MOTIONS IN MOTION: PRACTICAL TIPS TO ADVANCE YOUR DEFENSE

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FELONY CRIMINAL DEFENSE CHECKLIST: STATE COURT

TASK	NOTES
PRELIMINARY HEARING?	
ENTER APPEARANCE	
ARRAIGNMENT	
BOND/CONDITIONS OF RELEASE ISSUES	
PULL CHARGING STATUTE, ANNOTATIONS, AND JURY INSTRUCTIONS	
ISSUES WITH INDICTMENT/JURISDICTION/SOL?	
VENUE/JUDICIAL OR PROSECUTOR RECUSAL ISSUES?	
MENTAL COMPETENCY ISSUES	
MOTION FOR DISCOVERY	
SPEEDY TRIAL MOTION	
INITIAL DISCOVERY REVIEW	
GOOD FAITH LETTER(S) RE: MISSING DISCOVERY	
MOTION TO COMPEL DISCOVERY	
SUPPRESSION ISSUES (STOP, SEARCH, MIRANDA)	
SUBPOENAS TO THIRD PARTIES	
CASE INVESTIGATION (WITNESSES, DOCUMENTS, ETC.)	
IDENTIFY EXPERT WITNESS NEEDS (Motion for Funding if Indigent)	
INVESTIGATE STATE EXPERT WITNESSES	
DAUBERT MOTIONS FOR STATE EXPERTS	
NOTICE OF ALIBI?	
SEVERANCE (OTHER DEFENDANTS? OFFENSES?)	
SENTENCING ISSUES • MITIGATION EVIDENCE • MITIGATION EXPERT? • HABITUAL OR ENHANCEMENT ISSUES	

BATES LABEL ALL DISCOVERY & SEND BACK	
PRODUCE RECIPROCAL DISCOVERY	
MOTION TO REVEAL THE DEAL	
CREATE INDIVIDUAL FILES FOR WITNESSES	
ANY NOTICE REQUIRED BY RULES OF EVIDENCE FOR INTRODUCTION OF DEFENSE EVIDENCE?	
DISCUSS CLIENT TESTIFYING DECISION	
IF CLIENT IN CUSTODY, ARRANGE CIVILIAN CLOTHING (FILE MOTION IF NECESSARY)	
MOTIONS IN LIMINE __ INVOCATION OF RIGHTS __ PRIOR BAD ACTS __ FLIGHT __ CO-CONSPIRATOR PLEA/SENTENCE	
WITNESS LIST	
EXHIBIT LIST	
WITNESS SUBPOENAS (ISSUE & SERVE)	
PREPARE CROSS EXAMINATIONS	
PREPARE DIRECT EXAMINATIONS	
JURY INSTRUCTIONS (~~CIRCUMSTANTIAL EVIDENCE~~, ACCOMPLICE, LESSER INCLUDED) (PRE-FILE 24 HOURS BEFORE TRIAL OR AS DIRECTED BY JUDGE)	
VOIR DIRE PREP	
CHALLENGES TO VENIRE	
DRAFT OPENING	
DRAFT CLOSING	
DIRECTED VERDICT PREP	
SENTENCING	
POST-TRIAL MOTIONS	
APPEAL BOND	

MOTION FOR BOND REDUCTION

COMES NOW, the Defendant, John Doe, by and through undersigned counsel and pursuant to the United States Constitution, the Mississippi Constitution of 1890, the *Mississippi Rules of Criminal Procedure,* and related authority, and files his Motion for Bond Reduction as to Aggravated Assault Charge. In support of the Motion, Defendant shows the following:

1. This case was indicted on (date)(for the offense of Aggravated Assault. *See* Docket # 1. The Defendant has maintained his innocence on this charge and entered a plea of not guilty.

2. Undersigned counsel was appointed to represent the Defendant, who is indigent, on the Aggravated Assault charge on (date). *See* Docket # 9.

3. The Defendant has been continuously in custody since (date).

4. At the time of his arrest, Defendant was charged with this now-indicted Aggravated Assault charge as well as Capital Murder. Defendant has not been indicted for Capital Murder.

5. When the two cases were bound over to the grand jury, the County Court set a bond of $X for Aggravated Assault and $Y for Capital Murder. *See* Exhibit 1, County Court Order.

6. The Defendant has been unable to make the bonds as set by the County Court.

7. Mr. Does is entitled to a reasonable bail under the Eighth Amendment to the United States Constitution. Further, Article 3, Section 29 of the Mississippi

Constitution provides that excessive bail shall not be required and, absent certain exceptions, all persons shall be bailable by sufficient sureties before conviction.

8. As this Court is aware, the purpose of bail is not to punish, but rather to secure the accused's presence at trial. *Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979). "The justifiable premise for bail is that its denial punishes the accused prior to a guilty verdict while he is clothed with the presumption of innocence." *Id.*

9. Pursuant to Rule 8 of the *Mississippi Rules of Criminal Procedure*, Mr. Doe is entitled to a release on his own recognizance or on an appearance bond in an amount that he can reasonably make. Unless the Court specifically determines that Mr. Doe is a flight risk or a danger to the community, he is entitled to release under "the least onerous condition(s)" permitted under the Rules. *See MRCrP* 8.2.

10. Mr. Does has been determined by this Court to be indigent and qualified for appointed counsel. *See* Docket # 9. He cannot afford the bond amount currently set.

11. The Defendant requests that the Court reduce the bond on the Aggravated Assault charge pursuant to Rule 8 of the *Mississippi Rules of Criminal Procedure*.

12. The factors set forth in Rule 8.2 weigh in favor of a reduction of bond in this matter.

13. Under the circumstances, the Defendant requests an unsecured appearance bond. Any concerns the court has about appearance or protection of the community can be resolved by outfitting Mr. Doe with an ankle monitor or other conditions of release. Alternatively, Mr. Doe seeks a reduced secured appearance bond on the charge of Aggravated Assault.

WHEREFORE, PREMISES CONSIDERED, the Defendant requests that this Court review and reduce his bond conditions for the charge of Aggravated Assault, pursuant to the *Mississippi Rules of Criminal Procedure* and the Mississippi Constitution of 1890 and impose the least restrictive conditions of release. The Defendant prays for any further relief to which he may be entitled in the premises.

MOTION TO DISMISS INDICTMENT

Defendant, Jane Doe, by and through her counsel of record, files this Motion to Dismiss Indictment in the above-styled cause. In support of the Motion, the Defendant would show unto the Court the following:

1. Pursuant to MRCrP 14.1(a)(2)(E), an indictment shall include "the date, and if applicable, the time at which the offense was alleged to have been committed."

2. The Defendant here has been charged with 2 counts of sexual battery. In both counts of the Indictment, the offense is alleged to have occurred "on or about between (DATE) through and until (DATE)".

3. The date allegation in both counts fails to meet the requirements of MRCrP 14.1(a)(2)(E). This extremely broad allegation of date range wholly prevents Mrs. Doe from preparing any alibi defense, as she must put on proof of her whereabouts for a 4-month time period.

4. Contrary to the language of MRCrP 14.1(a)(2)(E), the Legislature has determined that the failure to provide a specific allegation regarding date is excusable. *Miss. Code Ann.* § 99-7-5. However, our courts have interpreted § 99-7-5 as to be inapplicable when there is "any indication that the lack of specificity str(ikes) a critical blow to [the defendant's] defense, such as might be the case were (the defendant is) attempting to establish an alibi defense. *Little v. State*, 744 So.2d 339, 341 (Miss. Ct. App. 1999). That is absolutely the case here, as Mrs. Doe is robbed by the indictment of the ability to prepare or even notice an alibi defense to the charges against her.

5. It is a well-settled, foundational concept of our system of justice that a defendant is entitled to present a defense at trial, protected by the Sixth Amendment's guarantee of a fair trial and the Fourteenth Amendment's due process clause. *California v. Trombetta*, 467 U.S. 479, 485 (1984). The right to present a defense is also protected by our Mississippi Constitution of 1890 in

Sections 14 and 26 of Article 3. It was protected even prior to 1890 by Mississippi courts: "The provision as to the nature and cause of the accusation is intended to secure to the accused such a specific description of the offense as will enable him to make preparation for his trial…." *Noonan v. State*, 9 Miss. 562 (Miss. 1844). In the instant case, it is impossible for Mrs. Doe to prepare or notice an alibi defense given the extremely broad allegation of time in both Count I and Count II of the indictment. As such, the indictment should be dismissed by this Court as insufficient.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully requests that this Court dismiss Counts I and II of the Indictment in this cause.

MOTION TO DISMISS

Defendant, Jane Doe, by and through the undersigned counsel, files this Motion to Dismiss. In support of this Motion, the Defendant would show the following:

1. The Defendant has been charged with four counts of alleged fraudulent statements under Mississippi's tax laws. Docket # 1.

2. The Defendant is a tax preparer.

3. In essence, each of the counts alleges that Defendant knowingly submitted tax returns that contained false statements relative to her clients' tax liability, such as by submitting incorrect medical expense information, overstated charitable contributions, or providing incorrect business income or loss information. In each count, Defendant is charged under *Miss. Code Ann*. § 97-7-10.

4. Certain counts of the Indictment, and parts of other counts, are due to be dismissed because the prosecution was initiated outside of the statute of limitations.

5. *Miss Code Ann.* § 99-1-5(1) enumerates certain offenses for which there is no statute of limitations under Mississippi law. *Miss. Code Ann*. § 97-7-10 is not in the list of offenses in that subsection.

6. *Miss Code Ann.* § 99-1-5(1) provides: "A personal shall not be prosecuted for any other offense not listed in this section unless the prosecution for the offense is commenced within two (2) years after the commission thereof."

7. The prosecution of the offenses charged in the Indictment was commenced when the Indictment was filed on September 3, 2021. Docket # 1.

8. Count I alleges that Defendant committed the offense "between the 1st day of May, 2018, and the 31st day of March, 2019." Docket # 1 at p. 1. Thus, prosecution of

this alleged offense must have been commenced by March 31, 2021 to be timely. It was not. Therefore, Count I is due to be dismissed.

9. Count II covers tax years 2018 and 2019 for Defendant's clients A and B Roe. Information provided in discovery shows that the Roes' 2018 tax return was submitted to the Department of Revenue on March 1, 2019. Thus, prosecution of the alleged offense as to tax year 2018 must have been commenced by March 1, 2021 to be timely. It was not. Therefore, Count II is due to be dismissed with respect to the tax year 2018 return. The alleged offense as to tax year 2019 was commenced during the statute of limitations.

10. Count III alleges that Defendant committed the offense "between the 1st day of February, 2017, and the 28th day of February, 2018." Thus, prosecution of this alleged offense must have been commenced by February 28, 2020 to be timely. It was not. Therefore, Count III is due to be dismissed.

11. Count IV covers tax years 2016, 2017, 2018, and 2019 for Defendant's client John Poe. That count alleges that the offense occurred "between the 1st day of February, 2017, and the 1st day of March, 2020." Information provided in discovery shows the following with respect to when Poe's tax returns were submitted to the Department of Revenue:

Tax Year	**Date Submitted to DOR**
2016	February 18, 2017
2017	March 10, 2018
2018	March 29, 2019

Thus, prosecution of the alleged offense for tax year 2016 must have been commenced by February 18, 2019; for tax year 2017 by March 10, 2020; and for tax year 2018 by March 29, 2021 to be timely. They were not. Therefore, Count IV is due to be dismissed with respect to the tax years 2016, 2017, and 2018 returns. The alleged offense as to tax year 2019 was commenced during the statute of limitations.

12. For the reasons stated herein and at any hearing set on this Motion, the Defendant prays that the following counts be dismissed for failure to commence the prosecution within the two year statute of limitations:

a. Count I in its entirety;

b. Count II as to tax year 2018;

c. Count III in its entirety; and

d. Count IV as to tax years 2016, 2017, and 2018.

Wherefore, premises considered, the Defendant respectfully requests this Honorable Court grant the relief requested herein.

MOTION TO DISMISS

Defendant, John Doe, files this Motion to Dismiss. In this case, Mr. Doe is charged under 18 U.S.C. § 922(g)(1) with a single count [Count 4] of possession of a firearm by a convicted felon. *See* Docket # 3, Indictment. Doe hereby moves for dismissal of the sole charge against him, for the reasons set forth herein.

I. INTRODUCTION

1. To begin, Mr. Doe denies that he was in possession of any firearm as alleged in Count 4 of the Indictment. But even if he were, such conduct would not be illegal for the reasons set forth herein. By filing this Motion, Doe does not concede the fact of possession and reserves all trial rights with respect to Count 4 in the event it is not dismissed.

2. Count 4 is based upon prior convictions Mr. Doe received for felony Driving Under the Influence, Possession of Cocaine, and Felon in Possession of a Firearm. These convictions were not for crimes of violence. However, Congress seeks to disarm Mr. Doe for life through 18 U.S.C. § 922(g)(1).

3. Under the United Supreme Court decision of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022) and its progeny, 18 U.S.C. § 922(g)(1) is unconstitutional as applied to Defendant Doe. For the reasons set forth in this Motion, Doe seeks dismissal of Count 4 of the Indictment in this case.

II. LEGAL BACKGROUND

4. 18 U.S.C. § 922(g)(1) bars an individual from possessing a firearm that affects interstate commerce if he "has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year."

5. The question before the Court is if this statute, as applied to the Defendant, violates Mr. Doe's Second Amendment Constitutional rights.

6. The Second Amendment provides "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II.

7. The United States Supreme Court has held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Dist. of Columbia v. Heller*, 554 U.S. 570, 592 (2008). In *Bruen*, the Supreme Court held "consistent with *Heller* and *McDonald* (561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010)), that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen*, 142 S. Ct. at 2122.

8. Before *Bruen*, the Fifth Circuit evaluated the legality of gun restrictions using familiar standards of scrutiny. See *United States v. McGinnis*, 956 F.3d 747, 753–54 (5th Cir. 2020). If legislation infringed on the historical right to bear arms, the Court asked whether the government had a sufficiently strong interest and whether its firearm regulation was sufficiently tailored. If a law breached the core of the Second Amendment liberty, the Court applied strict scrutiny; if not, the Court applied intermediate scrutiny. *Id*. at 754.

9. *Bruen*, 142 S. Ct. at 2129−31, decisively rejected that kind of analysis. In place of means-end balancing, *Bruen* "requires" courts to interpret the Second Amendment in light of its original public meaning. *Id*. at 2126, 2131; *Id.* at 2127 (rejecting courts' "two-step approach" to Second Amendment cases as having "one step too many"). As the Supreme Court explained, the Second Amendment codified a "pre-existing right" with pre-existing limits. *Id*. at 2127 (quoting *Heller*, 554 U.S. at 592, 128 S.Ct. 2783).

10. *Bruen* clarified the proper framework for analysis of supposed Second Amendment violations caused by regulatory statutes. Specifically, *Bruen* states:

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'

In other words, because historical gun regulations evince the kind of limits that were well-understood at the time the Second Amendment was ratified, a regulation that is inconsistent with those limits is inconsistent with the Second Amendment. *Id*.

11. When determining if federal regulations are "consistent with the Nation's historical tradition of firearm regulation," *Bruen* instructs courts first to look to evidence from the Founding-era because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Bruen,* 142 S.Ct. at 2130, 2136 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-35, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)). In the Second Amendment context, that necessitates an examination of evidence from (and around) 1791, when the Second Amendment was adopted. Moreover, when evaluating the scope of the right at issue, the Court must be wary of "[h]istorical evidence that long predates or postdates" 1791 and "guard against giving postenactment history more weight than it can rightly bear." *Id*. The further the evidence is removed from 1791, in either direction, the less salient the evidence becomes. In other words, the strongest evidence concerning the scope of the right at issue comes from the late-eighteenth and early-nineteenth centuries.

12. To uphold its burden, the Government must "identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not

a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Bruen*, 142 S.Ct. at 2133. When determining if the Government's proffered analogous restrictions pass constitutional muster, the analysis considers "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id*.

13. The Supreme Court recently employed the *Bruen* analysis to uphold Section 922(g)(8)'s prohibition of firearm possession for individuals found to pose a credible threat of violence to others. *United States v. Rahimi*, 602 U.S. 680 (2024). But the Court in *Rahimi* did not change the fundamental inquiry described in *Bruen* when examining Second Amendment challenges.

III. ARGUMENT

14. The Second Amendment's plain text covers the conduct proscribed by Section 922(g)(1), and the prosecution cannot meet its burden of establishing that this application of Section 922(g)(1) is consistent with the Nation's historical tradition of firearm regulation. As applied to Mr. Doe, Section 922(g)(1) is unconstitutional in that it disarms him for life on grounds inconsistent with the Nation's historical tradition of firearm regulation.

a. The restricted conduct falls within the text of the Second Amendment.

15. Applying *Bruen*'s standard, the Second Amendment's plain text covers the "posess[ion]" of a firearm that Section 922(g)(1) criminalizes. 18 U.S.C. § 922(g)(1). The term "'[k]eep arms' was simply a common way of referring to possessing arms." *Heller*, 554 U.S. at 583.

