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury" where "[a]n 'N' appeared next to each of the black prospective jurors' names on the jury venire list," and "[a]n 'N' was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors"). Just as in *Miller-El* and *Foster,* prosecutor Johnson's notes evidence his intent to discriminate, showing that "race was a factor" in jury selection.

ADA Johnson's constant notations of race and gender throughout his voir dire notes likewise reflect his effort to keep Black and female jurors off of the jury. Even assuming the State had a legitimate basis for identifying the race and gender information for the entire venire once, ADA Johnson surely had no proper reason to document this information over and over again, in so many forms, throughout the voir dire process. That race and gender information occupies such a ubiquitous presence in his voir dire notes is strong evidence that race and gender were on his mind as he targeted the jurors he wanted to remove from Mr. King's jury.

b. Prosecutor Johnson's notes expressly consider whether people were Black or not.

[17] *See Foster v. State*, 258 Ga. 736, 737-39 (1988).

Another piece of new evidence showing Deputy ADA Johnson's focus on race and gender in selecting Mr. King's jury can be found on the State's Jury List. *See* Ex. I. This list was limited to the 42 qualified jurors from whom the petit jury would be selected, and the 12 qualified jurors from which the alternates would be selected. There are handwritten notes in red ink marking the race and sex of the potential jurors, as well as who was struck and by whom. Notably, the notes begin by indicating the race and sex of each juror beside their name, such as "W/F" or "B/M." However, as the list goes on, the notes stop indicating which jurors were white with a "W" and instead simply flag Black jurors with a "B".

Ex. J (excerpt).

Again, ADA Johnson marked the race and sex of potential jurors all over the sheet, further evincing that race was a factor. Even more, by dropping the "W" indicators and only noting "B" along with the sex of qualified jurors, these notes elucidate that prosecutor Johnson was explicitly paying attention to whether prospective jurors were Black or not. ADA Johnson had admitted as much to the trial court during his second rant against *Batson,* when he angrily argued that *Batson* "now makes us look whether people are black or not." TT. 2071.[18] The same pattern appears in Exhibit K, where Johnson's notes, though beginning by labelling the race and gender of all jurors he was taking notes on, eventually marked only the race and sex of Black potential jurors. *See* Ex. K. These newly available notes confirm what ADA Johnson himself confessed—race was indeed a factor and Johnson was explicitly considering whether jurors were "black or not" when choosing a jury, in violation of *Batson*. TT. 2071.

c. Prosecutor Johnson Repeatedly Tallied the Number of Each Race and Sex Being Struck from the Jury

[18] In the same rant, just a few sentences earlier, Johnson stated that he was "forced" to act racially neutral when he was "in Brunswick because it was a physical impossibility if you wanted to strike ever black off of a jury for you to do that." TT. 2070.

These notes not previously disclosed to Mr. King reflect that prosecutor Johnson's repeatedly tallied the numbers of Black and white, and male and female, jurors using tally marks and other counting methods, additional evidence of the prosecution's discriminatory intent. *See* Exs. I, J, K.

One page of handwritten notes, which labels various qualified jurors' race and sex and seems to be contemplating jurors to strike, adds up race and sex as follows: "W 3" "B 8" "M 2" "F 9." *See* Ex. K at 1. These numbers directly correspond to prosecutor Johnson's 11 peremptory strikes in selecting the jury and alternates. The front page of another document, the State's jury panel notes, has the following scribbled at the top: "W – 10 + 2" "B – 2 + 1" "M – *[illegible]*" "F – 5 + 2." *See* Ex. H at 1. These tallies correspond to the race and gender of the people accepted as jurors and alternates onto the petit jury. On yet another document, the State's jury list, there are notes tallying the race and gender of what appears to be defense counsel's strikes: " M - |||||||||| 10" "F - ||||||| 7" "All white."[19] *See* Ex. J.

Once again, if Deputy ADA Johnson had not made race and gender a factor in choosing which qualified jurors to strike, there would be no need for him to

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[19] At the time of trial, the defense in a capital case had 20 peremptory strikes, to the prosecution's ten. *See, e.g.*, *Robinson v. State*, 278 Ga. 134, 134 (2004) (quoting statutory rule providing that in capital case, "the person indicted for the crime may peremptorily challenge 20 jurors and the state shall be allowed one-half the number of peremptory challenges allowed to the accused").

repeatedly count the number of Black and female jurors accepted onto, and struck from, the jury.

