Cornell Law School Team Wins Supreme Court Victory for Curtis Flowers

by SHERRIE NEGREA

In June, the U.S. Supreme Court overturned the 2010 conviction of Mississippi death row inmate Curtis Flowers, who was represented by Professors Sheri Lynn Johnson and Keir Weyble. Flowers, who is black, had been tried six times by the same white prosecutor for a 1996 quadruple murder that he says he did not commit.

ON the morning of July 16, 1996, four employees of the Tardy Furniture store in downtown Winona, Mississippi, were shot in the head, their bodies left sprawled on the floor or slumped over the counter.

Seven months later, **Curtis Flowers**, who had been fired from the store two weeks before the murders, was arrested and charged with the quadruple homicide. Flowers, twenty-six at the time, had no criminal record, and there was no forensic evidence linking him to the killings.

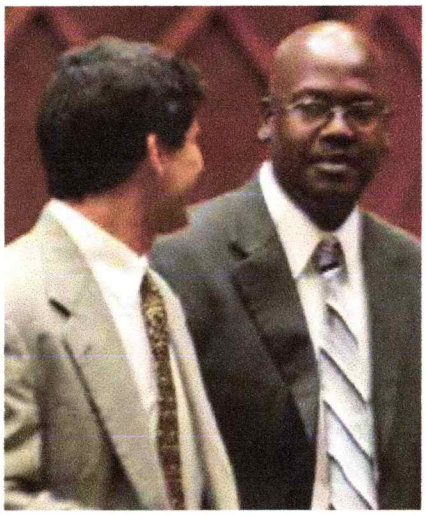
Yet over the next fourteen years, the Montgomery County prosecutor, **Doug Evans**, tried Flowers, an African American man who had grown up in Winona, six times for the execution-style slayings. The first three trials ended with a conviction and death sentence but were overturned by the Mississippi Supreme Court because of prosecutorial misconduct or because prospective jurors had been excluded based on their race. The next two were mistrials, and the sixth resulted in a conviction and death sentence.

In 2011, after Flowers was found guilty in his last trial, two Cornell Law School professors— **Sheri Lynn Johnson** and **Keir Weyble**—agreed to take over the appeal of the case. Working with two students from the Law School's capital punishment clinic, they took the case to the U.S. Supreme Court, which on June 21 overturned Flowers's conviction. In a 7–2 decision, the Court concluded that Evans had violated the U.S. Constitution by repeatedly excluding African Americans using peremptory challenges during jury selection.

While Flowers is imprisoned and may face a seventh trial in Mississippi, the Supreme Court decision will have a significant impact on the issue of racial bias in the selection of jurors. "The Supreme Court has had a number of cases in the past four or five years where they've had prosecutors primarily striking black jurors," said **John Blume**, the Samuel F. Leibowitz Professor of Trial Techniques and director of the Cornell Death Penalty Project. "I think the Court is trying to send a message: 'Don't do this. Take your peremptory challenges in terms of whether there are legitimate reasons to strike jurors, but don't cheat to win."

APPEAL TO THE MISSISSIPPI SUPREME COURT

The Flowers case landed at Cornell when **David Voisin**, a Mississippi lawyer, asked Johnson and Weyble whether they would handle the defendant's appeal. In the close-knit network



TOP: Curtis Flowers in court in September 2008.
BOTTOM: Curtis Flowers is lead away from the Montgomery County Courthouse in 2004 after an unsuccessful motion for a retrial.

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>
> — Sheri Lynn Johnson

of capital defense lawyers, Cornell Law School is well known because it is one of fewer than ten law schools nationwide that offer a capital punishment clinic fully staffed by faculty.

"I think it's very hard to pull off," said **Eduardo M. Peñalver**, the Allan R. Tessler Dean and Professor of Law. "You have to have the right people, and they have to have a profile within death penalty advocacy to maintain a flow of cases through the law school. And that requires exceptional commitment on their part."