16. Mr. Doe is a member of "the people" under the Second Amendment's plain text. *Bruen* reiterates that the Second Amendment guarantees "all Americans" the right to keep and bear arms. Therefore, the text of the Second Amendment applies to Doe and the charged conduct.

b. This application of Section 922(g)(1) is not consistent with the Nation's historical tradition of firearm regulation.

17. A blanket prohibition barring any individual convicted of any felony is an overbroad statute, inconsistent with history and the Second Amendment. And the prohibitions specifically applied to Mr. Doe are similarly inconsistent with the nation's historical tradition of firearm regulation.

18. 18 U.S.C. § 922(g)(1) itself was originally intended to keep firearms out of the hands of violent persons. "Indeed, the current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, ch. 850, §§1(6), 2(f), 52 Stat. 1250, 1250– 51 (1938)). "The law was expanded to encompass all individuals convicted of a felony (and to omit misdemeanants from its scope) several decades later, in 1961." *Id.* (citing An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, §2, 75 Stat. 757, 757 (1961)).

19. Historical analysis proves that around the time of the founding, restrictions on gun ownership and/or possession were not meant to be enforced against all citizens convicted of a broad range of criminal offenses—both violent and non-violent—that carried a punishment that exceeded one year imprisonment.

20. More recently, jurisprudence has attempted to return to the original meaning of the Second Amendment. *Bruen* was a landmark, sea change decision where the Supreme Court redefined the standard for evaluating statutes restricting an individual's Second Amendment right

to keep and bear arms. The *Bruen* decision triggered numerous challenges to gun laws across the nation.

21. One of these challenges surfaced in *Range v. Att'y Gen*., 69 F.4th 96 (3d. Cir. 2023) where the Third Circuit Court of Appeals held that the government did not carry its burden in showing that the Nation's history and a tradition of firearm regulation supported disallowing a felon from possessing a firearm under 922(g)(1). The Court dismissed the government's proposed historical analogies as "far too broad," noted that "a felon could 'repurchase arms' after successfully completing his sentence and reintegrating into society (Krause Dissent at 127-128) and distinguished between government confiscation of the instrument of crime from a status-based lifetime ban on firearm possession. *Range v. Att'y Gen*., 69 F.4th 96 (3d. Cir. 2023). The Court also dismissed the more than 80 district court decisions that have addressed § 922(g)(1) and ruled in favor of the government. (*See id.* "As impressive as these authorities may seem at first blush, they fail to persuade. First, the circuit court opinions were all decided before *Bruen.* Second, the district courts are bound to follow their circuits' precedent. Third, the Government's contention that "*Bruen* does not meaningfully affect this Court's precedent," Gov't Supp. Br. at 9, is mistaken for the reasons we explained in Section III, *supra."*).

22. Similarly, Judge Reeves in the Southern District of Mississippi found that the Government had not met its burden of proving that its prosecution of a defendant charged with felon in possession under Section 922(g)(1) could meet the *Bruen* standard. *United States v. Bullock*, 2023 U.S. Dist. LEXIS 112397, 2023 WL 4232309 (S.D. Miss. June 28, 2023). In *Bullock*, the defendant's prior felony convictions were for aggravated assault and manslaughter; he had served more than 15 years in prison. 2023 U.S. Dist. LEXIS 112397 at *5. Those offenses are of a much different character than those at issue here. Nevertheless, the Court found that the

Government had not met its high burden under *Bruen* and dismissed the Indictment. 2023 U.S. Dist. LEXIS 112397 at *82. Judge Reeves recently dismissed another prosecution under Section 922(g)(1) on *Bruen* grounds. *See United States v. Jones,* Case No. 3:23-CR-74-CWR-LGI (S.D. Miss. Jan. 8, 2024).

23. Applying *Bruen* standards to this case, there is no historical justification for completely and forever depriving Doe of his Second Amendment right to keep and bear arms. Mr. Doe's convictions were for non-violent felony offenses. Mississippi law does not categorize the offenses of which he was convicted as violent. *See Miss. Code Ann.* § 97-3-2 (defining crimes of violence under Mississippi law). The Government cannot meet its high burden to prove that he is worthy of lifetime disarmament.

24. The overwhelming historical evidence demonstrates that the over-broad nature of § 922(g)(1) is unconstitutional on as applied to Mr. Doe.

IV. CONCLUSION

25. Under "the standard for applying the Second Amendment," the Second Amendment's plain text covers Mr. Doe's possession and acquisition of firearms. There is no historical justification for completely and forever depriving Mr. Doe of the right to keep and bear arms because of non-violent felony convictions. Therefore, 18 U.S.C. § 922(g)(1) is unconstitutional as applied to Doe under the *Bruen* standard of review and Count 4 of this Indictment should be dismissed.

WHEREFORE, Mr. Doe respectfully asks the Court to grant his Motion to Dismiss Count 4 of the Indictment in this case.

MOTION TO APPOINT SPECIAL PROSECUTOR

COMES NOW, the Defendant, John Doe, by and through undersigned counsel, and files his Motion to Appoint Special Prosecutor. In support of this Motion, the Defendant would show unto the Court as follows:

1. In this cause, the Defendant is charged with Armed Robbery and Armed Carjacking from an incident that is alleged to have occurred on or about January 18, 2016.

2. Defendant was indicted on May 11, 2016.

3. In a separate case, Cause No. 16-325, Defendant has been indicted and charged with Armed Carjacking from an incident that is alleged to have occurred on or about February 6, 2016. That Indictment was filed on April 7, 2016.

4. In Cause No. 16-325, Defendant was appointed counsel, Lawyer Roe, to represent him due to a conflict with the Hinds County Public Defender's Office. Undersigned counsel was appointed in this case due to the same reason. *See* Docket #8, Order Appointing Counsel.

5. Subsequent to her appointment to represent the Defendant in Cause No. 16-325, attorney Roe was hired by the District Attorney's Office. Doe remains employed by the District Attorney's Office at present.

6. For this reason, attorney Doe sought to withdraw from representation of the Defendant in Cause No. 16-325. *See* Exhibit "A," Roe Motion to Withdraw. Roe also noted in her Motion to Withdraw that continued representation of the Defendant was prohibited by Rule 1.7 of the *Mississippi Rules of Professional Conduct*.

7. For these same reasons, in Cause No. 16-325, the District Attorney's Office filed a Motion seeking appointment of a special prosecutor. *See* Exhibit "B," District Attorney's Motion to Appoint Special Prosecutor. The District Attorney took the position in Cause No. 16-325 that a special prosecutor was required "so that the proceeding will be guaranteed to be conducted in an impartial manner and so that Defendant Doe's fundamental rights to a fair trial might not be in question…." *See* Exhibit "B," District Attorney's Motion to Appoint Special Prosecutor.

8. In Cause No. 16-325, the Court granted the District Attorney's motion and appointed the Attorney General as the special prosecutor. *See* Exhibit "C," Order Appointing Special Prosecutor.

9. A special prosecutor should be appointed in this case for the same reasons as set forth by the District Attorney in Cause No. 16-325 (i.e., "so that the proceeding will be guaranteed to be conducted in an impartial manner and so that Defendant Doe's fundamental rights to a fair trial might not be in question…."). The charges in this cause are similar to those in Cause No. 16-325, and the alleged occurrences took place within one month of one another.

10. Furthermore, since Roe's continued representation of the Defendant in Cause No. 16-325 would have been in violation of Rule 1.7 of the *Mississippi Rules of Professional Conduct*, the continued prosecution of Defendant by the District Attorney's Office in this case is prohibited by Rule 1.10.

WHEREFORE, PREMISES CONSIDERED, the Defendant requests that the Court enter an Order appointing a Special Prosecutor. The Defendant further prays for any additional relief to which he is entitled under the premises.

DEFENDANT'S MOTION FOR JUDICIAL RECUSAL

Defendant, John Doe, by and through counsel, files his Motion for Judicial Recusal. In support of this Motion, Defendant would show the following:

1. The Defendant herein is charged with one count of Simple Assault/Domestic Violence. The Defendant has entered a plea of Not Guilty.

2. On January 6, 2021, the Defendant appeared with counsel before the ____County Justice Court, with Hon. Judge Roe presiding. An agreement was reached with the County Prosecutor for a pre-trial diversion requiring the Defendant to be assessed by Correctional Counseling and to follow any recommendations for programming that came from that assessment as well as to maintain good behavior. If Defendant was compliant with the terms of the agreement, it was anticipated that the Prosecutor would seek dismissal of the charge at a status hearing before the Court in several months. This agreement was reached by the parties in consultation with the mother of the alleged victim, who is a minor. The mother believed the agreement to be in the best interest of the minor and announced to the court steps she was taking to ensure the health and wellbeing of the minor. After discussion with counsel and deliberation, the Court accepted the agreement and an order was entered resetting the case and referring the Defendant to Correctional Counseling for the assessment. A no contact order was also lifted at the request of the County Prosecutor and the mother.

3. On January 7, 2021, undersigned counsel was informed by court staff that Judge Roe had received new information and decided to rescind the agreement and place the case back on the trial docket. The no contact order was reinstated.

4. On January 8, 2021, undersigned counsel appeared before Judge Roe to inquire as to the reason for the changes. The County Prosecutor appeared by phone. The Court stated that it believed that the Defendant had been untruthful to him about his prior criminal record when the Defendant was arraigned on this charge in September of 2020. For this reason, the Court wanted the case placed back on the trial docket.

5. The case was recently reset for trial on February 25, 2021, with Judge Roe still presiding over the case.

6. "Every litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence *aliunde* the record." *Jenkins v. Forest County Gen. Hosp.*, 542 So.2d 1180, 1181-82 (Miss. 1988) (internal citation omitted).

7. Also, *Miss. Code of Judicial Conduct* Canon 3E provides:

> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding….

8. The Mississippi Supreme Court has also consistently held that when any appearance of impropriety arises then it is best for the judge to recuse himself. *See Jenkins*, 542 So.2d at 1181 ("a judge is required to disqualify himself if a

reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.") (internal citations omitted); *Dodson v. Singing River Hospital Syst.*, 839 So.2d 530, 533 (Miss. 2003) (holding "recusal is required when the evidence produces a reasonable doubt as to the judge's impartiality.").

9. Trial before an unbiased judge is essential to due process. *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971).

10. "[E]ven if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972).

11. Under these circumstances, there is at least the appearance that Judge Roe may not be a fair and impartial judge over the case of this Defendant. The Court has indicated it believes the Defendant has previously misled him. While the Defendant denies that he did so, he is left facing the prospect of a trial in front of a judge who believes him to be a liar. This implicates due process, particularly where the Defendant has a right to testify in his own defense and the judge himself is the finder of fact. The Defendant cannot have confidence under the circumstances that the Court will fairly and impartially listen to and weigh his testimony when the Court has already deemed him to have been untruthful. A reasonable person knowing all of these circumstances might question the impartiality of the tribunal.

12. Under these circumstances, a judicial recusal will alleviate any appearance of unfairness or impartiality that may implicate Due Process.

WHEREFORE, PREMISES CONSIDERED the Defendant respectfully requests that Hon. Judge Roe enter an order of recusal and that this case be assigned to another Justice Court Judge.

RULE 17.2 DISCOVERY REQUEST

Defendant, **JOHN DOE**, by and through the undersigned counsel, hereby requests that the State of Mississippi produce to the undersigned all items required to be provided pursuant to Rule 17.2 of the *Mississippi Rules of Criminal Procedure*.

Additionally, the Defendant notes that by making this request, the State of Mississippi is required to timely supplement its disclosures in accordance with Rule 17.8 of the *Mississippi Rules of Criminal Procedure*.

Finally, the Defendant invokes the rights afforded to him and the duties imposed upon prosecutors in *Brady v. Maryland*, 373 U.S. 83 (1963), *Mooney v. Holohan*, 294 U.S. 103 (1935), *Giglio v. United States*, 405 U.S. 150 (1972), *Kyles v. Whitley*, 514 U.S. 419 (1995), and all rights and protections afforded by the United States Constitution and the Mississippi Constitution of 1890.

Respectfully requested, this the 8th day of September, 2022.

OF COUNSEL:

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CERTIFICATE OF SERVICE

I, Graham P. Carner, hereby certify that on the below date I electronically filed the foregoing pleading with the Clerk of the Court using the MEC system, which sent notification of such filing to ALL COUNSEL OF RECORD.

This the 8th day of September, 2022.

/s/ Graham P. Carner
GRAHAM P. CARNER

MOTION TO COMPEL DISCOVERY OF EXCULPATORY EVIDENCE AND EXCLUDE EVIDENCE NOT PRODUCED IN DISCOVERY

COMES NOW, the Defendant, John Doe, by and through undersigned counsel, pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; the Mississippi Constitution; and the *Mississippi Rules of Criminal Procedure*, and hereby requests this Court order the State to disclose and make available for inspection any and all outstanding exculpatory materials the existence of which is known or by the exercise of due diligence may become known to the prosecution. Doe also requests that the Court exclude any evidence not produced in discovery, particularly "oral statements made" by prosecution witnesses that have not been produced. In support of this Motion, Doe shows as follows:

1. Doe previously filed a Motion for Discovery (Docket # 7), which is incorporated herein by reference as if fully reproduced in words and figures.

2. The State of Mississippi has, to date, provided 74 pages of materials responsive to the Motion for Discovery. *See* Exhibit 1, Letter from Carner to Prosecutor June 1, 2024. However, certain items requested from the State have not been produced:

   a. The Mental Evaluation Report of Witness Roe from Case No. X in the Circuit Court of Hinds County, Mississippi. *See* Exhibit 2, Email from Carner requesting Mental Evaluation Report; Exhibit 3, Letter from Carner to Prosecutor on May 24; Exhibit 1, Letter from Carner to Prosecutor on June 1.

   b. The "the substance of any oral statement made by" any witness the State may call to testify at trial. *See* Exhibit 4, Email from Carner Requesting the Substance of Oral Statements; Exhibit 1, Letter from Carner to Prosecutor June 1.

3. With respect to the Mental Evaluation Report of Roe, the docket from Roe's case shows that the Report was completed in March of this year. *See* Exhibit 5, Docket from Roe Case. Thus, this is information that the State possesses. *See* MRCrP 12.4.

4. Information regarding mental illness or infirmity is exculpatory impeachment evidence that the Defendant is entitled to in discovery. *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

5. The Court should order that this evidence, and any other exculpatory evidence that the State possesses, be produced. Exculpatory materials include but are not limited to: (1) exculpatory statements or statements of an exculpatory nature Mr. Doe or any other person made to law enforcement officers at any time; (2) evidence that is inconsistent with the State's theory of prosecution; and (3) names and addresses of eyewitnesses whom the prosecution does not intend to call at trial.

6. As to the "substance of oral statements" by witnesses the State may call to testify at trial, this is plainly required to be produced under Rule 17.2(1). *See also Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997).

7. In *Kolberg*, a case arising out of Hinds County, the State elicited testimony from a prosecution witness regarding a "basal skull fracture" that was not disclosed prior to trial. *Id.* at 1316. The State also did not disclose that another witness (the medical examiner) had taken slides at the autopsy to "to age bruises and injuries." *Id.* Over defense objection, the trial court ruled that there was no discovery violation. *Id.* at 1317. On appeal,

the Mississippi Supreme Court held that the trial court committed reversible error in ruling that there was no discovery violation. *Id.* at 1317-18. The Court ruled:

> Contrary to the lower court's ruling, there was a violation of the discovery rules by the State. District Attorney Peters admitted that he knew of the basal skull fracture issue: "If they wanted to know that, all they had to do was the exact same thing I did, which was to walk up and ask this doctor, 'Was there a basal skull fracture?' The first thing he told me was, 'In all likelihood, there was.'" The rules of criminal procedure in Mississippi do not require the defendant to ask about questions he had no idea he should ask. However, the rules do require the prosecution to produce the **"substance of any oral statement made** by any such witness" to the defense. Unif. R. Cir. Ct. Practice 4.06(a)(1)[1]. This Court has previously held that knowledge of an oral statement is no excuse for violating the discovery rule.

Id. at 1317 (citing *West v. State*, 553 So.2d 8, 16 (Miss. 1989)) (emphasis in original).

8. The Supreme Court concluded: "In the case at bar, District Attorney Peters failed to produce any information about the oral statements made by this witness and the slides used by Dr. Galvez. This is a violation of the discovery rules. If the district attorney does not provide the evidence to the opposing counsel during discovery, then it should not be introduced as evidence in the trial." *Kolberg*, 704 So. 2d at 1317-18.

9. Doe requests that the Court exclude any testimony from witnesses that is not included in the discovery produced to date by the State.

WHEREFORE, PREMISES CONSIDERED, and pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; the Mississippi Constitution; and the *MRCrP*, Mr. Doe requests that this Court grant his Motion to and grant all relief, general or specific, to which he is entitled in the premises.

[1] The precursor to *MRCrP* 17.2(1), which contains the same wording as the prior rule.