2. ADA Johnson's Proffered Reasons for Striking Seven of Eight Qualified Black Jurors Are Further Belied by His Notes, Which Show Disparate Treatment of Prospective Jurors

When the trial court found a *prima facie* case for discrimination and asked ADA Johnson to explain his peremptory strikes, Johnson twice ranted against *Batson,* ending his first rant by saying, "neither this Court nor the Supreme Court nor the defense should be involved in deciding whether or not the State has accurately or effectively performed its strikes." TT. 2035. He then proffered explanations for his strikes, most of which Mr. King's trial and appellate counsel have challenged as improper, pretextual, and factually inaccurate.

The newly available evidence from ADA Johnson's notes directly demonstrate what Mr. King's counsel have argued for decades—Johnson's reasons for striking qualified Black and female jurors are belied by the evidence. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Miller-El II,* 545 U.S. at 241. Johnson's notes underscore that his proffered reasons for striking Black and female jurors were not equally applied to white and male jurors. Further,

his notes themselves treated jurors differently, by only memorializing certain types of information based on a prospective juror's race.

a. Johnson's proffered reasons for striking black and female jurors also applied to white and male jurors, as evidenced by his notes.

Deputy ADA Johnson's notes demonstrate that his proffered reasons for striking Black and female jurors were pretextual because they illustrate his disparate treatment of jurors on the basis of race and sex. His newly discovered notes document that white and Black, male and female, jurors shared traits that he would later use as grounds only to exclude Black and female jurors. *See* Ex. I. As explained below, this evidence demonstrates that Johnson's proffered reasons were not his actual reasons for the strikes and further evinces that race and gender played a part in his peremptory strikes, in violation of *Batson*.

<u>Knowledge of King and King's Family:</u> Prosecutor Johnson cited familiarity with Mr. King or his family as a reason for striking four Black jurors: Jacqueline Alderman, Lillie Burkett, Gwen Gillis, and Maurice Vann. TT. 2035-36, 2038, 2042-43. Yet, his newly reviewed notes, quoted below, show that he also acknowledged that many white qualified jurors mentioned knowing Mr. King or his family:

- Connie Arnold (WF) – "Knew D – Bought videos"
- Karen Milton (WF) – "Knew D – When CT done"
- Jacqueline Alderman (BF) – underlined "From Surrency"; "Know D Family"
- Rebecca Griffin (WF) – "Knew D – School w/ Br"

- Martha Vaughn (WF) – "Knew D – thru school"
- James Edwards (WM) – "Knew D, V – in class?"
- Gwen Gillis (BF) – "Know D – aunt neighbor" "Smith kin=neighbor"
- Maurice Vann (BM) – "Know D Fam; Parents; Sister-school; go to Surrency"
- Lillie Burkett (BF) – "Know D - Family"
- Charles Harris, Sr. (BM) – "Know D – older family"
- Derrick Hall (BM) – "Know D"

See Ex. H.

Johnson did not strike a single white juror he identified as knowing Mr. King, yet struck every Black juror with any even remote connection to Mr. King or his family. These notes thus illustrate that prosecutor Johnson knowingly selected Black jurors to strike for purported reasons that equally applied to numerous white jurors—many of whom in fact had closer ties to Mr. King and/or his family than the struck Black jurors.[20] This a clear example of prosecutor Johnson's disparate treatment of jurors on the basis of race. *See Miller-El II,* 545 U.S. at 241 (supposedly race-neutral

[20] For instance, white prospective juror James Edwards, struck by the defense, R. 1833, thought he had taught both King and Karen Crosby in middle school. TT. 1218-19. Johnson did not ask a single question about his relationship with King and how that might impact him as a juror. *See* TT. 1225-26 (Johnson's voir dire of Edwards). Rebecca Griffin, a white woman selected as Juror No. 7, R. 1833, attended school with King's sister Juanita (a defense sentencing witness), and King went to school with Griffin's brother. TT. 809.

reasons that apply to struck Black jurors tend to prove discrimination if they apply equally to white jurors who served).[21]

Hesitancy on the Death Penalty: Prosecutor Johnson claimed hesitancy about imposing the death penalty as a reason to strike Black people Sarah McCall, Alnorris Butler, and Maurice Vann, and white woman Peggy Tillman. TT. 2037, 2038-39, 2047-48. Yet his newly reviewed notes show that he recognized many white and male qualified jurors were similarly hesitant about imposing the death penalty—and didn't strike a single one.