Voisin knew Johnson and Weyble because they both have deep ties to the capital defense community. Johnson, the James and Mark Flanagan Professor of Law, is a renowned expert on the interface of race and issues in criminal procedure. And Weyble, clinical professor of law, is a nationally known expert in post-conviction litigation and has represented prisoners in capital cases across the South for more than twenty years.

When Voisin suggested they take on the Flowers' appeal, both were attracted to the case because of its focus on racial issues in jury selection and the sheer number of trials involved. "I'd never encountered another case that went to trial six times," Weyble said. "That alone made my ears perk up."

As they began researching the case, they found the evidence that racial discrimination had occurred during jury selection to be overwhelming: Out of the forty-three African Americans in the jury pool for Flowers's six trials, Evans struck forty-one. And in the sixth trial, he struck five out of six.

Not only did Evans eliminate nearly all prospective jurors who were African American, he also engaged in disparate questioning of the potential jurors. In the last trial, Evans asked each struck black prospective juror twenty-nine questions, while asking each seated white juror one question.

"The numbers are extraordinary all by themselves," Johnson said. "For whatever reason, Evans wanted a white jury and did whatever he could to get his white jury."

Another issue that became a focus in their initial appeal was the weak evidence Evans used in the case. For example, a witness who was near the crime scene the day of the murders could identify the perpetrator only as being black and initially named someone else as the suspect, Johnson said.

"He only made identification of Mr. Flowers after there were various suggestive comments made," Johnson said. "So a variety of factors made this an unreliable identification and in our view should have meant that the identification should not have gone to the jury at all."

When the Mississippi Supreme Court reaffirmed Flowers's conviction in his sixth trial, Johnson and Weyble appealed to the U.S. Supreme Court, but it remanded the case back to the lower court. The justices asked the Mississippi Supreme Court to reconsider the case in light of the U.S. Supreme Court's 2016 decision in *Foster v. Chatman*, which overturned the conviction of a Georgia death-row inmate after he obtained documents showing that prosecutors had highlighted the race of prospective black jurors and written "definite NO!" or "No Black church" after their names.

The line for the oral argument in *Flowers v. Mississippi* on March 20, 2019.

Capital Punishment Clinic

Started in 1996, the Capital Punishment Clinic provides representation to indigent death-sentenced inmates, primarily in the South. Since its inception the clinic has represented approximately thirty death-row inmates and seven individuals charged with capital crimes. Students in the clinic participate fully in the litigation of death penalty cases. Clinic projects vary from year to year, but students have worked on cases at all stages of the criminal process including at trial, on direct appeal, and in state post-conviction and federal habeas corpus proceedings.

Under the supervision of faculty members experienced in capital litigation, clinic students work as members of legal teams assembled to meet the needs of individual clients. For example, students take part in formulating case theories and strategies; they learn to review court issues, and develop legal arguments; and they often have opportunities to attend and observe court proceedings in clinic cases. Some students will be involved in case investigation, a task that frequently involves meeting with and interviewing clients or potential witnesses, such as mental health experts. In addition to client representation, the clinic also has a classroom component designed to enhance students' knowledge of the law and skills relevant to capital litigation.

TOP AND BOTTOM: Journalists for the podcast "In the Dark" interview people waiting in line to attend the oral argument on March 20, 2019.

The Mississippi Supreme Court, however, did not find Foster relevant to Flowers's conviction in his sixth trial. "They pasted in their previous opinion that ignored the prosecutor's history," Johnson said. "They pasted it in word for word."

SECOND APPEAL TO THE U.S. SUPREME COURT

As they prepared their second appeal to the U.S. Supreme Court, Johnson and Weyble enlisted **Pablo Chapablanco '19** and **Sam Macomber '20**—students in the Capital Punishment Clinic—to work on the case. During the fall '18 and spring '19 semesters, Chapablanco and Macomber worked late into the night, poring over the jury selection records and preparing a 600-page research document that would become an essential part of the arguments made to the Supreme Court. "They did extraordinary work on behalf of Curtis Flowers, combing through the voir dire and all of the statistics," Johnson said.