MOTION FOR EVALUATION OF DEFENDANT'S MENTAL CONDITION AS IT RELATES TO COMPETENCY TO STAND TRIAL OR BE SENTENCED AND TO THE DEFENDANT'S MENTAL CONDITION AT THE TIME OF THE ALLEGED OFFENSE

John Doe, by and through his counsel, respectfully moves this court, pursuant to Miss. Code Ann. § 99-13-11 (1972), the *Mississippi Rules of Criminal Procedure*, the United States Constitution, the Mississippi Constitution of 1890, and related authority, to enter its order for Mr. Doe to be given a mental evaluation performed by a court appointed psychiatrist or psychologist. In support of this Motion, Defendant would show unto the court the following:

1. That Mr. Doe has been indicted in the above referenced cause number for Drive By Shooting and Shooting into a Vehicle.
2. Undersigned counsel has received information that calls into question the Defendant's mental condition as it relates to both his competency to participate in these proceedings and to his mental state at the time of the offenses alleged in the Indictment.
3. *MRCrP* 12.1-12.6 provide for the procedures for requesting and obtaining a mental evaluation of a Defendant.
4. *MRCRP* 12.2(a) states: "If at any time before or after indictment, the court, on its own motion or the motion of any party, has reasonable grounds to believe that the defendant is mentally incompetent, the court shall order the defendant to submit to a mental examination."
5. *MRCrP* 12.2(d) provides: "The motion shall state the facts upon which the mental examination is sought."

6. That upon information and belief (and supported by documentation that will be provided to the Court), Mr. Doe has been previously diagnosed with serious mental health conditions. Due to the nature of these records, they will be provided to the Court at the hearing on this Motion.
7. The matters set forth in the medical records obtained to date show that Defendant has previously been diagnosed with "Schizophrenia, paranoid type, chronic with acute exacerbation." In addition, discovery materials produced by the State in this matter show indications that Mr. Doe may have been suffering an acute mental health event at the time of the events alleged in the Indictment.
8. In light of these findings, counsel for Mr. Doe is unsure as to whether he fully understands and can participate in the proceedings against him in this Court.
9. Mr. Doe may be incompetent to stand trial in this matter and/or may not have appreciated the potential criminality of his actions at the time of the alleged offense.
10. Pursuant to the *Mississippi Rules of Criminal Procedure*, the United States Constitution, the Mississippi Constitution of 1890, *Lavender v. State*, 378 So.2d 656 (Miss. 1980), and related authority, justice will best be served by a mental examination at the earliest possible date to resolve any questions of Defendant's mental condition, including but not limited to:

    (a) His capacity to understand and knowingly, intelligently and voluntarily waive his constitutional rights;

    (b) His competency to stand trial;

    (c) His mental state at the time of the alleged offenses with respect to his ability to know the nature and quality of his alleged acts and to know the differences between right and wrong in relation to his alleged acts at that time;

(d) Evaluation of any mitigating circumstances; especially whether the offense with which the defendant is charged was committed while the defendant was under the influence of extreme mental or emotional disturbance; and

(e) Whether the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Said mental examination should consist of a comprehensive evaluation of defendant's personality including a comprehensive battery of psychological tests.

11. Pursuant to *Lavender,* justice will best be served by said mental examination at the earliest possible date to resolve any questions of his competency to proceed with and assist counsel with his defense for, as the Mississippi Supreme Court stated, "[I]in this cause we have clearly set out the principle that if there is a reasonable probability that the accused is incapable of making a rational defense, he should receive proper and adequate psychiatric examination and evaluation." *Id.,* citing *Stevenson v. State*, 325 So.2d 113 (Miss.1975); *McGinnis v. State*, 241 Miss. 883, 133 So.2d 399 (Miss. 1961).
12. That should the court approve this request for psychological examination, Mr. Doe further moves for payment of expenses associated with the examination to an appropriate mental health care professional.
13. That it is in the interest of justice for Mr. Doe to receive a mental evaluation.

WHEREFORE, PREMISES CONSIDERED, John Doe, respectfully requests that this court grant this motion and enter its order that he be given a mental examination to determine his competency to stand trial and his mental condition at the time of the alleged offenses. Defendant further requests any other relief to which he may be entitled.

MOTION TO DISMISS FOR FAILURE TO PROVIDE SPEEDY TRIAL

John Doe, by and through his counsel, and pursuant to the Sixth Amendment of the United States Constitution and Article III Section 26 of the Mississippi Constitution, files this *Motion to Dismiss for Failure to Provide Speedy Trial* and in support thereof, Mr. Doe would show the following:

FACTS

1. Mr. Doe is charged with aggravated assault in this matter, arising from an alleged incident on February 19, 2021. *See* Docket # 1, Indictment.
2. The indictment was filed on July 22, 2022, more than two years ago. Docket # 1.
3. On January 2, 2024, Mr. Doe invoked his Constitutional right to a speedy trial. *See* Docket # 39.

APPLICABLE LAW

I. The Constitution

4. The right to speedy trial is a concept as old as jurisprudence itself. The right is set forth in the Sixth Amendment to the United States Constitution, which holds that "In all criminal prosecutions, the *accused shall enjoy the right to a speedy* and public trial." Emphasis added. This right has been incorporated to apply to the states through the Fourteenth Amendment. *See Klopfer v. North Carolina*, 386 U.S. 213 (1967). This right is further echoed in Article III Section 26 of the Mississippi Constitution.
5. The language of the Supremacy Clause, which directs that "…the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding," obliges all state courts to enforce the supreme law

of the land. *See* U.S. Const. art. VI, cl. 2. "An excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 371 (1990). "By virtue of the Supremacy Clause, we are obligated faithfully to enforce, not to subvert, the Constitution of the United States as the supreme law of the land." *Evans v. State*, 441 So.2d 520, 532 (Miss. 1983). *See also Bolton v. City of Greenville*, 178 So.2d 667, 672 (1965); *Sanders v. State*, 429 So.2d 245, 248, 251 (Miss. 1983)). One such constitutional provision, the Sixth Amendment, guarantees the accused in a criminal case a speedy and public trial.

II. Barker v. Wingo

6. To that end, the United States Supreme Court has established four factors to be used by state and federal courts in analyzing Sixth Amendment speedy trial issues. *See Barker v. Wingo*, 407 U.S. 514 (1972). Those four factors include: (1) length of delay, (2) reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant. *Id.*

1. Length of Delay

7. The first *Barker* factor – length of delay – generally concerns the length of time that passes from an accused's arrest until trial. *United States v. Hill*, 622 F.2d 900, 909 (5th Cir.1980) ("The Sixth Amendment clock begins to tick upon indictment when no prior arrest on the alleged offense is involved.") (*citing Dillingham v. United States*, 423 U.S. 64 (1975) (per curiam); *United States v. Marion*, 404 U.S.

307, 320–21 (1971)). While there are some exceptions to the rule, "it may generally be said that 'any delay of eight months or longer is 'presumptively prejudicial.'" *Smith*, 550 So.2d at 408. *Smith* and its twenty year progeny clearly hold that "prejudice will be presumed" when a trial is delayed for "eight months or longer," and that an eight-month delay requires analysis of the remaining three *Barker* factors. *See also Thomas*, 48 So.3d at 475; *Murray*, 967 So.2d at 1230; *Jenkins* 947 So.2d at 276; *Manix*, 895 So.2d at 176; *Young*, 891 So.2d at 817. Further, an eight-month delay causes this first factor – length of delay – to weigh in favor of the defendant. *See also Price*, 898 So.2d at 648; *Manix*, 895 So.2d at 176; *Stevens v. State*, 808 So.2d 908, 916 (Miss.2002); *Herring v. State*, 691 So.2d 948, 955 (Miss.1997); *Moffett*, 49 So.3d at 1086; *Stark*, 911 So.2d at 450; *Hersick*, 904 So.2d at 121; *Brengettcy v. State*, 794 So.2d 987, 992 (Miss.2001).

8. As mentioned above, this indictment was filed on July 22, 2022. Mr. Doe's speedy trial demand was file January 2, 2024. It has been 808 days since his indictment and 279 days since he invoked his right to a speedy trial.
9. As Mississippi Supreme Court precedent indicates a presumption of prejudice at eight months (240 days), this court certainly *must presume* prejudice at the length of delay here, regardless of which benchmark is used.
10. Because the delay is, indeed, presumptively prejudicial, this factor weighs in favor of Mr. Doe and requires an analysis of the remaining three *Barker* factors.
11. Where the length of delay is presumptively prejudicial, the burden shifts to the State to provide a satisfactory reason for the delay. The Mississippi Supreme Court clearly held in *Flora v. State* that "[t]his Court should not be expected to simply

accept at face value the claims of crowded dockets, backlogged laboratory testing, and other similar logistical problems, which undeniably exist." *Flora v. State,* 925 So.2d 797, 817 (Miss. 2006).

2. Reason for Delay

12. Because the State has produced no evidence to explain the delay, this second Barker factor – reason for the delay – should weigh in favor of Mr. Doe as well. More specifically, the *Barker* Court held "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker* at 531.
13. *Barker* holds that an overcrowded docket, while "more neutral" than "deliberate delay," still must be weighed against the State because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id*.
14. The only apparent reason for some delay at this point is that the Office of the District Attorney which secured the indictment had to be replaced due to a conflict of interest. But that must heavily weigh against the State, which was the reason for the conflict and any delay to resolve it.
15. Therefore, and by the Supreme Court reasoning, Mr. Doe has, thus far, won two out of two factors.

3. Assertion of the Right

16. According to *Barker*, a "defendant's assertion of his speedy trial right ... is entitled to *strong evidentiary weight* in determining whether the defendant is being

deprived of the right." *Barker*, 407 U.S at 531-32. The term "assertion of the right" means to make a demand for a speedy trial. As the Mississippi Supreme Court has said more than once, a defendant "gains far more points under this prong of the *Barker* test where he has demanded a speedy trial." *State v. Ferguson,* 576 So.2d 1252, 1255 (Miss. 1991); *Jaco v. State,* 574 So.2d 625, 632 (Miss.1990).

17. Mr. Doe has clearly attempted to assert his right to speedy trial through his filing on January 2, 2024. Docket # 39. Even before that filing, Mr. Doe announced that he was ready for a trial and the case was a first setting on September 25, 2023, only to have that trial continued when the District Attorney's office raised the issue of its own conflict of interest.

18. The Mississippi Supreme Court has said, more than once, that a demand for a speedy trial **is distinct** from a demand for dismissal due to violation of the right to a speedy trial. *Brengettcy v. State*, 794 So. 2d 987 (Miss. 2001); *Perry v. State*, 637 So. 2d 871, 875 (Miss. 1994). *See also Adams v. State*, 583 So. 2d 165, 169-70 (Miss. 1991). In *Adams*, the court observed that a demand for dismissal for violation of the right to speedy trial is not the equivalent of a demand for speedy trial. Such a motion seeks discharge not trial. Moreover, the Fifth Circuit Court of Appeals has held, "an assertion that charges be dismissed for a speedy trial violation is not a value protected under *Barker*." *Cowart v. Hargett,* 16 F.3d 642, 647 (5th Cir. 1994). The Fifth Circuit expounded on *Cowart* in *U.S. v. Frye*, 489 F. 3d 201 (5th Cir. 2007). There, the defendant argued that a motion to dismiss should count as an assertion of the right. To that point, the court held, "… a defendant's assertion of his speedy trial rights should manifest his desire to be tried

promptly; that repeated motions for dismissal are not an assertion of the right, but an assertion of the remedy; and that a motion for dismissal is not evidence that the defendant wants to be tried promptly. *Id*. at 211-12; (citing *United States v. Litton Sys., Inc.*, 722 F.2d 264, 271 (5th Cir.1984).

19. Mr. Doe has consistently made known his desire to be tried in a speedy manner.

20. Prior to considering the fourth and final *Barker* factor – prejudice – the analysis thus far finds the first three *Barker* factors clearly weighing in Mr. Doe's favor: 1) *Length of delay* – because the length of delay in this case surpasses the eight-month presumption, this factor surely weighs heavily in Mr. Doe's favor; 2) *Reason for the Delay* – this factor further weighs in Mr. Doe's favor as the only available reason for delay is purely the fault of the government; and, 3) *Assertion of the right* – this factor should weigh in Mr. Doe favor as well, as he clearly asserted his right. Mindful even that no single *Barker* factor is controlling, Mr. Doe has still prevailed in all three prongs thus far.

4. Prejudice

21. As to the final factor, the United States Supreme Court has stated that a defendant is not required to show prejudice affirmatively to win a *Barker* analysis. *Moore v. Arizona,* 414 U.S. 25, 26 (1973). Here, though, Mr. Doe has been prejudiced. His life has been put on hold, as he cannot secure employment with this serious felony charge pending against him. He also has endured mental and emotional stress related to this prosecution and has been treated for substance disorders. Further, the passage of time is known to diminish witness memory and the quality of evidence presented at trials, which impairs the defendant's right to a fair trial. *See*,

e.g., Jenkins 947 So.2d at 278 (discussing "the three interests for which the speedy trial right was designed: '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'").

22. It cannot be understated how a time period of nearly four years since the incident and more than two years since filing of the Indictment impairs Mr. Doe's defense. This delay impedes Mr. Doe's and other witnesses' ability to recall the events of the day in question. Moreover, a two year delay increases the potential for evidence to be mishandled and/or lost altogether. Additionally, over this time period the investigation has grown stale. These factors undoubtedly impair Mr. Doe's defense.

23. As shown above, Mr. Doe has met every prong of the test laid out by the United States Supreme Court in *Barker*.

WHEREFORE PREMISES CONSIDERED, and for the reasons set out above, and that will be presented at a hearing of this matter, John Doe respectfully moves that this court, pursuant to his rights under the United States and Mississippi Constitutions, grant his *Motion to Dismiss for Failure to Provide a Speedy Trial*.

MOTION TO SUPPRESS AND DISMISS

Defendant, John Doe, by and through counsel, files this Motion to Suppress and Dismiss. For the reasons set forth herein, the evidence derived from the traffic stop in this case should be suppressed. Since the only evidence against Doe is evidence derived from the stop, his charge should be dismissed.

I. INTRODUCTION

1. Mr. Doe is charged herein with Driving Under the Influence (Second Offense).

2. Mr. Doe was charged following a traffic stop in the City of ##. All evidence that the City has against Mr. Doe was derived from that traffic stop.

3. Doe seeks suppression of all evidence derived from the traffic stop, as the stop was based solely on an uncorroborated anonymous tip. The officers did not have reasonable suspicion to justify the stop. Since the stop violated the law, all evidence derived from it is "fruit of the poisonous tree." Accordingly, the charge against Doe is due to be dismissed.

II. FACTS

4. Doe was stopped by the ## Police Department on October 17, 2015.

5. Doe was stopped by ### Officer Roe.

6. Detective Poe joined the stop and ulimately wrote the DUI citation.

7. In court proceedings in the Municipal Court of ##, Officer Roe and Detective Poe testified as to the basis for the stop. The testimony was given under oath and was recorded by undersigned counsel with permission of the court.

8. Counsel has provided the City of ## with the recording and will provide it to the Court for consideration with this Motion.

9. The contents of the sworn testimony from the recording are summarized here, with time stamps for the particular statements.

10. Detective Poe was administered the oath 2 seconds into the recording. He testified that he issued the DUI citation (43-48 seconds) but that he did not initiate the stop (53-55 seconds). Officer Roe made the stop (56 seconds). Detective Poe said the stop was made because the police received a call from dispatch that an anonymous source reported a car that was driving recklessly (1:04-1:09). Detective Poe testified that he saw Mr. Doe pull in to the Holiday Inn parking lot (1:28). While observing the vehicle he did not see any swerving, weaving, or other similar behavior that would justify a stop (1:32-1:38).

11. Officer Roe was also adminsitered the oath (4:50). He confirmed that Detective Poe wrote the citation (5:30-5:35) but that Officer Roe made the stop (5:35-5:38). In relaying why the stop was made, Officer Roe testified that dispach made a report of a vehicle driving recklessly or carelessly (5:42-5:52). Officer Roe confirmed that the call from dispatch was based on an anonymous tip (5:57-6:01). Dispatch provided a description of the vehicle and he saw a vehicle that matched that description (6:02-6:14). Officer Roe testified after he saw the vehicle he immediately got behind it and pulled it over (6:14-6:19). Officer Roe did not observe the vehicle swerving, weaving, or exhibiting any driving behavior to justify a stop (6:25-6:35). He pulled the vehicle over solely because it matched the description of the vehicle that was called out by dispatch (6:35).

12. Based upon this testimony, it is clear that Mr. Doe was stopped purely based upon uncorroborated information from an anonymous tip. The officers did not observe anything that caused them to make the stop other than a vehicle that matched the description given by the

anonymous tipster. The officers did not witness anything that corroborated the tipster's report of reckless or careless driving.