- Alnorris Butler (BM) – "DP – Pause = OK" "Serious enough" "Hesitant on record" "Wrinkled Nose" "Last Choice"
- Maurice Vann (BM) – "bowed head at DP quest – put Hd down again [] choose all 3 [] Open mind- All 3" "Know D Fam"
- Charles Harris, Sr. (BM) – "opp to DP – can't make up mind" "confusing"
- Aimee Smith (WF) – "DP-In the middle"
- James Miles (WM) – "DP=Middle"
- Sarah McCall (BF) – "DP – Questions – Relig – In some cases" "Not fst choice – could"
- Patricia McTier (BF) – "DP – It would be hard – yes – she is religious"
- Lamarvin Parker (BM) – "DP – OK"
- Rodney Reese (WM) – "DP Beyond shadow of a doubt"
- Carzell Rooks, Jr. (BM) – "Said wld have to go/w DP [] LWOP"
- Peggy Tillman (WF) – "DP = Sparingly, Exten Cir., Opp to Auto DP"

Ex. I.

[21] And he improperly struck Jacqueline Alderman, claiming in part that it was because she knew King or his family. She did not.

Again, ADA Johnson proffered reasons for his strikes that applied just as well to white men but never struck them, he only used these notes to justify the strikes of Black and/or female qualified jurors—further proof of his discriminatory intent.

Ministers: Prosecutor Johnson claimed that he struck Lillie Burkett, a Black woman, because she was a minister and he "do[es] not take people on juries who are ministers." TT. 2042. Yet again, his newly reviewed notes show that he recognized a white male, Thomas Lightsey, was also a minister, but did not strike him.

- Lillie Burkett (BF) – circled "Church – minister"
- Thomas Lightsey (WM) – circled "Minister"

Ex. I.

ADA Johnson acknowledges that both Burkett and Lightsey were ministers on a second set of notes as well. Ex. K. ADA Johnson effectively accepted Mr. Lightsey by exercising all ten of his strikes before Lightsey was reached. The petit jury was filled before Lightsey was reached, but only because the defense did not exhaust their peremptory challenges—something Johnson could not have known would happen.[22] ADA Johnson thus implicitly "accepted" Lightsey by not saving a

[22] The process of striking prospective jurors here was identical to the procedure described in *Foster,* where "the State went first" and "the defense could accept any prospective juror not struck by the State without any further opportunity for the State to use a strike against that prospective juror." 578 U.S. at 504. "Accordingly, the State had to 'pretty well select the ten specific people [it] intend[ed] to strike' in advance." *Id.* (record citations omitted).

strike for him. Had the defense used all or more of their strikes, Lightsey would have been reached and thus accepted by default by the State.

Exposure to Intellectual Disability: Prosecutor Johnson never asked Jane Ford a single question, yet used Ms. Ford's former employment as an "on and off" substitute teacher, where she had worked with children with intellectual disability, and her one-word agreement with defense counsel that she enjoyed working with them, as his "primary" reason to strike her. TT. 2040. Yet, ADA Johnson's newly reviewed notes show that he recognized many other potential jurors who knew or were involved with intellectually disabled or mental-health challenged individuals and did not strike them.

- Samantha Drew (WF) – "FR: Mildly Ret."
- Glenn [sic] Branch (WM) – "Around MR"
- James Orvin (WM) – "under care of psychiatrist"
- Jane Ford (WF) – "MR – School spec ed enjoyed"
- Catherine Strickland (WF) – "MR SpEd"

At least two of the seated male jurors whom Johnson accepted, Glynn Branch and James Orvin, admitted to having personal relationships with people with intellectual disabilities and acknowledged that people with intellectual disabilities had real limitations. TT. 670, 727. Ms. Ford had similarly recognized that the intellectually disabled students she had worked with years earlier had "real disabilities," and when asked by defense counsel if she enjoyed working with them,

answered in the affirmative. TT. 1145.[23] Deputy ADA Johnson struck Ms. Ford, but not similarly-situated male jurors, calling into question the sincerity of his proffered reasons for striking her and tending to prove purposeful discrimination. *See Miller-El II,* 545 U.S. at 241.