Chapablanco, now a clerk for a U.S. district court judge in El Paso, remembers being pessimistic that the Supreme Court would grant their petition for a writ of certiorari. Each term, the Supreme Court receives between 7,000 and 8,000 new cases and selects only about eighty of them to review with oral argument.

But during the summer of 2018, Chapablanco changed his mind when American Public Media began airing a series on the case on the podcast "In the Dark." "When we started listening to the podcast and people started to say how good it was and how it was going to win an award, that's when we realized that we're going to be in the spotlight and the work we're doing is actually going to be scrutinized," he said. "It was just a huge help because it opened up a lot of possibilities for us."

What also helped attract the justices' attention was the circumstance of a defendant having been tried for the same crime six times. When they filed their petition to the Supreme Court, however, it focused on a single issue: whether the prosecutor deliberately used race to exclude prospective jurors in the sixth trial.

In its 1986 decision in *Batson v. Kentucky*, the Supreme Court had ruled that prosecutors may not use peremptory challenges to exclude jurors solely on the basis of race because it violates the equal protection clause of the 14th Amendment.

In their petition, Johnson and Weyble pointed to another hallmark of racial discrimination in jury selection: the disparate questioning. While Evans asked both African Americans and whites about their relationships to Flowers and witnesses in the case, he asked only prospective African American jurors details about those relationships.

"The prosecutor dug very deep to find those potential biases in the jurors, but he did not ask those probing questions of white potential jurors," said Macomber. "So the whole point was the prosecutor was striking jurors and giving some reason, and that was a pretext for race."

On November 2, 2018, the Supreme Court agreed to hear Flowers's appeal, five months after the legal team had filed its petition. The decision started the clock ticking on a deadline to file the brief on the case in forty days.

While they had accumulated a set of written arguments over their six years of work on the case, preparing a brief for the Supreme Court "requires a deeper dive" on the key issues, Weyble said.

"When the Supreme Court decides to hear a case, you're often starting, briefing-wise, from scratch, or nearly from scratch," he said. "You're building a new written product, and that was the case, here. That takes a huge amount of time, especially in a case like this where so much turns on granular factual detail."

On December 27, the team filed the brief, and began waiting for its day in court.

A rendering by Arthur Lien of Sheri Lynn Johnson arguing at the Supreme Court on March 20 on behalf of Curtis Flowers.

THE SUPREME COURT HEARING

The line outside the Supreme Court steps began snaking around the block at 3:00 a.m. the morning of the hearing on March 20. Among the hundreds of people waiting for a coveted seat at the oral argument were Cornell Law students, supporters of Flowers, and avid listeners of the podcast.

At 10:06 a.m., Johnson, who had focused on the issue of race bias from the start of the appeal, began presenting her argument and quickly delved into the numbers in the case. "The only plausible interpretation of all of the evidence viewed cumulatively is that Doug Evans began jury selection in Flowers VI with an unconstitutional end in mind, to seat as few African American jurors as he could," she said.

Making her first appearance before the Court, Johnson was then interrupted by Associate Justice **Samuel A. Alito Jr.**, who asked if she thought she would have a chance of winning the case solely on the basis of the striking of African American jurors in the sixth trial, without the history of the previous trials. Johnson replied, "The evidence still is clear and convincing that Mr. Evans acted with discriminatory motivation in this case, even if we set aside his history, and his—the reasons that he was unwilling to tell the truth in previous cases."

Later in the argument, another answer to Alito's question came from an unlikely corner of the Court—Associate Justice

Cornell Death Penalty Project

In addition to running the Capital Punishment Clinic, the Cornell Death Penalty Project conducts empirical research on capital cases and sponsors periodic symposia related to capital punishment. Areas of particular interest include race and the death penalty, mental impairment and the death penalty, and the law of federal habeus corpus.