III. ARGUMENT

13. In *Cook v. State*, 159 So. 534 (Miss. 2015), the defendant was convicted of first offense Driving Under the Influence in Justice Court. *Id.* at 536. At the trial *de novo* in County Court, Cook sought dismissal of the charge, "claiming that the investigatory stop which led to Cook's arrest was a illegal search and seizure because it was based on an anonymous tip that lacked sufficient indicia of reliability." *Id.* The motion was denied and Cook was convicted in County Court. *Id.* He appealed to Circuit Court, which affirmed the conviction. *Id.* He then appealed to the Mississippi Supreme Court, which assigned the case to the Court of Appeals. *Id.* The Court of Appeals held that the investigatory stop was justified and affirmed the conviction again. *Id.*

14. Cook then sought certiorari review from the Mississippi Supreme Court. *Id.* Certiorari was granted for the Court to "consider whether the investigatory stop, which was based on an anonymous tip and led to Cook's arrest, violated Cook's Fourth-Amendment right to be free from unreasonable searches and seizures." *Id.* The Supreme Court held that the stop was illegal, reversed Cook's conviction, and entered a judgment of acquittal. *Id.* at 541.

15. In analyzing the legality of the stop that led to Cook's arrest, the Supreme Court noted that the key facts surrounding the stop were not disputed. *Id.* at 536. Those key facts are summarized here. The officer who initiated the stop of Cook was on patrol duty when he received a call from "dispatch to 'be on the lookout' (BOLO) for a vehicle that was driving erratically and the driver of the vehicle possibly flashing a badge of some sort." *Id.* The officer

did not know the source of the original call. *Id.* To the officer's knowledge, the tip called out by dispatch was anonymous and uncorroborated. *Id.* The call described the make, model, color, and license-plate number of the vehicle. *Id.*

16. The officer saw a vehicle matching the description of the BOLO from dispatch. *Id.* He followed the vehicle and observed it. *Id.* During the officer's observation, he did not see "the driver flashing a badge or committing any crimes." *Id.* Nevertheless, the officer stopped the vehicle. *Id.* From the evidence gathered as a result of the stop, Cook was arrested for DUI. *Id.*

17. The Supreme Court began its analysis of the legality of the stop of Cook with a recognition that "[a]n individual's right to be free from unreasonable searches and seizures is protected" by both the United States and Mississippi Constitutions. *Id.* at 537. Under longstanding state and federal precedent, "police officers may detain a person for an investigatory stop when the officers have 'reasonable suspicion, grounded in specific and articulable facts' which allow 'the officers to conclude the suspect is wanted in connection with criminal behavior'." *Id.* (internal citations omitted). There are two general sources for developing reasonable suspicion: "an officer's personal observation, or an informant's tip." *Id.* (internal citations omitted).

18. Regarding tips from an informant, the Supreme Court noted that they "may provide reasonable suspicion if accompanied by some indication of reliability; for example, reliability may be shown from the officer's independent investigation of the informant's information." *Id.* (internal citations omitted).

19. In further review of the legal standards governing the case, the *Cook* Court also examined *Florida v. J.L.*, 529 U.S. 266 (2000). *J.L.* also involved a seizure based solely on an

anonymous tip and no personal observation of the officer. *Cook*, 159 So.3d at 537-38. The officer received an anonymous tip that a young black man wearing a plaid shirt was carrying a gun. *Id.* at 538. The officer located a person matching that description, detained him, searched him, and arrested him. *Id.* The United States Supreme Court ruled that the seizure and search was illegal because the anonymous tip lacked sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop. *Id.* In so ruling, the Court held that the fact that the anonymous tipster accurately described the defendant's location and and appearance was not a sufficient indication of reliability. *Id.* The Court ruled that the reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." *Id.*

20. The Mississippi Supreme Court also surveyed three prior Mississippi cases. *Id.* at 539-40. One of those cases, *Floyd v. City of Crystal Springs*, 749 So. 2d 110 (Miss. 1999), involved a tip from a known informant who had provided credible information to law enforcement in the past. *Cook*, 159 So.3d at 539-40. The Court distinguished that case from Cook's, which involved an anonymous tip. *Id.* at 540. In the two prior cases involving anonymous tips, the Court noted that in one, *Williamson v. State*, 876 So. 2d 353 (Miss. 2004), the officers verified the informants' information regarding potential illegal conduct before initiating any search or seizure. *Cook*, 159 So.3d at 539. That case was distinguished from Cook's on that basis. *Id.* The Court found that Cook's case resembled *Eaddy v. State*, 63 So. 3d 1209 (Miss. 2011). In *Eaddy*, the Mississippi Supreme Court held that a stop based on an anonymous tip that lacked sufficient indicia of reliability was unlawful. *Cook*, 159 So.3d at 539-40.

21. Applying these precedents to the undisputed facts in *Cook*, the Mississippi Supreme Court held that the investigatory stop locked reasonable suspicion. Id. at 540-41. The Court noted that the potentially illegal conduct described by the anonymous tipster (erratic driving and flashing a badge) "was never observed by the officers in today's case prior to stopping Cook." *Id.* at 540. The only information that the officers confirmed was the location and description of the vehicle given by the anonymous source. *Id.* This, the Court said, was not sufficient to justify a stop. *Id.*

22. The Court concluded its analysis by holding:

> The lack of sufficient indicia of reliability in today's case, coupled with the officers' failure to corroborate the criminal activity reported, results in the stop violating Cook's Fourth-Amendment right to be secure from unreasonable searches and seizures. As such, the trial court erred in denying Cook's motion to dismiss. For this same reason, the Court of Appeals erred in affirming the trial court.

Id. at 541.

23. The stop in this case is similar to that in *Cook*. Officer Roe made the stop on Mr. Doe's vehicle purely based off of information from an uncorroborated anonymous tip. Officer Roe got a report from dispatch of a vehicle driving recklessly or carelessly (of note, unlike in *Cook*, there was no report of any other suspicious activity such as flashing a law enforcement badge). The dispatch report was based upon an anonymous tip. The report included the description of the vehicle. Officer Roe saw a vehicle matching that description and immediately initiated a traffic stop. He did not see any driving behavior that warranted a stop. He saw nothing that corroborated the report of careless or reckless driving. He stopped the car only because it matched the description of the vehicle given by dispatch.

24. While Officer Roe made the initial stop, Detective Poe arrived just behind him and ultimately wrote the DUI citation. He too said that the stop was based on the anonymous tip called out by dispatch. While he observed Mr. Doe pull into the hotel parking lot after Officer Roe initiated the stop, he too did not observe any driving behavior that warranted a stop.

IV. CONCLUSION

25. Simply put, the stop of Mr. Doe's vehicle was based only on an uncorroborated anonymous tip. There was nothing that the officers observed that served as the basis for the stop. Just as in *Cook*, there was no reasonable suspicion to justiufy an investigatory stop. For this reason, all evidence resulting from the stop must be suppressed. Since all of the evidence in this case was gathered as a result of the stop, the case is due to be dismissed, just as in *Cook*.

WHEREFORE, PREMISES CONSIDERED, the Defendant, John Doe, respectfully requests that this Court rule that the stop of Mr. Doe' vehicle was unlawful, suppress all evidence derived from that stop, and dismiss this case against Mr. Doe.

MOTION TO SUPPRESS AND DISMISS

Defendant, Jane Doe, by and through counsel, hereby submits her Motion to Suppress and Dismiss. In support, Doe shows as follows:

INTRODUCTION

1. Doe was arrested on November 14, 2021 following a traffic stop. Doe was charged with Driving Under the Influence (1st Offense) and Minor in Possession of Alcohol. She has entered a plea of not guilty.

2. The City has provided discovery in the form of a written report and dash camera videos.

3. Based upon information provided in discovery, Doe hereby moves to suppress all evidence gathered as result of the traffic stop. Since evidence gathered as a result of the traffic stop is the **only** evidence against Doe, the charges against her are due to be dismissed.

FACTS

4. The traffic stop at issue was initiated by XX Police Department Officer Roe.

5. In his the part of the report describing the traffic stop (Exhibit "1"), Roe writes the following description of his initial encounter with and eventual traffic stop of the vehicle Doe was driving:

> On Sunday 11-14-2021 at approximately 0130 hours, I (Officer Roe) was traveling north bound on ## Dr approaching ## Ave when I observed a white Acura (later found to be a 2017 white Acura ILX tag number ####) traveling east bound ### Ave from getting off the interstate. The vehicle picked up some speed to get over the hill, so I fell in behind the vehicle just past Liberty Park. It was traveling at about 40mph in a 35 mph zone, then it slowed down to below 25mph at ### St. I noticed there were three occupants in the vehicle. The vehicle then turned left (North Bound) onto ### St. and I continued on ### to Hwy ##. I stayed focused on the vehicle, because the way it was

traveling, there were no businesses open in that direction and no residence in that general vicinity. I turned north on Hwy ## and noticed the Acura turning east on ### St. I passed ### St. and observed the vehicle continue east on ### St. I started thinking this was strange since they could have continued on ### to Hwy ## as I did. I turned around and followed the vehicle. The vehicle then turned onto south bound ## and then onto east bound ## Ave. At this point i really started getting suspicious towards the drivers actions in which the way they went to get to this location. I started thinking that maybe they were avoiding the police for some reason. The vehicle then turned onto south bound ###. I continued to ## Dr. and turned around to see if they would come out of the no outlet area. The Acura then pulled out of ## back onto eastbound ## Ave. When the vehicle passed me, I noticed the three occupants in the vehicle and that meant to me that they did not turn in there to drop anyone off nor did they have enough time to as it came back out of that area quickly. I proceeded to stop the vehicle for suspicious activity at ### near ### Dr.

6. The City also produced dash camera videos (Exhibit "2")[1]. The following is counsel's transcription (with time stamps from the "Current Time" displayed on the L3 video player set forth as **[hour:minute:second]**) of Officer Roe's exchange with Doe at the beginning of the traffic stop, as reflected in the dash camera video from Officer Roe' patrol car[2]:

Roe: How you doing? Let me see your Driver's License. **[1:39:10]**

Doe: (Unintelligible due to music) **[1:39:34]**

Roe: I asked you for your license. I will explain whenever I get your license. **[1:39:38]**

Roe: (Retrieves Doe's license) How do you pronounce your last name? **[1:39:55]**

Roe: Doe? Okay. Ms. Doe when I first picked you up you turned on Church Street—took a long way around just to make another turn. Then you turned

[1] The enclosed disc marked as Exhibit 2 contains 3 videos. The only video significant to the issues raised in this Motion is the dash camera video from Officer Roe's patrol car.

[2] While Officer Roe voice is clearly audible in the video, Ms. Doe's is not due to music being played in Officer Roe' patrol car.

in a neighborhood back there—came right back out. That's called suspicious activity. That leads me to believe you were trying to avoid me for some reason. Now do you understand what I am saying? Okay. **[1:39:58]**

7. After some initial questioning of Doe, Officer Roe returned to the front of his patrol vehicle. Another officer, Officer Poe, had arrived on scene. Officer Roe turned the investigation over to Officer Poe, but first detailed the reason for the traffic stop (from Exhibit "2"):

Roe: When I first got her I picked her up on ### Avenue right at ###. I followed her. She never really sped or anything. She slowed down like to 20-something at one point. **[1:41:39]**

***

[Roe describes the route of the vehicle] **[1:41:58]**

***

She was doing nothing but avoiding me and everything. **[1:42:35]**

LEGAL STANDARDS

8. A police officer may initiate an investigatory stop when they have reasonable suspicion based on specific and articulable facts, that criminal activity has occurred or is imminent. *See Terry v. Ohio*, 329 U.S. 1, 21; *McCray v. State*, 486 So.2d 1247, 1249-50 (Miss. 1986); *Reynolds v. City of Water Valley*, 75 So.3d 597, 600 (Miss. Ct. Ap. 2011). An investigatory stop must be justified at its inception. *Gonzales v. State*, 963 So.2d 1138, 1142 (Miss. 2007). " '[M]ere hunches' or a person or vehicle 'looking suspicious' are insufficient to establish reasonable

suspicion for an investigatory stop." *Reynolds*, 75 So.3d at 600 (citing *Qualls v. State*, 947 So.2d 365, 371 (Miss. Ct. App. 2007); *Anderson v. State*, 864 So.2d 948, 951 (Miss. Ct. App. 2003). If an officer "did not have the requisite reasonable suspicion, then evidence obtained during the investigatory stop...is fruit of the poisonous tree and is inadmissible." *Reynolds*, 75 So.3d at 600 (citing *Haddox v. State*, 636 So.2d 1229,1233 (Miss. 1994)).

ARGUMENT

9. In this case, Officer Roe initiated the traffic stop based upon a mere hunch of "suspicious activity". The stop was not the product of reasonable suspicion based upon specific, articulable facts that criminal activity had occurred or was imminent. The stop was unlawful, and all evidence derived from it must be suppressed. Since all the evidence gathered in this case resulted from the investigatory stop, the two charges against Doe are due to be dismissed.

10. The facts of this stop are highly similar to those in the *Reynolds* case, where the Court of Appeals found a stop was not based on reasonable suspicion. 75 So.3d at 601. As a result, the DUI conviction in that case was revered and rendered. *Id.*

11. In *Reynolds*, the defendant was charged with DUI as a result of a traffic stop *Id.* at 598-99. The undisputed facts of that stop are related below. At 4:30 a.m., Water Valley Police Officer Blair was on routine patrol in the city. While stopped at a red light, Officer Blair saw a car stop 6 car lengths behind him. After the light changed, both Officer Blair and the other car went through the intersection. Officer Blair turned into a store parking lot to perform a security check. The other car—a silver Chevrolet Corvette—kept driving straight. *Id.* at 598.

12. After conducting the security check, Officer Blair again saw the Corvette, which was on a different street. When the Corvette drove past him, Officer Blair observed that it was

driving below the speed limit. The officer saw two occupants in the vehicle, a white cup in the passenger's hand, and the passenger point at the officer. After the passenger pointed, the Corvette decreased its speed even more, down to 5-8 miles per hour. *Id.*

13. Officer Blair then followed the Corvette. He called in the license plate, which did not reveal any reason for a stop. The Corvette kept driving and the officer kept following. The pair reached an intersection. The Corvette turned right, which led toward an elementary school. The officer turned left but then decided to turn around to initiate a traffic stop. Officer Blair believed that the route of the vehicle was suspicious since the Corvette had turned toward an elementary school at 4:30 a.m. As the offer drove toward the school he encountered the Corvette, which had also turned around and was driving toward the officer. Officer Blair turned around again, turned on his blue lights, and initiated a traffic stop. The Corvette immediately pulled over. Officer Blair admitted that he did not observe any traffic violations, improper driving, or indications of driving under the influence prior to the stop. *Id.* at 598-99.

14. Reviewing the investigatory stop, the Court of Appeals concluded it "was not based on specific and articulable facts that a crime had occurred or was imminent." *Id.* at 600. Relying on longstanding precedent, the Court noted that an investigatory stop can be made "as long as the officer has an objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.* (internal citations omitted).

15. Reviewing the evidence, the Court found that the behavior of slowing down, pointing at the officer, and taking a route that seemed suspicious for the time of day was not sufficient reasonable suspicion to support an investigatory stop. *Id.* at 600-601. The Court concluded its analysis by saying:

> Considered as a whole, these acts of "suspicious behavior" do not demonstrate Reynolds had committed any criminal act or that one was imminent. Officer Blair might have been correct under the circumstances in concluding that the Corvette looked suspicious at 4:30 a.m.; however, **merely looking suspicious is not sufficient to justify a *Terry* investigative stop. There was simply no evidence Reynolds had committed any criminal offense or was about to engage in criminal activity.**

Id. at 601 (emphasis added).

16. Since the investigatory stop was not permitted, all evidence resulting from the stop "is considered fruit of the poisonous tree and should have been suppressed at the hearing." *Id.* at 601. The Court of Appeals reversed and rendered the DUI Conviction. *Id.*

17. In a previous Court of Appeals case, *Anderson v. State*, 846 So.2d 948 (Miss. Ct. App. 2003), a stop based on the "suspicious route" of a defendant was also discussed. While the Court ultimately did not decide the legality of the stop (because it separately found that an illegal search followed the stop), *Anderson* remains instructive. First, it was cited with approval in *Reynolds*. 75 So.3d at 600. Second, while not deciding the question, the Court characterized the bases of the stop (slowing down when the officer was seen, lingering at a stop sign, and taking a circuitous route) as "of questionable value to create reasonable suspicion" and as "certainly weak". *Anderson*, 864 So.2d at 951. In light of *Reynolds*, it is difficult to imagine the Court of Appeals would have upheld the stop in *Anderson* had it reached that question.

18. The stop at issue in this case is nearly identical to that in *Reynolds*. Here, the officer encountered Ms. Doe's vehicle at night. The officer observed the vehicle drive slower after he says the vehicle observed him. But the officer never saw the vehicle violate any traffic laws or any driving behavior (other than the route) that led to the stop. Rather, the officer candidly admits that

he stopped the vehicle because it looked suspicious purely because of the route that it traveled. The officer had a hunch that the vehicle was "trying to avoid him" for some unknown reason.