b. Disparate Notetaking During Jury Selection

The newly received files from the District Attorney's Office show that Johnson wrote notes during voir dire which anticipated excuses to strike Black prospective jurors, such as detailing their physical mannerisms when answering questions on the death penalty or documenting the criminal histories of their family members—indicating disparate treatment and discriminatory intent in violation of *Batson.*

Noting Behaviors of Black Jurors on Death Penalty Questions: The newly available evidence shows that ADA Johnson repeatedly took note of the affects and behaviors of Black prospective jurors who were responding to questions about the death penalty, but never the affects and behaviors of white jurors who had similar stances. While numerous white and Black qualified jurors expressed hesitancy on the death penalty, as acknowledged by Johnson's own notes and discussed above

[23] That Johnson even learned this about Ms. Ford was happenstance. Defense counsel did not ask this question of any other jurors with connections to people with intellectual disability.

(Ex. I), it was *only* Black jurors of whom Johnson made sure to note small mannerisms.

- Alnorris Butler (BM) – "DP-Pause=ok" "Serious enough" "Wrinkled Nose" "Hesitant on Record"
- Maurice Vann (BM) – "bowed head at DP quest – put Hd down again"

ADA Johnson then relied on these observations of Mr. Butler to justify striking him, almost verbatim reading off of his notes to rationalize his strike, stating he struck Mr. Butler because he "paused, wrinkled his nose, he was hesitant to answer, he made the statement that it would be his last choice…". TT. 2036-37. ADA Johnson did not take notes on, for instance, prospective white juror Aimee Smith Reddy's mannerisms during her voir dire, despite the fact that she "cried through a lot of the voir dire" (as acknowledged by both parties during a cause challenge by the defense) and was also hesitant, or, in her words, "in the middle" on the death penalty. TT. 346, 322. ADA Johnson accepted Ms. Reddy as a juror.

<u>Noting Criminal Histories v. Victimhood of Juror Family Members:</u> In his notes, prosecutor Johnson only made notes on the victimhood of white potential jurors and their families who had experienced crime, but never noted the victimhood of Black potential jurors or their families—instead noting when Black jurors or their family members had criminal histories or suspected ties to criminal cases.

- Jacqueline Alderman (BF) – "H = Rayonier → involved in Rayonier theft case"

- Vondola Barney (BF) – "Bro in Jail? → Robbery" "Ed Alex Walker [illegible]" "Dad City Council"
- Charles Harris, Sr. (BM) – "father charged w/ Rape"
- Patricia McTier (BF) – "rel to Wilma Mctier, Pros for AA"
- Geraldine Robinson (BF) – "nephew conv of manslaughter"
- Barbara Dean (WF) – "stepson shot by Darren"
- Rebecca Griffin (WF) – "Bros house broken into"
- Shirley Davis (WF) – "Victim of Burg"

Ex. H.

Although Johnson asked jurors in general voir dire whether they or their family and friends had been victims of crimes, his notes reflect that he memorialized only the positive responses of white jurors and disregarded the victimhood of Black jurors. For example, Ms. McCall (a Black woman) told counsel during voir dire that she had been the victim of a crime when her home was broken into and her jewelry was stolen. TT. 867. Yet, ADA Johnson did not take any notes on her victimhood like he had white potential jurors Griffin or Davis whose families were also victims of burglaries. In another instance, Mr. Parker (a Black man) told defense counsel that his vehicle had been broken into and everything stolen from it. TT. 902. Again, ADA Johnson didn't think to add this to his notes. Caring only about the victimhood of potential jurors when those jurors were white is yet another example of ADA Johnson's disparate treatment of jurors based on race.

Rather, what ADA Johnson would write down about Black jurors or their family members was criminal histories, despite only directly questioning one of the 89 potential jurors that were individually questioned about familial criminal history.

In fact, some of the criminal history information found in ADA Johnson's newly discovered notes was never discussed in the trial record at all, leaving open the question of how ADA Johnson acquired the information and how accurate it was. ADA Johnson's voir dire notes on familial criminal history were limited to five jurors, all of whom were Black people, and his notes on Black women Ms. Barney, Ms. Alderman, and Ms. McTier are particularly telling.[24]

ADA Johnson asked Ms. Vondola Barney, a Black woman, to clarify whether her brother, Edgar Alexander Walker, was in jail after she indicated to defense counsel that he had been a victim of a crime and had been in jail at one point. TT. 1446, 1449-50. ADA Johnson then asked for her brother's name and abruptly concluded questioning. TT. 1449–50. Ms. Barney never indicated what her brother was in jail for, but somehow "robbery" ended up in ADA Johnson's notes. Exhibits I at 4, K at 1.