Leadership

- **John H. Blume**, director of the Cornell Death Penalty Project, is a graduate of the Yale Law School. He is the former director of the South Carolina Death Penalty Resource Center, and has been counsel of record in numerous capital cases argued before the United States Supreme Court, the federal courts of appeal and state supreme courts.
- **Sheri Lynn Johnson**, assistant director of the Project, is also a graduate of the Yale Law School. Her research has focused on the influence of race on the criminal process.
- **Keir M. Weyble**, director of death penalty litigation, is a graduate of the University of South Carolina School of Law. He has represented prisoners in capital cases in the state and/or federal courts of Alabama, Indiana, Mississippi, South Carolina, Texas, and Virginia, and has served as cocounsel for the prisoner in four habeas corpus cases decided by the Supreme Court of the United States.

OPPOSITE: Professor Johnson (right) being interviewed by Nina Totenberg of National Public Radio

Brett M. Kavanaugh, who in a remark to the opposing lawyer, **Jason Davis**, a special assistant attorney general for Mississippi, said, "We can't take the history out of the case."

Over the course of the hourlong hearing, the questions posed by Kavanaugh and Alito are what surprised Johnson the most. "They're very conservative justices, and so I would not have expected them to be sympathetic to any claim of a criminal defendant," she said.

Before the hearing was over, Weyble said it was apparent that the decision would turn in their favor. "This case was not one of those where we had no idea," he said. "It seemed pretty clear early on in the argument that the Court understood what was going on in the case."

For the students who had worked on the case, the hearing gave them the opportunity to watch Johnson's superb skills in oral argument. "She was absolutely amazing," Chapablanco said. "She was really poised and she really addressed each part of the argument. She knew the facts back to back."

What struck Macomber about the hearing was the contrast between the intimate setting of the courtroom and the starkness of the issues in the case. "Professor Johnson was so close to the justices, and they are just nine humans asking questions," he said. "The room is so small, it feels almost conversational, but it was dehumanizing because during an hour of oral argument, no one after the introduction of the case mentioned Curtis Flowers's name and no one noted the result of this decision is about life and death."

THE DECISION

When the decision was released last June, neither Weyble nor Johnson was surprised that it was written by Kavanaugh. In his thirty-one-page decision, he wrote, "In sum, the state's pattern of striking black prospective jurors persisted from Flowers's first trial through Flowers's sixth trial." He concluded that "we break no new legal ground. We simply enforce and reinforce Batson by applying it to the extraordinary facts of this case."

The Supreme Court remanded the case back to Mississippi for "further proceedings," which could result in a seventh trial. Evans hasn't publicly stated whether he will try Flowers again, but has stated he remains convinced of Flowers's guilt.

"There's no question about [Flowers's] guilt," Evans said in an interview with reporters from the podcast "In the Dark." "Courts are just like me and you. Everybody's got opinions."

If he does try Flowers again, however, he will have fewer witnesses to prove his case. In the past two years, a jailhouse informant who claimed that Flowers had confessed and a woman who claimed that she saw Flowers running from the murder scene have both recanted their testimony.

"The case has certainly gotten much weaker in the nine years since it was tried last," said Weyble, who along with Johnson believes Flowers is innocent. "If I were a prosecutor, I would think pretty seriously about whether I'm just going to embarrass myself by trying this case again."

The Supreme Court decision was not only a victory for Flowers but was also celebrated at the Law School, reaffirming the faculty's commitment to representing death-penalty inmates. "There's a lot of commentary from the profession that law schools are out of touch and not engaged with the profession," Peñalver said. "I think Cornell's distinction is that we can theorize and produce scholarship with the best of them, but also our most academically inclined scholars are deeply respective of practice. I think that's something that all of the members of the community—current students, alumni, and faculty—can take pride in."

Cornell Center on the Death Penalty Worldwide

The Cornell Center on the Death Penalty Worldwide is the only center in the United States devoted to research, advocacy, training, and litigation on the application of the death penalty around the world. It promotes transparency through its public database on countries retaining capital punishment, fills gaps in research by issuing groundbreaking reports, and builds the capacity of capital defense lawyers, particularly in sub-Saharan Africa, through the Makwanyane Institute.

Professor Sandra Babcock is the faculty director of the Cornell Center on the Death Penalty Worldwide. She was the principal architect of the Malawi Resentencing Project, which has led to the release of more than 140 prisoners who had been sentenced to death.