19. This is not reasonable suspicion based on specific, articulable facts that a crime had been committed or was imminent. Just as in *Reynolds*, this Court should rule that the stop was not a proper investigatory stop. The court should accordingly suppress or exclude all evidence that resulted from the stop. As the City has no evidence other than the fruit of the poisonous tree, Ms. Doe's charges of Driving Under the Influence and Minor in Possession of Alcohol are due to be dismissed.

WHEREFORE, PREMISES CONSIDERED, Defendant, Jane Doe, requests that this Court suppress all evidence derived from the stop of her vehicle in this case. Since all of the evidence in this case was derived from the stop of her vehicle, the charges against Doe are due to be dismissed. Doe prays for all additional relief to which she is entitled in the premises.

MOTION TO SUPPRESS

Defendant, Jane Doe, by and through her undersigned counsel, files this Motion to Suppress. In support of this Motion, Ms. Doe shows as follows:

I. INTRODUCTION

1. Ms. Doe is charged in this case with 10 counts of felony Aggravated Animal Cruelty and 10 counts of misdemeanor Simple Animal Cruelty. *See* Docket # 1.

2. The evidence in support of the charges was collected and seized during two searches of Ms. Does' property on Date. Both searches were illegal.

3. The first search was conducted without a warrant or consent. Law enforcement went onto and all over Ms. Does' property for an "animal welfare check". However, law enforcement was acting on a lone, uncorroborated anonymous tip and lacked probable cause to trigger the exigent circumstances exception to a warrantless search. Law enforcement, therefore, trespassed on Ms. Does' property.

4. The second search occurred pursuant to a purported search warrant which was obtained based upon the findings of the initial illegal, warrantless search. But that warrant was for the wrong address and did not otherwise describe the property to be searched. The search warrant fails the particularity requirement and is invalid. The search warrant is also invalid because the information used to support its issuance was illegally obtained.

5. Through this Motion, Doe seeks suppression of all evidence derived from the two illegal searches of her property.

II. FACTUAL BACKGROUND

6. Everything relevant to this motion happened on DATE.

7. On that day, the Random County Sheriff's Office (RCSO) received an anonymous tip at 11:50 a.m. that there were dogs at John Doe's house that were being mistreated. The anonymous tip was received by RCSO Captain Roe.

8. Cpt. Roe states in his report that he then directed RCSO Lieutenant Poe to "do a welfare check on the dogs and try to speak with the owners." The group that went with Lt. Poe included RCSO deputies A and B.

9. The group traveled to ADDRESS in Random County, Mississippi, the residence of John Doe, and Ms. Doe, John's wife.

10. Dispatch records from the RCSO show that the group was dispatched at 11:53 a.m. on DATE. Those records show they arrived between 12:03 and 12:08 p.m.

11. Deputy A writes that when he got to the property, he saw one dog that was skinny but had shelter and water. He and "other deputies" then proceeded to the back yard of the residence and located other dogs, "both living and deceased". Deputy A states that he took photographs on the property. Deputy A reports that RCSO Investigator Soe was notified and that he understood Investigator Soe was going to seek a search warrant.

12. Deputy B's report states that he walked to the door of the Does' residence. He knocked but no one answered. He stated he saw one skinny dog from the door and that he and other deputies approached the dog. After that, they went deeper into the property and located other dogs, living and deceased. After the dogs were found throughout the property, Investigator Quarles was contacted.

13. Cpt. Roe writes that Lt. Poe called him while at the Does' residence, prompting him to go there. Dispatch records show Cpt. Roe was dispatched at 12:31 p.m. and arrived at Ms. Does' residence at 12:40 p.m.

14. Cpt. Roe writes that when he arrived, he and the group of deputies walked around the property to "evaluate the situation." He took photographs. After the walk around the property, Cpt. Pruitt informed the Sheriff, Chief Deputy, and Investigator Soe.

15. Dispatch records show that Investigator Soe arrived at the Does' residence at 2:00 p.m. on DATE, nearly two hours after RCSO officers initially entered the property.

16. Investigator Soe's report says that he received a call from Cpt. Roe "requesting my assistance at 15 CR 418". Roe told Investigator SOE that RCSO had received an anonymous tip of animal neglect and that RCSO agents had "found several dead and malnourished dogs."

17. Investigator Soe writes: "Upon arriving on the scene, I found the deputies had pulled to the front of the property. They informed me they found six dead dogs and 20 living animals that were malnourished." Investigator Soe left to apply for a search warrant for the property.

18. Investigator Soe then reports: "Once the warrant was signed, I came back to ADDRESS. I gave Jane the search warrant for the property and all the curtilage." He then conducted the search, which resulted in more photographs being taken and the seizure of living dogs.

19. The Search Warrant that Investigator Soe sought and obtained permitted the search of this place: "**WRONG ADDRESS IN RANDOM COUNTY, MS.**" Exhibit 1, Search Warrant. The property to be searched is only described by its address, WRONG ADDRESS. No other description—such as a physical description of the house or land or reference to geographic landmarks or intersecting roads—is included.

20. The Search Warrant directs "A SEARCH OF THE ABOVE-DESCRIBED PLACE." Exhibit 1, Search Warrant. Again, the only description of the place to be searched was the WRONG ADDRESS.

21. The property that was searched is located at **ADDRESS**.

III. LEGAL STANDARDS

22. The Fourth Amendment to the United States Constitution and Article III, § 23 of the Mississippi Constitution of 1890 make Mississippians secure in their homes and lands by protecting them from unreasonable searches and seizures. Article III, § 23 is applicable here because of its presence in the Mississippi Constitution, and the Fourth Amendment has been incorporated to the states via the Fourteenth Amendment. *See Cook v. City of Madison*, 168 So.3d 930, 935 (Miss. 2015), citing *Maryland v. Pringle*, 540 U.S. 366, 369 (2003).

23. Mississippi's appellate courts have consistently held that the protections afforded by Article III, § 23 of the Mississippi Constitution are broader than the Fourth Amendment protections. In surveying decades of Mississippi case law construing Article III, § 23, the Mississippi Court of Appeals recently stated:

> Our Supreme Court has held that the protection afforded by Section 23 "is somewhat broader than" the Fourth Amendment to the United States Constitution because Section 23 protects all of the people's "possessions," not just their "papers" and "effects." *Falkner v. State*, 134 Miss. 253, 257, 261, 98 So. 691, 692-93 (1924). "The term 'possessions' is a very comprehensive term, and includes practically
>
> everything which may be owned, and over which a person may exercise control." *Id.* at 257, 98 So. at 692.

Okhuysen v. City of Starkville, 333 So. 3d 573, 579 (Miss. Ct. App. 2022).

24. Article 3, § 23 "protects '*all* the land owned by the person searched.'" *Okhuysen*, 333 So. 3d at 581, citing *Arnett v. State*, 532 So. 2d 1003, 1010 (Miss. 1988) (emphasis in original). Because of this broad protection, the lawfulness of a search under Section 23 does not focus on

the "reasonable expectation of privacy" found in Fourth Amendment cases. "Rather, the primary question under Section 23 is whether the official who conducted the search 'committed a 'trespass' in going on the lands of the defendant.'" *Okhuysen*, 333 So. 3d at 581, citing *Arnett*, 532 So. 2d at 1010 and *Davidson v. State*, 240 So. 2d 463, 464 (Miss. 1970).

25. "A common-law trespass is simply an entry 'upon the land of another without a license or other right for one's own purpose.'" *Okhuysen*, 333 So. 3d at 581-82, citing *Thomas v. Harrah's Vicksburg Corp.*, 734 So. 2d 312, 316 (¶10) (Miss. Ct. App. 1999). A trespass is committed "'even if the trespasser has a good-faith belief that he has the right to enter the land.'" *Okhuysen*, 333 So. 3d at 582, citing *Reeves v. Meridian S. Ry. LLC*, 61 So.3d 964, 968 (¶19) (Miss. Ct. App. 2011). In *Okhuysen*, the Court of Appeals ruled that a city official had committed a trespass and violated Article III, Section 23 by entering property without the owner's permission and without a warrant. 333 So. 3d at 582.

26. "As a general rule, warrantless searches of private property are *per se* unreasonable." *Jordan v. State*, 995 So. 2d 94, 107 (Miss. 2008). *See also Evans v. State*, 823 So. 2d 617, 619 (Miss. Ct. App. 2002).

27. "There are exceptions to this rule. An officer may conduct a warrantless search (1) if granted permission, *Loper v. State*, 330 So. 2d 265, 266 (Miss. 1976), (2) under exigent circumstances, **if probable cause exists**, *Carroll v. United States*, 267 U.S. 132, 149, 69 L. Ed. 543, 45 S. Ct. 280 (1925) and (3) of a vehicle when making a lawful contemporaneous arrest. *New York v. Belton*, 453 U.S. 454, 460, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981)." *Evans*, 823 So. 2d at 619-20 (emphasis added).

28. The text of the Fourth Amendment mandates that search warrants "particularly describ(e) the place to be searched." U.S. Const. amend. IV. This particularity requirement has

been interpreted as meaning that a warrant must describe the place to be searched with a level of specificity that will erase "any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched." *Steele v. United States,* 267 U.S. 498, 503 (1925).

29. Art. III, § 23 of the Mississippi Constitution has its own particularity requirement, stating that "no warrant shall be issued without probable cause, supported by oath or affirmation, **specially designating the place to be searched**...." Miss. Const. Art. III, § 23 (1890) (emphasis added). The particularity requirement in Mississippi's Constitution has been found to expand a Mississippian's right to be secure in his home beyond the substantial protections already afforded by the Fourth Amendment. *Graves v. State,* 708 So.2d 858, 861 (1997). In instructing courts how to evaluate potential violations of Art. III, § 23, the Mississippi Supreme Court stated, "the protection afforded by Section 23 of our Constitution should be liberally construed in favor of our citizens and strictly construed against the state." *Scott v. State*, 266 So.2d 567, 569-70 (Miss. 1972).

30. Evidence that is illegally obtained cannot be used and must be suppressed as "fruit of the poisonous tree". The Mississippi Supreme Court has succinctly described this exclusionary rule:

> The "fruit of the poisonous tree" doctrine--also known as the exclusionary rule--"prohibits introduction into evidence of tangible materials seized during an unlawful search." *Murray v. United States,* 487 U.S. 533, 536, 108 S.Ct. 2529, 2532, 101 L.Ed.2d 472, 480 (1988) (citing *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). The doctrine prohibits "testimony concerning knowledge acquired during an unlawful search." *Id.* (citing *Silverman v. United States,* 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961)). Of critical import to this case, the doctrine "prohibits the introduction of *derivative evidence,* both tangible and testimonial, that is, the product of the primary evidence, or that is otherwise acquired as a result of the unlawful search, up to the point at which the connection becomes 'so attenuated as to dissipate the taint.'" *Id.* (citing *Nardone v. United States,* 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939) (emphasis added); *see also Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Marshall v. State, 584 So. 2d 437, 438 (Miss. 1991).

IV. ARGUMENT

31. As set forth herein, the evidence from the DATE searches of Ms. Does' property was illegally obtained and must be suppressed.

A. The First Warrantless Search Was Illegal

32. Ms. Doe and her husband are owners of the property located at ADDRESS that was searched by RCSO.

33. The initial search of Ms. Does' property was done without a warrant or consent. It constituted a trespass.

34. For the search to have been permissible, one of the exceptions to the warrant requirement must have been present: (1) consent, (2) exigent circumstances supported by probable cause, or (3) a vehicle exception.

35. The vehicle exception does not apply, as the search at issue did not involve a vehicle.

36. Neither Ms. Doe nor her husband consented to the search of their property. Indeed, neither were present at their residence when the initial trespass and search was begun.

37. The only way for the search to be permitted is for there to have been exigent circumstances supported by probable cause. There were not.

38. To meet the exigent circumstances exception three elements must be met "(1) there are reasonable grounds to believe that an emergency situation exists and that there is an immediate need for police assistance in order to protect life and property; (2) the primary motivation for the search is not to make an arrest and/or to seize evidence; and (3) there is some reasonable basis, approximating probable cause, to associate the emergency with the area or place searched."

Crawford v. State, 192 So.3d 905, 932 (Miss. 2015).

39. RCSO deputies who trespassed on the Does' property did so to conduct a "welfare check" on dogs after receiving an anonymous tip.

40. To begin, a "welfare check" of an animal is not an exigent circumstance under Mississippi law. Since Article 3, Section 23's protections are to be strictly construed against the State, this court should decline to extend the definition of exigent circumstances to include welfare checks on animals. The State cannot meet its burden of showing that there was such an immediate need for police assistance to justify a warrantless intrusion on the Does' property.[1]

41. But even if the court were to consider a welfare check of animal to be an appropriate exigent circumstance, the trespass on and illegal search of Ms. Does' property would still fail, as there must be probable cause at the time of the emergency intrusion on private property.

42. An anonymous tip can establish probable cause for a search warrant if it passes the *Gates* test, "a 'totality of the circumstances' test to determine when information obtained through an anonymous tip can establish the probable cause for a search or arrest warrant, which is necessary to protect citizens from unreasonable searches and seizures." *Cooper v. State*, 145 So. 3d 1219, 1225 (Miss. Ct. App. 2013), citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The *Gates* test considers the veracity, reliability, and basis of knowledge of the anonymous tip in order to conduct a "conscientious assessment of the basis for crediting such tips" as required by the Fourth Amendment. *Id.* at 233, 238. *See Cooper*, 145 So.3d at 1225; *See also State v. Woods*, 866 So. 2d 422 (Miss. 2003) (ruling that officers lacked probable cause based on an informant's tip where there was "no indicia of veracity or reliability" of the tip at the time the search warrant was sought).

[1] There is no legitimate reason, for instance, that the RCSO could not have sought a warrant to address this circumstance. As demonstrated herein, they did have an illegitimate reason for not doing so: they lacked probable cause to obtain a warrant.

43. Here, the RCSO received an anonymous tip about allegedly maltreated dogs at the Does' property. Within minutes, RCSO officers entered the Does' private property and traversed all over it and took photographs. The officers did not investigate the veracity of the tip or corroborate it in any way before committing their trespass and illegal search. The officers did not have anything close to probable cause that would have supported the issuance of a warrant. They had a single anonymous tip. The Mississippi Supreme Court has recognized the dangers inherent in anonymous tips, such as being motivated by animus or a desire to harass or embarrass another. *See Cook v. State*, 159 So. 3d 534, 540 (Miss. 2015).

44. In the context of establishing reasonable suspicion for a stop (a lower standard than probable cause at issue here), the United States Supreme Court has said:

> Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, *see Adams v. Williams*, 407 U.S. 143, 146-147, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," *Alabama v. White*, 496 U.S. at 329. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." 496 U.S. at 327.

Fla. v. J.L., 529 U.S. 266, 270 (2000).

45. Simply put, the officers did not have either probable cause or a lawful exigent circumstance to enter the Does' property without a warrant or permission. The officers trespassed and all evidence and derivative evidence from the initial search of the property must be suppressed. *See Okhuysen v. City of Starkville*, 333 So. 3d 573 (Miss. Ct. App. 2022).

B. The Second Search Was Pursuant to a Warrant That Was Fatally Flawed

46. After the illegal first search, a search warrant was obtained. A second search followed receipt of the search warrant, a copy of which is attached as Exhibit 1.

47. To begin, other than the unverified and uncorroborated anonymous tip, the facts and circumstances used to procure the search warrant were obtained during the first search, which was illegal as detailed above. *See* Exhibit 2, Underlying Facts and Circumstances. A search warrant cannot be obtained using information that was illegally gathered. *See Rome v. State*, 348 So.2d 1026 (Miss. 1977) ("Well established in our jurisprudence is the rule of law that the legality of a search and seizure must be based on preceding steps which themselves are legal.") (citing *Davidson v. Sta*te, 240 So.2d 463 (Miss.1970)); *Chesney v. State*, 165 So.3d 498 (Miss. Ct. App. 2015).

48. But the search warrant suffers from another fatal flaw: it fails the particularity requirements of both the state and federal constitutions.

49. The search warrant authorized the search of "WRONG ADDRESS". Exhibit 1. No other description of the property to be searched was given, such as a physical description of a house or other structures, a description of the land itself, or references to nearby landmarks or intersecting roadways.

50. The search pursuant to the warrant was done at ADDRESS, not WRONG ADDRESS. These are two distinct locations. It would be the same if the warrant authorized a search of "1 Pine Street" and officers instead searched "1 Oak Street".

51. Simply put, the search warrant did not authorize a search of ADDRESS. This fails the particularity requirement of both the state and federal constitutions. As noted above, the Mississippi Constitution offers protections to home and landowners beyond the substantial ones conferred by the Fourth Amendment. Mississippi courts are to strictly construe Art. III, § 23 against the State. The flawed search warrant here cannot overcome that scrutiny.

52. Because the search warrant was flawed in multiple ways, evidence arising from the search pursuant to that warrant must be suppressed. *Marshall v. State*, 584 So. 2d 437, 438 (Miss. 1991).