[24] Indeed, Mr. King's counsel suspected ADA Johnson was only looking up criminal histories of Black prospective jurors and their family members, and not doing the same for the white jurors, and twice asked the court "to inquire as to whether or not the prosecutor looked up every juror on this panel, including the white male jurors, to find out whether or not there was any prosecution of anybody in their family, and if so, to present that evidence to the Court and make it part of the record." TT. 2060. Mr. King's counsel suggested that "if they only looked at black defendants to see whether or not there was anyone prosecuted, I think that establishes abundantly clearly what we're seeing in court today." TT. 2055.

Similarly, ADA Johnson never asked Jaqueline Alderman about her husband's knowledge or connection to any theft case, and Ms. Alderman never mentioned anything of the sort, though, when asked by the prosecutor about his employment, she said that he worked as a supervisor at Rayonier. TT. 572. Yet Johnson's notes indicate "H" (husband) "involved in Rayonier theft case." Exhibit I at 1; *see also* Exhibit K at 2. ADA Johnson then used this as a purported reason to strike Ms. Alderman later, despite Johnson's failure to ask Ms. Alderman about it or whether it might affect her jury service. In fact, ADA Johnson, apparently recognizing the weakness of this claimed reason for striking Ms. Alderman, sought to backtrack from it, and emphasized to the court that it was not his "main reason" for striking her. TT. 2035-36. And though he insinuated that Mr. Alderman was connected to the crime, he conceded, "I cannot tell the Court that he is a party to that [the Rayonier theft], but we have had some contact with him in that respect." In fact, upon information and belief, Mr. Alderman was not involved in any theft crime at Rayonier. That Ms. Alderman's *husband* (not the juror herself) may have *worked* at Rayonier while a crime was committed by someone else entirely is an even more tangential reason for striking her.[25]

[25] The trial court was not convinced of this reasoning, as it found that ADA Johnson had improperly struck Ms. Alderman in violation of *Batson* and reinstated her on the jury. TT. 2069.

Like the distant Rayonier connection to Ms. Alderman, ADA Johnson also flagged tangential family connections to potential criminal cases as reasons to keep Black people off the jury. Seemingly out of nowhere, during his individual questioning of Patricia McTier, ADA Johnson asked her if she was related to a Wilma McTier through her husband. When Ms. McTier answered "through marriage, yes," Johnson asked "and would that be your husband's brother?" to which Ms. McTier answered in the negative, clarifying "they probably about second or third cousins." TT. 884-85. Just as abruptly as he started, ADA Johnson then completely changed course to ask about Ms. McTier's views on the death penalty, never giving context for why he was asking about Wilma McTier, her husband's distant cousin, in the first place. It was not until ADA Johnson proffered reasons for his strike of Ms. McTier that he told the Court "I struck her because we have prosecuted Wilma McTier for aggravated assault. … My understanding was that that was her brother. She indicated it was her husband's – some other relationship. My indication was it was her brother-in-law. She indicated it was like her brother's uncle. Nevertheless, I did go back and look that up to determine that we did in fact prosecute Wilma McTier for aggravated assault." TT. 2039-40. In addition to misrepresenting her relation to Wilma McTier, ADA Johnson had never asked Ms. McTier about whether she even knew about her husband's distant cousin's prosecution or if it would affect her ability to be a fair minded juror on Mr. King's

case. ADA Johnson's notes confirm that Ms. McTier's distant relative's criminal history was on his mind from the beginning. Ms. McTier never mentioned Wilma McTier, but rather Johnson knew about Wilma McTier's alleged aggravated assault prosecution prior to voir dire, asked her about her relationship to him with no context, and then used it as his sole reason to strike her. The charge, only tenuously related to Ms. McTier in the first place, had also been dismissed by the time of voir dire: Wilma McTier had been charged for aggravated assault in 1994, and it was *nolle prossed* in 1997. *See* Ex. L.

These notes suggest that ADA Johnson investigated the criminal histories only of Black prospective jurors and their relatives, either in preparation for jury selection or during jury selection, and considered victimhood relevant, but only for white victims. This disparate treatment indicates discriminatory intent and suggests that ADA Johnson was looking for reasons to exclude Black jurors once voir dire had begun. Indeed, during the *Batson* colloquy, Mr. King's lawyers made this very point and asked for discovery of the prosecutor's criminal background investigation of all the jurors to determine whether the State was only investigating Black jurors. *See* TT. 2060 (defense counsel asking the court "to inquire as to whether or not the prosecutor looked up every juror on this panel, including the white male jurors, to find out whether or not there was any prosecution of anybody in their family, and if so, to present that evidence to the Court and make it part of the record"). Deputy

ADA Johnson's notes provide further proof that, at minimum, he engaged in disparate investigation of jurors on the basis of race in preparation for jury selection.

3. The Totality of the Circumstances, Now Including Johnson's Newly Discovered Notes, Prove that ADA Johnson Discriminated in His Strikes Against Black and Female Jurors.

"A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *See Miller-El II*, 545 U.S. at 252. As described in earlier sections, ADA Johnson's newly available notes, in addition to the previously available evidence,[26] prove that his proffered reasons for striking at least **seven** jurors (in addition to his disallowed strike of Ms. Alderman) were plainly pretextual in violation of *Batson and J.E.B. See Miller-El II,* 545 U.S. at 265 (holding that some "evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination."). To grant relief, this Court need only find one. Even the strike of "a single prospective juror for a discriminatory purpose" violates the Constitution. *Snyder*, 552 U.S. at 478 (quotations and citations omitted).

[26] Evidence that, on its own, proved to one judge of the Eleventh Circuit, and two United States Supreme Court justices, that discrimination had occurred.

Sarah McCall. ADA Johnson's proffered reasons for striking Ms. McCall, a Black woman—that the death penalty was not her "first choice," she was hesitant, and that her husband said she would be opposed to the death penalty—fall apart when reviewed against the backdrop of ADA Johnson's newly discovered notes as well as previously available evidence. ADA Johnson's notes show that Ms. McCall's views on the death penalty were similar to several white jurors whom Johnson did not strike for their hesitancy on the death penalty. Ex. H at 2, 3. Taken together with the fact that Johnson's false reasoning about Ms. McCall's husband is flatly contradicted by the record, it is clear that Ms. McCall was struck on the basis of race.[27]

Lillie Burkett. ADA Johnson proffered two reasons for striking Ms. Burkett, a Black woman: she was a minister, and she knew Mr. King and Ms. Crosby's families. Both of these reasons applied to white jurors who were not struck and are now acknowledged in his notes, as discussed above.[28] Even though he specifically

[27] Even without the benefit of these additional notes, Judge Wilson found ADA Johnson's strike of McCall discriminatory. *King*, 69 F.4th at 884 (Wilson, J., dissenting).

[28] Again, even without the benefit of these additional notes, Judge Wilson found ADA Johnson's strike of Ms. Burkett discriminatory. *King*, 69 F.4th at 885-86 (Wilson, J., dissenting).

noted that like Ms. Burkett, Thomas Lightsey was a minister, ADA Johnson did not reserve a peremptory strike for him. Ex. H at 5, J at 2.

Gwen Gillis. ADA Johnson's proffered reason for striking Ms. Gillis, a Black woman, was that she lived in the same neighborhood as some of both Mr. King and Mr. Smith's families, and "I don't think she can be fair in that respect." Yet, as the newly received notes show, buttressing the previously available evidence, Johnson acknowledged that several other white jurors whom Johnson accepted as jurors had similar relationships with Mr. King's family or Mr. King himself, and Ms. Gillis even emphasized how little interaction she had with Mr. King's auntie during her individual voir dire.

Patricia McTier. ADA Johnson's proffered reason for striking Ms. McTier, a Black woman, was that he had prosecuted her distant relative for aggravated assault. His newly available notes, which focus on the criminal histories of Black jurors' family members but never their victimhood, now confirm what counsel have suspected from the transcripts—Johnson used a distant family member's (by marriage) *nolle prossed* charge as a pretext for removing another Black woman from the jury. ADA Johnson never inquired with Ms. McTier about her relationship with Wilma McTier and how a *nolle prossed* charge would in any way affect her ability to be a competent and fair juror.

<u>Jane Ford.</u> ADA Johnson proffered two reasons for striking Ms. Ford, a white woman: that she "enjoyed" working with intellectually disabled children, and because she was a single mother and would need help caring for her children. Again, ADA Johnson's notes show that there were many male jurors Johnson accepted that had similar levels of familiarity with people with intellectual disability. Further, Johnson's proffer about her single-motherhood was factually untrue, as she had testified that her children were 20 and 17 and did not need care. TT. 1136-37. His own notes show that she had only said the issue of pay was a problem, not childcare. Ex. H at 3.