V. CONCLUSION

53. For three core reasons, the evidence obtained from the search of Ms. Does' property must be suppressed.

54. First, the initial search was illegal. The officers had no warrant and no exception to the warrant requirement applies. The officers trespassed on Ms. Does' property.

55. Second, the search warrant was obtained based upon information learned during the first, illegal search. Illegally obtained evidence cannot support issuance of a search warrant.

56. Third, the search warrant did not authorize the search of ADDRESS. The search warrant—though already fatally flawed—fails the particularity requirement.

57. For all of these reasons, all evidence obtained on DATE from Ms. Does' property is "fruit of the poisonous tree" and must be suppressed.

WHEREFORE, PREMISES CONSIDERED, Defendant, Jane Doe, requests that this Court suppress all evidence obtained or derived from the searches of her property on DATE, 2024. The Defendant prays for any additional relief to which she may be entitled in the premises.

MOTION TO SUPPRESS VIDEOTAPED CUSTODIAL INTERROGATION

Defendant, John Doe, by and through counsel and pursuant to the 5th, 6th, and 14th Amendments to the United States Constitution; Article 3, Sections 14 and 26 of the Mississippi Constitution of 1890; and related authority, hereby submits his Motion to Suppress Videotaped Custodial Interrogation. In support, Doe shows as follows:

INTRODUCTION

1. Doe has been charged with five felonies in this matter, for offenses alleged to have been committed on July 5, 2022 and September 12, 2022. *See* Docket # 1, Indictment. He has entered a plea of not guilty to all charges.

2. The State has provided the following discovery to date: (1) a copy of the Indictment; (2) a 4-page police report and (3) one video of a custodial interrogation of Doe that occurred on September 13, 2022.

3. Doe hereby moves to suppress the videotaped custodial interrogation and all evidence derived from it.

FACTS

4. Doe was arrested on September 12, 2022 on a variety of felony charges.

5. Doe was arrested after being shot by an off-duty Police Officer following the events that led to the September 12 charges in the Indictment. Doe was shot in the foot and transported to Random Hospital. After his release from the hospital, Doe was transported to Random Police Department custody.

6. Two Random Police Department Investigators initiated a custodial interrogation of Doe on September 13, 2022 in an interview room at RPD Headquarters.

7. The custodial interrogation was recorded on video and has been produced by the State in discovery.

8. At the beginning of the custodial interrogation, the following exchange occurred between Doe and two RPD investigators (one male and one female):

Male Investigator: Before we ask you any questions, you must understand your rights. You have the right to remain silent, anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise these rights to not answer questions or have to make any statements. Do you understand your rights?

Doe: [Nods head indicating affirmative response].

Male Investigator: Initial one through five.

Doe: [Initials]

Doe: Uhh…I—I want a lawyer.

Male Investigator: Huh?

Doe: I want a lawyer.

Male Investigator: Uh… You want a lawyer?

Doe: Yeah.

Male Investigator: Well do you want to give a statement about what happened?

Doe: I want a lawyer.

Male Investigator: I mean we'll appoint you one—

Doe: Alright.

Male Investigator: So— but—do you want to give a statement about what happened?

Doe: Nah, I gave one last night.

Male Investigator: To?

Doe: They got it—uh— whoever it was at the residence.

Male Investigator: Okay, so you don't want to give a statement?

Doe: [Shakes head indicating negative response].

Female Investigator: But you talked to a different agency, we have other charges on you —

Doe: What charges you have?

Female Investigator: In order for you to find that out you have to want to make a statement, you have to want to cooperate. MBI has a set of charges on you and we have a set of charges on you, so what they talked to you about is different than what we need to talk to you about. You understand?

Doe: Okay… I only have two charges what are the other charges?

Male Investigator: The charges we have on you are sexual battery and aggravated assault.

Doe: That's only two charges.

Male Investigator: What charges we have on you…

Doe: That's only two charges.

Female Investigator: Well they're charging you with an officer involved shooting. We're not. Them two different charges.

Male Investigator: Yeah… they charging you for the why you got shot. That got nothing to do with us.

Doe: But you charged me with aggravated assault… and sexual battery… How am I being charged with aggravated assault?

Male Investigator: [Overlapping] That's why—

Female Investigator: [Overlapping] That's the reason we had to read you your rights. So that you could know. It's up to you if you want to know or not. If you don't wanna know, we fine. We just…

Doe: Yeah.

Male Investigator: Yeah what?

Doe: Yeah… I wanna know.

Male Investigator: You wanna give a statement?

Doe: Yeah.

Male Investigator: Alright. I'm going to read you your waiver. I've had read to me or I have read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises have been made to me and no pressure or coercion has been used against me. You can sign and date right there.

Doe: [Signs waiver form].

See Exhibit "1," Video of Doe Custodial Interrogation. To date, no signed rights waiver has been produced in discovery.

LEGAL STANDARDS

9. In *Collins v. State*, 172 So.3d 724 (Miss. 2015), the Mississippi Supreme Court summarized the standards to be employed when viewing a motion to suppress like this one:

> The Fifth Amendment to the United States Constitution provides that, in a criminal case, no person shall be compelled to be a witness against himself. U.S. Const. amend. In *Miranda*, the United States Supreme Court created procedural safeguards to protect the Fifth Amendment right to silence, including that a defendant has the right to have an attorney present during an interrogation, as an attorney can safeguard a defendant's Fifth Amendment rights. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). **"[I]f the individual [in custody] states that he wants an attorney, the interrogation must cease until an attorney is present."** *Id.* at 474. "If the interrogation continues without the presence of an attorney and a statement is taken, a **heavy burden** rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475. Accordingly, the **prosecution bears the burden of proving beyond a reasonable doubt that a statement was given after a valid waiver.** *Jordan v. State*, 995 So. 2d 94, 106 (Miss. 2008). The determination of whether a defendant's rights were waived voluntarily, knowingly, and intelligently is a mixed issue of law and fact. *Id.*
>
> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, **a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."** *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). Thus, once the right to counsel is invoked, the police may not subject the accused to further interrogation until counsel is made

> available, "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.* at 484-85.

Collins, 172 So. 3d at 735–36 (emphases added). *See also Minnick v. Mississippi*, 498 U.S. 146 (1990); *Michigan v.* Mosley, 423 U.S. 96 (1975).

10. After a clear invocation of rights, interrogation can only resume if it is re-initiated by the accused. In *Collins*, the Mississippi Supreme Court also set forth the standards to be employed in determining who initiated a continued interrogation:

> The [United States] Supreme Court later clarified that, in order to admit an accused's statement into evidence after an invocation of the right to counsel, the accused must initiate the conversation, and then, "where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044–45, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). "The inquiries are separate," thus, it must first be determined whether the accused initiated the conversation, and then, if he did, it must be determined whether he knowingly and intelligently waived the rights he previously invoked. *Id.* at 1045, 103 S.Ct. 2830; *Haynes v. State*, 934 So.2d 983, 988 (Miss. 2006).
>
> In determining whether the accused "initiated" conversation after an invocation of rights, the Court noted that inquiries "relating to routine incidents of the custodial relationship[like what am I charged with will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*." *Bradshaw*, 462 U.S. at 1045, 103 S.Ct. 2830. For example, "some inquiries, such as a request for a drink of water or a request to use a telephone ... are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." *Id.* Thus, "the Supreme Court's use of the term 'initiate' involves more than the inquiry of simply 'who talks first.' " *Haynes*, 934 So.2d at 988. The trial court did not acknowledge this standard, but appeared to examine only who spoke first, finding "The officer left the room, and then the defendant initiated contact with the officer."

Collins, 172 So. 3d at 736–37.

11. In *Pannell v. State*, 7 So. 3d 277, 282–83 (Miss. Ct. App. 2008), the Court of Appeals expounded on the meaning of the term "interrogation" under state and federal standards:

> The Mississippi Supreme Court has applied a broad interpretation to the term "interrogation" to include not only questioning, but rather "questioning and its functional equivalent." *Culp v. State*, 933 So.2d 264, 273(¶ 19) (Miss.2005) (citing *Pierre v. State*, 607 So.2d 43, 52 (Miss.1992)). In the landmark decision of *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the United States Supreme Court defined "functional equivalent" to mean "words or actions ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301, 100 S.Ct. 1682. In broadening its definition of "interrogation," the Supreme Court in *Innis* noted that its concern in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) was that "the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Innis*, 446 U.S. at 299, 100 S.Ct. 1682.

12. If a statement is obtained in violation of the Defendant's rights, all evidence derived from that statement is excluded as "fruit of the poisonous tree." *Green v. State*, 344 So.3d 854, 857 (Miss. 2022).

ARGUMENT

13. Doe unequivocally invoked his right to counsel at least 5 times in a short period of time. Immediately after the Male Detective advised him of his rights, Doe twice said, "I want a lawyer". The Male Investigator then asked Doe, after these two clear statements, "Uh…you want a lawyer?" To which Doe replied, "Yeah," his third invocation of his right to counsel. Despite these three clear invocations, the Male Investigator then asked Doe if he wanted to make a statement. Doe clearly answered, for the fourth time, "I want a lawyer." The Male Investigator then said that an attorney could be appointed, and Doe replied, "Alright," his fifth invocation of his right to counsel.

14. Despite these five clear invocations of his rights to counsel, the Male Detective did not cease the interrogation, but kept asking if Doe wanted to make a statement. Doe clearly

communicated that he did **not** want to give a statement, at least three times (the first time he was asked if he wanted to give a statement, Doe invoked his right to counsel, as related above).

15. Doe clearly invoked his rights to counsel and to remain silent. **The first time he did so, the custodial interrogation should have ceased.**

16. It did not. Instead, the investigators misled Doe into eventually signing a rights waiver and giving a statement. They did so by saying that Doe could not be told what he was charged with unless he "cooperated" and "gave a statement". Specifically, the Female Investigator said: "In order for you to find that out [the charges against Doe] you have to want to make a statement, you have to want to cooperate."

17. Doe's rights were violated when the custodial interrogation did not cease after he unequivocally and repeatedly invoked his 5th and 6th Amendment rights.

18. After these rights invocations, interrogation could only resume if Doe re-initiated it.

19. He did not. The plain facts show that the conversation that followed Doe's clear invocations of his rights under *Miranda* and its progeny was initiated by the police and designed to induce a waiver after Doe's clear invocation of those very rights. Doe simply wanting to know what he was charged with (again, in response to conversation initiated by police after he invoked his rights) is not sufficient for a finding that he re-initiated the interrogation.

20. Even worse, the police re-initiated the interrogation by misleading Doe into a supposed waiver of his rights. Under any applicable test, the State cannot meet its heavy burden of proving beyond a reasonable doubt that defendant's statement was given after a knowing and intelligent waiver of his rights.

21. Because of these serious constitutional violations, the videotaped custodial interrogation of September 13, 2022 is due to be suppressed.

22. In addition, any evidence derived from the videotaped custodial interrogation of September 13, 2022 is due to be suppressed as "fruit of the poisonous tree". *Green v. State*, 344 So.3d 854, 857 (Miss. 2022).

WHEREFORE, PREMISES CONSIDERED, Defendant, John Doe, requests that this Court suppress the September 13, 2022 custodial interrogation as well as all evidence derived from that custodial interrogation. Doe prays for any further or additional relief appropriate under the circumstances.

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO EXCLUDE EVIDENCE

COMES NOW, the Defendant, John Doe, by and through undersigned counsel, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution; the Mississippi Constitution; and the *Mississippi Rules of Criminal Procedure*, and hereby requests this Court to dismiss the charge against the Defendant or exclude evidence not produced in discovery. In support of this Motion, Doe shows as follows:

1. In this case, Defendant is charged with Aggravated Assault. See Docket # 1. It is claimed that Defendant, while a pretrial detainee at the Random County Adult Detention Center in Random, Mississippi, assaulted Peter Poe, also a detainee awaiting trial for a murder charge.

2. Trial in this matter is set for June 3, 2024. *See* Docket # 12. The Defendant is in custody and has demanded a speedy trial. *See* Docket # 11.

3. Doe previously filed a Motion for Discovery (Docket # 7), which is incorporated herein by reference as if fully reproduced in words and figures. The State of Mississippi has provided 25 pages of materials responsive to the Motion for Discovery. However, the State has not provided the recorded statement of Peter Poe, the alleged victim, or the recorded statement of the Defendant.

4. The video statements are the most crucial evidence in this case. According to written reports, the alleged victim claimed that the Defendant was the aggressor in the altercation and the Defendant stated that the opposite was the case.

5. This is a "he said, he said" case, with the actual words of the two involved persons—recorded on video—have not been produced for more than a year.

6. While there is no due diligence requirement when it comes to the State's discovery obligations,[1] Defendant has sought these video statements many times and in a multitude of ways. Defendant will either supplement this motion with documentation of these many requests or provide proof of same at the hearing on this Motion.

7. The State (including law enforcement) is either unable or refuses to produce this crucial evidence, which goes to the ultimate issue of whether this was an assault or self-defense.

8. Rule 17.9(a) of the *Mississippi Rules of Criminal Procedure* gives this Court wide authority when it comes to sanctioning discovery violations, including the power "to enter such other order as it deems just under the circumstances."

9 Under the extreme facts of this case—where the State has failed to produce evidence of the contents of the statements of the Defendant and the alleged victim when that constitutes the entirety of the evidence on the ultimate issue—this Court should dismiss the charge against the Defendant. Alternatively, the Court should order the exclusion of any evidence regarding the statements of the Defendant and the alleged victim.

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[1] In *Banks v. Dretke*, 540 U.S. 668 (2004), the Supreme Court considered the Fifth Circuit's use of a defendant-due-diligence requirement to dismiss the defendant's *Brady* claim. The diligence question in *Banks* was whether the defendant "should have interviewed a witness who could have furnished the exculpatory evidence the prosecutor did not disclose." *Banks*, 540 US at 688. The Supreme Court rejected this requirement in no uncertain terms. The Supreme Court stated:

> The state here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoners still has the burden to… discover the evidence," so long as the "potential existence" of a prosecutorial misconduct claim might have been detected. A rule thus declaring "prosecutor may hide, defendant must seek," is not tenable in a system constitutionally bound to accord defendant due process. "Ordinarily we presume that public officials have properly discharged their official duties." We have several times underscored the "special role played by the American prosecutor in the search for truth in criminal trials." Courts, litigants, and juries properly anticipate that "obligations [to refrain from improper methods to secure a conviction]… which plainly rest upon the prosecuting attorney, will be faithfully observed." Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial appropriation.' *See Kyles*, 514 U.S. at 440 ("The prudence of the careful prosecutor should not . . . be discouraged.").
>
> *Id.* at 696 (internal citations omitted).

WHEREFORE, PREMISES CONSIDERED, and pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; the Mississippi Constitution; and the *MRCrP*, Mr. Doe requests that this Court grant his Motion to Compel Discovery and grant all relief, general or specific, to which he is entitled in the premises.

MOTION TO EXCLUDE LATE DISCLOSED EVIDENCE

COMES NOW, the Defendant, John Doe, by and through undersigned counsel, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution; the Mississippi Constitution; and the *Mississippi Rules of Criminal Procedure*, and hereby requests this Court to exclude late disclosed evidence. In support of this Motion, Doe shows as follows:

1. In this case, Defendant is charged with Aggravated Assault. See Docket # 1. It is claimed that Defendant, while a pretrial detainee at the Random County Adult Detention Center in Random, Mississippi, assaulted Peter Poe, also a detainee awaiting trial for a murder charge.

2. Trial in this matter is set for Monday, June 3, 2024. *See* Docket # 12.

3. Doe previously filed a Motion for Discovery (Docket # 7), which is incorporated herein by reference as if fully reproduced in words and figures.

4. On Thursday, May 30, 2024, pre-trial motions were heard in this matter. During that hearing, the Court heard a motion related to two recorded statements that the defendant had been seeking since June of 2023.

5. The Court ruled that those statements would be excluded if not produced by the State by close of business on Thursday, May 30, 2024. The State produced the statements at 5:32 p.m. on May 30.

6. On Friday, May 31, 2024, the State produced a supplemental of report of Officer Roe at 4:42 p.m. The email by which the supplemental report was produced and the report itself are attached as Exhibit 1.

7. The State's production of discovery in this case has been troubling. As of the time of the pre-trial motions hearing on May 30, the State had produced 25 pages of discovery, all on June 7, 2023, almost 1 year before this trial date, which has been set since November 6, 2023. *See* Docket # 12.

8. Since the pre-trial motions hearing, the State has produced: 40 pages of medical records, a physical evidence receipt report, 2 photographs, 2 recorded statements, and 6 pages of supplemental reports. In the 2 business days before trial, the amount of discovery has ballooned from the 25 pages that have existed for a year to 74 pages and 2 recordings. *See* Exhibit 2, Letter from Carner Regarding State's Discovery.

9. The State has not timely and promptly supplemented discovery as required by Rule 17.8 of the *Mississippi Rules of Criminal Procedure*.

10. Defense counsel has been diligent in seeking discovery in this matter, as detailed in the Motion for Discovery (Docket # 7), Motion to Compel (Docket # 8), the communications attached as an exhibit to a prior Motion related to the recorded statements (Docket # 24.2), and a prior letter sent to the District Attorney's Office on May 24, 2024, attached as Exhibit 3.

11. The Court previously ruled that the recorded statements would be excluded if not produced by the close of business on Thursday, May 30, two business days before trial. The State then produced the Roe supplemental report (which has apparently existed since November 10, 2021) at 4:42 p.m. on May 31 (the end of the last business day before trial).

12. The Roe report identifies, for the first time ever in this case, a purported witness to the alleged assault, Eyewitness Guy.

13. Eyewitness Guy appears to be in the custody of the Mississippi Department of Corrections. *See* Exhibit 4.

14. Eyewitness Guy does not appear on the State's trial subpoenas. See Docket # 30.

15. Because of the late disclosure by the State, defense counsel has not had any opportunity to investigate or interview Eyewitness Guy, investigate the substance of his alleged statements, or investigate issues that may touch on the reliability or credibility of those statements.

16. Rule 17.9(a) of the *Mississippi Rules of Criminal Procedure* gives this Court wide authority when it comes to sanctioning discovery violations, including the power "to enter such other order as it deems just under the circumstances."

17. Under these circumstances, the Court should exclude Officer Roe, or any other witness, from testifying about the contents of the late disclosed Supplemental Report attached as Exhibit 1.

WHEREFORE, PREMISES CONSIDERED, and pursuant to the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; the Mississippi Constitution; and the *MRCrP*, Mr. Doe requests that this Court exclude testimony from Officer Satcher regarding the contents of the supplemental report produced at the end of the business day on the Friday before trial.

MOTION FOR FUNDS TO HIRE EXPERT WITNESS

Defendant, by and through counsel, files this his *Motion for Funds to Hire Expert Witness* and asks this court to grant the funds necessary to hire an expert witness in the field of Forensic Pathology, and in support thereof would state the following:

1. That this motion proceed on an *ex parte* basis because "the State has no role to play in the determination of the defendant's use of experts [and other defense funding]. The necessity and propriety of such assistance is a matter left entirely to the discretion of the trial court." *Manning v. State,* 726 So.2d 1152, 1191 (Miss. 1998);

2. The Defense further specifically objects to any argument or response from the State in regards to funding for this expert. See *Id*;

3. That Mr. Doe is charged herein with capital murder. The case involves issues related to medical causation of death, and it is anticipated that the State will call as an expert witness the forensic pathologist who performed the autopsy related to this case. The State has produced a report of autopsy and 416 pages of medical records in this case;

4. That forensic death investigation is a complex process that requires specialized knowledge, training and education. Mr. Doe's attorney does not possess this specific knowledge, training and education;

5. That use of a forensic pathology expert will significantly aid the defense of Mr. Doe in defense of this alleged crime;

6. That "[it is imperative] that no defendant have such evidence admitted against him without the benefit of an independent expert witness to evaluate the data on his behalf." *Polk v. State, Appendix,* 612 So.2d 381 (Miss. 1993)

7. That "due process considerations require that a defendant have access to an independent expert." *Id*. *See also Brown v. State, 152 So.3d 1146 (*Miss. 2014*); Isham v. State* 161 So.3d 1076 (Miss. 2015) (Finding a trial court in error for refusal to grant funds necessary to hire independent experts);

8. That some of the factors "a reviewing court should consider when determining if a defendant was denied a fair trial as a result of a trial court's denial of funds for an expert include:

> a. whether and to what degree the Defendant had access to the State's experts,
> b. whether the Defendant had the opportunity to cross examine those experts,
> c. The extent to which the State's case depends on the State's expert and the degree of possible error associated with the matter for which the expert is requested.
> d. and lack of prejudice or incompetence of the State's experts.

Ellis v. State, 2006- KA-01163-COA, (Miss. 2008).

9. Further, Mr. Doe requires his own expert so he may effectively investigate this matter and cross examine the State's witnesses with regard to forensic pathology/death investigation issues in this case;

10. That, while Mr. Doe will have the opportunity to cross examine witnesses that the State might present with respect to these issues, such cross-examination is meaningless without a comprehensive background in and understanding of forensic pathology/death investigation;

11. That Mr. Doe is indigent, as previously determined by this Court, and cannot afford to hire a forensic pathology expert;

12. The medical causation issues in the case, as well as the ability to interpret and present those findings with the assistance of an expert is critical to Mr. Doe's ability to mount a reasonable defense when the State is seeking to imprison this Defendant for the rest of his life. *Crane v. Kentucky* 476 U.S. 683 (1986); *Johnson v. State*, 529 So.2d 577, 588 (Miss. 1988) (*see*

also Ake v. Oklahoma, 470 U.S. 68, 76 (1985) *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent defendant is entitled to counsel at trial); *Douglas v. California*, 372 U.S. 353 (1963) (legal assistance must be effective);

13. That denial of funds to hire a forensic pathologist will be fatal to Mr. Doe's ability to present all necessary evidence;

14. This motion will be supplemented with proposals of potential expert witnesses/fees;

15. That for the foregoing reasons, Mr. Doe is entitled to assistance of a forensic pathology expert, that funds should be ordered for him to hire that expert, and denial of the same would violate his rights under the United States and Mississippi Constitutions to due process and a fair and impartial trial.

WHEREFORE, PREMISES CONSIDERED, Defendant John Doe respectfully moves this court to enter an order granting payment of funds necessary to hire an expert witness in forensic pathology in this matter so that Mr. Doe may effectively present a defense. The Defendant further prays for any additional relief to which he may be entitled in the premises.

DEFENDANT'S MOTION TO SEVER COUNTS

Defendant, John Doe, by and through the undersigned counsel, files his Motion to Sever Counts. In support of this Motion, Doe shows as follows:

1. Mr. Doe has been charged with five offenses in the Indictment (Docket # 1) in this case:

Count 1: Sexual Battery, an alleged violation of *Miss. Code Ann.* § 97-3-95(1)(a), with an alleged offense date of September 12, 2022 and the alleged victim being Person 1.

Count 2: Aggravated Assault, an alleged violation of *Miss. Code Ann.* § 97-3-7(2)(a)(ii), with an alleged offense date of September 12, 2022 and the alleged victim being Person 1.

Count 3: Armed Robbery, an alleged violation of *Miss. Code Ann.* § 97-3-7(2)(a)(ii), with an alleged offense date of September 12, 2022 and the alleged victim being Person 1.

Count 4: Armed Carjacking, an alleged violation of *Miss. Code Ann.* § 97-3-117(2), with an alleged offense date of July 5, 2022 and the alleged victim being Person 2.

Count 5: Kidnapping, an alleged violation of *Miss. Code Ann.* § 97-3-53, with an alleged offense date of July 5, 2022 and the alleged victim being Person 2.

2. *Miss. Code Ann.* § 99-7-2 permits multi-count indictments under certain circumstances, though they are still subject to severance under *Mississippi Rule of Criminal Procedure* 14.3 and related authority.

3. Rule 14.3 of the *MRCrP* provides that a court may sever the counts of an indictment "if it is deemed appropriate to promote the fair determination of a defendant's guilt

or innocence of each offense." The Comment to Rule 14.3 lays out a three-factor test to be used when determining whether severance is proper:

a. The time period between the alleged offenses,

b. whether the evidence proving each count would be admissible to prove each of the other counts, and

c. whether the crimes are interwoven.

4. In *Corley v. State*, 584 So. 2d 769, 772 (Miss. 1991), the Mississippi Supreme Court set forth the procedure and standards to be employed in evaluating a severance motion:

> When a defendant raises the issue of severance, we recommend that a trial court hold a hearing on the issue. The State, then, has the burden of making a prima facie case showing that the offenses charged fall within the language of the statute allowing multi-count indictments. If the State meets its burden, a defendant may rebut by showing that the offenses were separate and distinct acts or transactions. In making its determination regarding severance, the trial court should pay particular attention to whether the time period between the occurrences is insignificant, whether the evidence proving each count would be admissible to prove each of the other counts, and whether the crimes are interwoven.

5. Here, there is absolutely no connection between the September 12 alleged offenses and the July 5 alleged offenses. Accordingly, any evidence put forth by the State concerning the September offenses would have no relation to the July offenses. Thus, the alleged crimes are not interwoven and are due to be severed. Without a doubt, trying these separate and unrelated offenses together would serve to confuse the jury, cause undue prejudice to Defendant, and would not promote the fair determination of Mr. Doe's guilt or innocence.

6. Accordingly, Doe requests that this Motion be set for hearing and that, thereafter, this Court enter an order severing Counts 1-3 (the September 12, 2022 alleged offenses) of the Indictment from Counts 4-5 (the July 5, 2022 alleged offenses).

WHEREFORE, PREMISES CONSIDERED, John Doe requests that a hearing be held on this Motion in accordance with Mississippi law and that, thereafter, this Court enter an order severing Counts 1-3 (the September 12, 2022 alleged offenses) of the Indictment from Counts 4-5 (the July 5, 2022 alleged offenses), such that separate trials can be held.

Respectfully requested, this the 1st day of July, 2023.

RESPECTFULLY SUBMITTED,

JOHN DOE, DEFENDANT

BY: */s/ Graham P. Carner*
GRAHAM P. CARNER

MOTION TO APPOINT SECOND COUNSEL FOR DEFENDANT

COMES NOW, the Defendant, John Doe, by and through undersigned counsel, pursuant to Rule 7.2 of the *Mississippi Rules of Criminal Procedure* and related authority, and hereby requests this Court appoint a second attorney to represent him in this matter. In support of this Motion, Defendant would show as follows:

1. The Defendant has been indicted for two offenses: (1) Armed Robbery pursuant to *Miss. Code Ann.* § 97-3-79 and (2) Armed Carjacking pursuant to *Miss. Code Ann.* § 97-3-117.

2. *Miss. Code Ann.* § 97-3-79 states that those convicted of armed robbery "shall be imprisoned for life in the state **penitentiary if the penalty is so fixed by the jury**; and in cases where the jury fails to fix the penalty at imprisonment for life in the state penitentiary the court shall fix the penalty at imprisonment in the state penitentiary for any term not less than three (3) years." (emphasis added)

3. In a hearing before this Court in 2018, the State announced that it would be seeking a life sentence to be imposed by the jury if Defendant is convicted of armed robbery at trial.

4. If the Defendant is found guilty of armed robbery following a trial then there will immediately follow a sentencing proceeding with the same jury determining whether to impose a life sentence. Such a sentencing hearing would require exploration of mitigation evidence, such as the history and background of the Defendant. To be prepared to effectively represent the Defendant in such a proceeding, additional investigation and preparation must be done with regard to mitigation evidence and other matters bearing on the sentence.

5. Because of the heavy workload to prepare for trial on the merits as well as a potential sentencing hearing at which the State would seek life imprisonment for a Defendant who was just over 18 years old at the time of the alleged offense, the Defendant requests that this Court appoint a second attorney to represent him in this matter.

6. Appointing additional counsel in a non-death penalty case is within the discretion of the trial court. *MRCrP* 7.2(a)(2).

7. Undersigned counsel has consulted with Attorney 2, an attorney with extensive experience in felony criminal defense. Attorney 2 has expressed willingness to serve as secondary counsel for the Defendant in this matter.

8. Undersigned counsel has also consulted with the Defendant about this matter. The Defendant has consented to Attorney 2's representation.

WHEREFORE, PREMISES CONSIDERED, and pursuant to Rule 7.2 of the *Mississippi Rules of Criminal Procedure*, Defendant requests that this Court enter its order appointing Attorney 2 as second counsel in this matter and grant all relief, general or specific, to which he is entitled in the premises.

MOTION TO EXCLUDE TESTIMONY OF EXPERT ROE

Defendant, John Doe, by and through undersigned counsel and pursuant to the *Mississippi Rules of Evidence* and related authority, files this Motion to Exclude Testimony of Expert Roe. In support of this Motion, the Defendant would show as follows:

1. The Defendant is charged by indictment with two counts of Sexual Battery.
2. The State of Mississippi has listed Expert Roe as a potential expert witness to testify at trial.
3. Expert Roe is a Licensed Clinical Social Worker and a self-described therapist. *See* Exhibit "1," State Witness List and CVs.
4. Roe provided therapy to the alleged victim, M.W., following the events alleged in the Indictment. Therapy records have been produced by the State in discovery.
5. The State intends to call Roe to testify "consistently with her therapy records, including her diagnosis of M.W., the type of therapy employed in her sessions with M.W. and her reasons for choosing that course of therapy." *See* Exhibit "1," State Witness List and CVs at p. 1.
6. Rule 401 of the *Mississippi Rules of Evidence* defines relevant evidence as that "evidence having tendency to make the existence of any fact that is of consequence to the determination of that action more probable or less probable than it would be without the evidence".
7. Evidence that is not relevant is not admissible. *MRE* 402.

8. The proposed testimony of Expert Roe is not relevant. Ms. Roe will testify solely about events and a course of therapy that occurred after the offenses alleged in the Indictment. The question for the jury in this trial is whether the alleged events took place and John Doe is guilty of the offense of Sexual Battery. M.W.'s after-the-fact course of therapy with a social worker does not make determination of whether the offense was committed by the Defendant more probable or less probable. *See Parks v. State*, 950 So. 2d 184, 187 (Miss. Ct. App. 2006) ("Relevant evidence is evidence that tends to show whether a fact of consequence to an action either occurred or did not occur.").
9. Even if the court finds that there is some relevance to the proposed testimony, its admission would be unfairly prejudicial under *MRE* 403. The only purpose that could be served by admission of the testimony is bolstering the account of M.W. by having a therapist/social worker vouch for her. Rule 403 balancing should result in exclusion, even if the court finds some relevancy to the testimony.
10. Further, it appears that all Expert Roe can testify about is what M.W. told her about the alleged events and the impact they have supposedly had on her. That is hearsay as defined by *MRE* 801. Hearsay is to be excluded under *MRE* 802.
11. Finally, since the State appears to be offering Roe as an expert witness, it must demonstrate that Roe is qualified and that her testimony meets the requirements of *MRE* 702 and related authority. *See, e.g., Brown v. Prof'l Bldg. Servs.*, 284 So. 3d 754, 762 (Miss. Ct. App. 2017) ("The proponent of

expert testimony must show by a preponderance of the evidence that the testimony is reliable.")

12. The Defendant challenges the qualifications of Roe to make any "diagnosis" that comports with *MRE* 702. The proposed opinions and testimony of Roe do not meet the other criteria for admission under *MRE* 702, as they are not based upon sufficient facts or data, are not the product of reliable principles and methods, and the witness has not reliably applied any principles or methods to the facts of the case. *See, e.g., Illinois Cent. R. Co. v. Brent,* 133 So. 3d 760 (Miss. 2013).

13. For these reasons, the Court should exclude the testimony of Expert Roe.

WHEREFORE PREMISES CONSIDERED, Defendant John Doe moves that this court enter an Order excluding the testimony of Expert Roe.

MOTION TO REVEAL THE DEAL WITH WITNESS ROE

COMES NOW, the Defendant, by counsel, and moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Mississippi Constitution, and the *Mississippi Rules of Criminal Procedure*, to order the prosecution to reveal any deal, tentative deal, or other inducements that have been offered to or agreed by Witness Roe or his counsel. In support of his motion, defendant states as follows:

1) So-called "deals" with witnesses are a classic form of *Brady* material. *See, e.g, DuBose v. LeFevre*, 619 F.2d 973 (2d Cir. 1980) (failure to admit promise that witness would be rewarded by favorable testimony); *Skipper v. WainRoe*, 598 F.2d 425, 427 (5th Cir.), *cert. denied*, 444 U.S. 974, 100 S. Ct. 469, 62 L. Ed. 2d 389 (1979); *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (failure to disclose assurances of reward for favorable testimony); *United States v. Sanfilippo*, 564 F.2d 176, 179 (5th Cir. 1977) (witness testified untruthfully concerning scope of agreement with prosecution).

2) This is true even where there is some technical way in which the prosecution can pretend that no deal exists. Courts have condemned any "apparent effort [on the part] of the prosecution to conceal the true nature of the dealings with its key witness...." *United States v. Butler*, 567 F.2d 885, 888 (9th Cir. 1978). This Court "will not tolerate prosecutorial participation in technically correct, yet seriously misleading, testimony which serves to conceal the existence of a deal with material witnesses." *Blankenship v. Estelle*, 545 F.2d 510, 513 (5th Cir. 1977). Where a witness likely expected a deal, but the prosecution refused to put it in writing and disclose to the jury exactly what it was, this only increased the significance, for the purpose of assessing his credibility, of his

expectation of favorable treatment. Since a tentative promise of leniency could be interpreted by the witness as being contingent on his testimony, there would be an even greater incentive for him to "make his testimony pleasing to the prosecutor." *Porterfield v. State*, 472 So.2d 882, 884 (Fla. DCA 1, 1985); accord *Campbell v. Reed*, 594 F.2d 4, 8 (4th Cir. 1979); *United States v. Bynum*, 567 F.2d 1167, 1169 (1st Cir. 1978); *United States ex rel. Washington v. Vincent*, 525 F.2d 262, 265 (2d Cir. 1976); *Marrow v. State*, 483 So.2d 17, 19-20 (Fla. DCA 2, 1985).