<u>Alnorris Butler</u>. ADA Johnson's proffered reason for striking Mr. Butler, a Black man, was that he "paused, wrinkled his nose, he was hesitant to answer, he made the statement that it would be his last choice…" when asked about the death penalty. TT. 2036-37. This reason was basically verbatim to ADA Johnson's newly discovered notes documenting Mr. Butler's affect—a pattern of notetaking that Johnson only used for Black individuals, never for white individuals with similar views on the death penalty. *See* Ex. H at 2.

<u>Vondola Barney</u>. ADA Johnson's proffered reason for striking Ms. Barney, a Black woman, was because her brother was allegedly prosecuted by the State for an armed robbery, but during voir dire, nothing about a robbery came up, only that her brother had previously been in jail. ADA Johnson never asked what her brother

was or had been in jail for, though his notes indicate that her brother was involved in a "robbery" – something he must have investigated prior to or during jury selection, or once defense counsel raised a *Batson* challenge. In light of the totality of circumstances, ADA Johnson's strike of Ms. Barney was also discriminatory.

B. Mr. King's *Batson* Claim is Properly Before This Court Because It Relies On Evidence Not Available to Mr. King at Trial or on Direct Appeal

As discussed *supra,* under O.C.G.A. § 9-14-51, any ground for relief that was not raised in an initial habeas petition is waived unless (1) the claim is not waivable under the federal or state constitutions or (2) "any judge to whom the petition is assigned . . . finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition." As enumerated above, although Mr. King long suspected that evidence of jury discrimination could be found in ADA Johnson's notes from trial, the State consistently and repeatedly denied Mr. King's requests to review the content, and Mr. King had no evidence from the notes to bring a claim until now. Despite raising *Batson* claims at trial and on direct appeal, requesting multiple *in camera* inspections, and repeatedly requesting—and being denied—access to the prosecution's notes, Mr. King has finally been allowed access to at least some of those documents and has discovered, as documented above, that the prosecutor's notes in fact evince his discriminatory intent. He thus could not have raised this claim, supported by conclusive evidence,

any earlier. *See Palmer,* 279 Ga. at 851 (holding claim was "not procedurally defaulted . . . because [petitioner could] show cause and prejudice to excuse the procedural default") (citing O.C.G.A. § 9-14-48 (d)); *see also Watkins*, 315 Ga. at 375. As described in detail above, Mr. King has shown both cause for the failure to present the evidence earlier and prejudice from the error. ADA Johnson's notes and records from jury selection, which were not available to Mr. King prior to these habeas proceedings, compel this court to consider Mr. King's *Batson* claim on the merits.

CONCLUSION

Mr. King has long suspected and sought to prove that his capital trial was tainted by prosecutorial misconduct, both in the suppression of material *Brady* evidence and in the prosecutor's intentional discrimination in the selection of his jury in violation of *Batson*. Recently discovered evidence now confirms textbook evidence of both of these constitutional violations, and has additionally shown that ADA Johnson knowingly allowed his witness to testify falsely violating his duty under *Napue*. Each one of these claims merits habeas relief.

Mr. King respectfully requests that the Court issue a scheduling order that provides for additional discovery (for instance, the unsealing of the sealed records the prosecutor provided the Court in initial habeas proceedings), an evidentiary hearing to present proof in support of the claims raised in this Petition, and post-

hearing briefing. He also requests the opportunity for oral argument regarding any procedural issues the Court must address.

This the 8th day of July, 2024.

Respectfully submitted,

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Counsel for Petitioner, Warren King

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

WARREN KING, Petitioner,	)	
	)	
vs.	)	Habeas Corpus
	)	Case No. ___________
SHAWN EMMONS, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, Respondent.	)	

NOTICE OF ELECTRONIC FILING

This is to certify that on July 8, 2024, I filed the attached pleading via the Peachcourt system, which will serve a copy to counsel for Respondent, as follows:

Sabrina Graham, Esq.
sgraham@law.ga.gov
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, GA 30334

This the 8th day of July, 2024.

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Anna Arceneaux (Ga. 401554)

Counsel for Petitioner, Warren King