3) In the instant case, Defendant seeks revelation of any deals, promises, or inducements to Witness Roe. Mr. Roe is currently serving sentences arising out of Random County. The details of any agreement or arrangements between the State and Mr. Roe (such as, that his testimony will assist him in seeking parole or that the State will inform the Parole Board or others of his assistance) must be produced in accordance with the aforementioned authority.

WHEREFORE, PREMISES CONSIDERED, Defendant John Doe respectfully requests that the Court grant the relief sought herein.

MOTION IN LIMINE TO EXCLUDE ALL EVIDENCE OR WITNESS TESTIMONY OR OTHER REFERENCES RELATING TO OTHER CRIMES, PRIOR CONVICTIONS OR ARRESTS, WRONGS, OR OTHER BAD ACTS OF DEFENDANT

Defendant, John Doe, by and through undersigned counsel and pursuant to Rules 401, 403, and 404 of the *Mississippi Rules of Evidence*, files this Motion *In Limine* to Exclude All Evidence or Witness Testimony or Other References Relating to Other Crimes, Prior Convictions or Arrests, Wrongs, or Other Bad Acts of Defendant. In support of this Motion, the Defendant would show as follows:

1. The Defendant asks this court to enter an order prohibiting the State during the trial of this matter from any comment or remark on his past criminal convictions or any other alleged wrongs or bad acts, as well as any witness testimony regarding the same.
2. Mr. Doe is charged by indictment with Aggravated Assault.
3. Rule 401 of the Mississippi Rules of Evidence defines relevant evidence as that "evidence having tendency to make the existence of any fact that is of consequence to the determination of that action more probable or less probable than it would be without the evidence";
4. Admission of any other crimes, wrongs or other bad acts are wholly irrelevant to the case at bar and would serve to unfairly prejudice Mr. Doe in this matter.
5. Rule 404(b) of the Mississippi Rules of Evidence, specifically disallows evidence of this any other crimes, wrongs or bad acts in that such evidence is not admissible to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Miss.*

R. Evid. 404(b). Further, admission of these facts would in no way prove any element enumerated in Rule 404(b).

6. Any other alleged arrest or offense is completely unrelated to the offense charged in this matter, other than to place Mr. Doe's character in issue. *Settles v. State*, 584 So. 2d 1260, 1265 (Miss. 1991).

7. Evidence of other wrongs is inadmissible in a trial of an accused to demonstrate behavior that conforms to the charge in the indictment. *Thomas v. State*, 19 So. 3d 130, 133 (Miss Ct. App. 2009) (citing *Spraggins v. State*, 606 So. 2d 592, 593 (Miss. 1992)). Offering into evidence proof of other similar crimes for the purpose of showing an accused is more likely to be guilty by virtue of having engaged in the same sort of acts before is, and always has been, inadmissible. *Blanks v. State*, 547 So. 2d 29 (Miss. 1989).

8. Even if prior convictions or arrests were somehow to be found relevant and admissible under 404(b), such evidence should not be allowed to be mentioned because any probative value that it may have is greatly outweighed by its undue prejudicial effect to Mr. Doe.

9. The failure to suppress such other alleged wrongs or acts would create fatal prejudice to Mr. Doe's defense and as such, would be a violation of his due process rights to a fair and impartial trial by jury under both the United States and Mississippi Constitutions.

10. A limiting jury instruction or other remedy would be insufficient to cure any mention of this prejudicial evidence that may be presented, even inadvertently. Therefore, Mr. Doe respectfully requests the Court to instruct

the prosecution to refrain from making any direct or indirect reference whatsoever in person, by counsel, or through witnesses, regarding any prior bad acts, crimes, wrongs, arrests, and/or convictions of Mr. Doe and further that the State specifically instruct its witnesses that such testimony is not admissible and should not be mentioned in the presence of the jury.

11. That it is in the interests of justice that any mention of past criminal history or irrelevant other charges, wrongs or bad acts be suppressed in this matter.
12. Thus, the Court should order the State, from voir dire through verdict, to make no reference to these matters.

WHEREFORE PREMISES CONSIDERED, Defendant John Doe moves that this court order that his past criminal history or any other alleged crimes, wrongs or bad acts be excluded under Rule 401, Rule 404(b), and Rule 403 of the *Mississippi Rules of Evidence* and that the State be prohibited of any mention or comment thereon and further that the State direct any witnesses against any mention of any suppressed evidence.

MOTION IN LIMINE TO PROHIBIT REFERENCES TO
DEFENDANT'S ASSERTION OF RIGHT TO SILENCE AND COUNSEL

Defendant, John Doe, by and through undersigned counsel and pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article 3, Section 26 of the Mississippi Constitution of 1890; and related authority, files this Motion *In Limine* to Prohibit References to Defendant's Assertion of Right to Silence and Counsel. In support of this Motion, the Defendant would show as follows:

1. Defendant is charged herein Aggravated Assault. *See* Docket # 1, Indictment.

2. Following Defendant's arrest, an interview of the Defendant was attempted by law enforcement. At that time, Defendant was advised of his "*Miranda* Warnings," which include the right to silence and to counsel under the Fifth and Sixth Amendments to the United States Constitution. Defendant exercised his rights and declined to give a statement.

3. The Fifth Amendment protects, among other rights, the right to not be "compelled in any criminal case to be a witness against himself."

4. The Sixth Amendment provides that a Defendant in a criminal case shall have "the Assistance of Counsel for his defence."

5. The referenced provisions of the Fifth and Sixth Amendments apply to the States by incorporation through the due process protections of the Fourteenth Amendment. These rights are safeguarded by the issuance of "*Miranda* Warnings" prior to custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

6. Article 3, Section 26 of the Mississippi Constitution of 1890 provides similar protections to those detailed above.

7. In *Doyle v. Ohio*, 426 U.S. 610 (1976), the United States Supreme Court held that prosecution commentary on a defendant's post-arrest silence violates the rights guaranteed by the Fifth and Fourteenth Amendments and *Miranda v. Arizona*, 384 U.S. 436 (1966). The *Doyle* Court held that "the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619-20 (footnote omitted). The same logic applies to *Miranda's* protection of the right to assistance of counsel under the Sixth Amendment.

8. Similarly, in *Griffin v. California*, 380 U.S. 609, 614 (1965) the Supreme Court held: "[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin* specifically dealt with a prohibition on such when the Defendant elected to not testify at trial. *See also Griffin v. State*, 557 So.2d 542 (Miss. 1990); *Davis v. State*, 970 So.2d 164 (Miss. Ct. App. 2006).

9. Since any commentary by the State with respect to the Defendant's invocation of his rights to silence and counsel would violate the United States

Constitution and the Mississippi Constitution and would be highly prejudicial to the Defendant, the State should be barred from mentioning, referencing, or alluding to such material in any way. *See Whittley v. Meridian*, 530 So.2d 1341, 1343-44 (Miss. 1988) (detailing the purpose of pre-trial motions *in limine*). Examples of how these references have been made in prior cases include impeaching a Defendant who testifies with regard to the invocation of his rights to silence or counsel and arguments to the jury to the effect of: "why didn't the Defendant tell this story to the police when they asked him," "this is the first time anyone has heard this story," etc. Thus, the Court should order the State, from voir dire through verdict, to make no reference to the Defendant's invocation of his rights to silence or counsel during his custodial interrogation (whether he testifies at trial or not) or on the Defendant's not testifying at trial (should he choose to not testify).

WHEREFORE, PREMISES CONSIDERED, Defendant, John Doe, respectfully requests that the Court enter an Order granting the relief sought herein. The Defendant prays for any further or additional relief to which he may be entitled in the premises.

MOTION IN LIMINE TO EXCLUDE EVIDENCE OF FLIGHT AND JURY INSTRUCTION REGARDING THE SAME

John Doe, by and through his counsel and pursuant to the *Mississippi Rules of Evidence*, the United States Constitution, the Mississippi Constitution of 1890, and related authority, files this *Motion in Limine to Exclude Evidence of Flight* and asks this court to enter an order prohibiting the State, at trial, through its District Attorneys or Witness testimony from any comment or remark on the alleged flight of Mr. Doe during or after the incident in question and, in support thereof, would show the following:

Facts

1. Mr. Doe is charged by indictment with one count of armed robbery for events arising on or about November 21, 2015. *See* Docket # 1, Indictment.

2. Discovery provided in this matter alleges that, following the alleged event, Mr. Doe exited a car and attempted to elude police prior to his arrest.

3. Mr. Doe was on state probation at the time of his arrest. *See* Exhibit "1," Sentencing Order from *State v. Doe*, In the Circuit Court of Random County, Mississippi, Cause No. X.

4. While the State has not yet submitted proposed jury instructions, out of an abundance of caution the Defendant anticipates the State may offer a proposed "flight instruction" or attempt to elicit testimony or other evidence of flight in this case.

Flight Instructions and Evidence, Generally

5. Admission of a "flight instruction", that is, an instruction to the jury that allows the finder of fact to adduce guilt from evidence of flight, has been long scrutinized by the Mississippi appellate courts.

6. Courts have generally discouraged such instructions, even going so far as to label them "dangerous" *Ervin v. State,* 136 So.3d 1053 (Miss. 2014) quoting *Randolph v. State*, 852 So.2d 547, 567 (Miss. 2002); See also *Fuselier v. State,* 468 So.2d 45 (Miss. 1985) (*Fuselier I*) ("Here, because the court was aware of an explanation for Fuselier's flight, which was at that time inadmissible, we are of the opinion that the flight instruction should not have been granted."); *accord Liggins v. State,* 726 So.2d 180 (Miss. 1998) ("Evidence of flight is inadmissible where, as in this case, there is an independent reason for flight known by the court which cannot be explained to the jury because of its prejudicial effect upon the defendant."); *Banks v. State,* 631 So.2d 748, 751 (Miss. 1994) ("The present case does not fall within either of the circumstances where a flight instruction would be appropriate or warranted."); *Quarles v. State,* 199 So.2d 58 (Miss. 1967) ("This instruction should not have been given. It is confusing in form [and] capable of misleading the jury...."); *Eubanks v. State,* 85 So.2d 805 (Miss. 1956) ("The facts did not warrant the giving of this instruction. Appellant gave an entirely plausible and uncontradicted explanation of the reason why he was absent from the county for five weeks. The sheriff's testimony to the effect that he could not locate appellant does not negative [sic] the uncontradicted status of appellant's testimony in this respect. *Instructions on flight, if given at all, should be used only in cases wherein that circumstance has considerable probative value.* Moreover, such an instruction is primarily argumentative.") (emphasis added).

7. Further, there is no discernable difference in the giving of a flight instruction and introduction of evidence of flight. *See Mack v. State* 650 So.2d 1289, 1309-1310 (Miss. 1994) ("If a prosecutor cannot give a jury instruction on flight because evidence of flight is probative of things other than the defendant's guilt or guilty knowledge, it follows that the prosecutor should not be allowed to place the evidence before the jury.").

The Two-Pronged Test: Explanation and Probative Value

8. While the admission of flight evidence and flight instructions is not expressly forbidden, the Courts have developed a two-pronged test to determine whether the jury should be allowed to hear them. *Kuebler v. State* 204 So.3d 1220 (2016); *See also Reynolds v. State,* 658 So.2d 852, 856 (Miss.1995) ("[A]n instruction that flight may be considered as a circumstance of guilt or guilty knowledge is appropriate only where that flight is unexplained *and* somehow probative of guilt or guilty knowledge.") *emphasis added*; *States v. State*, 88 So. 3d 749, 758 (Miss. 2012)("[W]ith the prosecutors having been duly warned on multiple occasions about the danger of submitting flight instructions, there can be no legitimate hue and cry from the State in the future if this Court ... reverses a criminal conviction based on the trial court's improper grant of a flight instruction which had been improvidently submitted by the prosecutor."); See also *Fuselier v. State*, 468 So.2d 45; *Randolph v. State,* 852 So.2d at 567.

9. Firstly, the flight must be unexplained to be admissible. *See Kuebler*, 204 So.3d at 1226; *See also Reynolds*, 658 So.2d at 856; *Brown v. State*, 690 So.2d 276, 294 (Miss.1996) ("Only unexplained flight warrants a flight instruction.").

10. Through counsel, Mr. Doe contends that he did not flee from the police as a result of his guilty knowledge or conscious from having robbed the complainant as alleged in the

indictment of this matter and as the State may have the jury believe, but rather because he was on probation and in danger of having his sentence revoked in that case.

11. Mr. Doe should not be placed in the potential situation of having to choose to testify to explain his alleged flight from the police to the jury in this matter.

12. The Court explains this reasoning in *Mack v. State* 650 So.2d 1289. In *Mack*, the trial court allowed evidence that the defendant fled from the police as he was wanted for criminal charges elsewhere. *Id* at 1309. When evidence of his flight, which had nothing to do with his guilt for the crime charged, was presented by the State, it placed the him in the position of having to explain the same to the jury, something he should not have had to be compelled to do.

13. Here, Mr. Doe has an absolute right to remain silent under the Fifth Amendment to the United States Constitution and cannot be compelled to take the stand and give evidence. If this court were to allow presentation of evidence of flight, a reason for which the court is aware and the jury is not, the court will be forcing Mr. Doe to take the stand in his own defense and rebut those assertions.

14. Even if Mr. Doe were to take the stand, allegations of flight should not be allowed in to evidence as it has now been explained to the court and has no probative value.

15. The Mississippi Supreme Court, in *Kuebler v. State*, held that flight instructions or evidence supporting the same is inadmissible when the court is *merely aware* of an explanation for the defendant's flight. *Kuebler* at 1226 citing *Fuselier v. State*, 468 So.2d 45 ("Under our precedent, a defendant's flight has been explained if the trial judge simply is "aware of an explanation" for the flight."). This means that the court does not have to believe an accused's explanation why he fled, but merely be made aware of its existence. In fact, the

Kuebler Court termed the defense's proffered testimony regarding his explanation for flight after his attorney had made the court aware of it "entirely unnecessary". *Id.* at 1227.

16. Here, again, Mr. Doe has provided this court with a reason for his flight other than any imagined consciousness of guilt regarding this alleged armed robbery.

17. Secondly, the Courts have held that "Flight instructions are to be given only in cases where that circumstance has *considerable* probative value". *Banks v. State*, 631 So.2d 748, 751 (Miss.1994) (quoting *Pannell v. State*, 455 So.2d 785, 788 (Miss.1984)) (emphasis added). *See also Randolph v. State*, 852 So.2d at 567.

18. In *Kuebler*, the Court has said that this type of evidence should only be allowed when it is "highly probative" *Kuebler* at 1227 (citing *Liggins*, 726 So.2d at 183; *Banks*, 631 So.2d at 751; *Pannell*, 455 So.2d at 788; *Tran*, 681 So.2d at 519; *Mack*, 650 So.2d at 1308; *Brown*, 690 So.2d at 294; *Fuselier*, 702 So.2d at 390).

19. Here, any evidence of flight has absolutely no probative value as to the question of whether or not Mr. Doe committed the crimes charged. The State will not be estopped from calling any witness to testify as to the events alleged to have taken place during the actual commission of the alleged crime herein (and thereby, the only testimony relevant to these proceedings) if the court rightly excludes evidence of irrelevant events taking place *after* the alleged crime. Introduction of subsequent flight evidence or the giving of a flight instruction serves only to attempt to improperly sway the jury with the State's alleged consciousness of guilt of the crime charged herein due to alleged flight from the scene, a reason for which this court has now been provided. Any minimal value evidence this kind of might lend would be greatly outweighed by its unduly prejudicial effect on Mr. Doe.

Conclusion

20. Mr. Doe did not flee from the police as a result of any imagined guilty knowledge surrounding the alleged incident in question. Mr. Doe maintains that any "flight" during the traffic stop in this matter was a result of his fear of violation of probation in a completely unrelated matter.

21. That failure to suppress such evidence or allow any "flight instruction" would create fatal prejudice to Mr. Doe' defense and as such, would be a violation of his due process rights to a fair and impartial trial by jury under both the United States and Mississippi Constitutions.

22. That a limiting jury instruction or other remedy would be insufficient to cure any mention of this prejudicial evidence that may be presented, even inadvertently. Therefore, Mr. Doe respectfully requests the Court to instruct the State to refrain from making any direct or indirect reference whatsoever in person, by counsel, or through witnesses, regarding alleged flight and further that the State specifically instruct its witnesses that such testimony is not admissible and should not be mentioned in the presence of the jury.

23. That it is in the interests of justice that this evidence be excluded in this matter.

WHEREFORE, PREMISES CONSIDERED, John Doe moves that this court order that any evidence of his alleged flight in this matter be excluded and that the State be prohibited of any mention or comment thereon, from *voir dire* to verdict, and further that the State direct any witnesses against any mention of any excluded evidence.