2006-DP-0815-SCT RT

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I. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE WHICH RESULTED FROM THE UNREASONABLE SEIZURE THAT VIOLATED GOFF'S RIGHTS PURSUANT TO THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND §23 OF THE MISSISSIPPI CONSTITUTION OF 1890.

The State rests its argument in response primarily on a procedural bar. The State asks this Court not to consider the constitutional claim raised in this issue based on Goff's failure to "contemporaneously object" to the evidence at trial. *Brief of Appellee* at 11-13. The bar has no application to this case. As the State recognized in its brief, the purpose of the contemporaneous objection rule is to allow the trial court to first rule on an issue before a defendant may present it on appeal. The trial court in this case had that opportunity.

As set forth in the opening brief, Goff through counsel filed a motion pre-trial seeking to suppress evidence taken from his vehicle. There was a lengthy evidentiary hearing and at the conclusion of that hearing the trial court ruled against Goff. From that point forward there was no need to lodge an objection to each piece of evidence separately offered. See Lacy v. State, 700 So.2d 602, 606 (Miss. 1997); Kettle v. State, 641 So.2d 746, 748 (Miss. 1994) (discussing contemporaneous objection rule in context of motions *in limine*).

To the extent the State may be alleging trial stand-by counsel stipulated to the admission of the evidence that was the subject of the pre-trial suppression motion it is manifestly wrong. Stand-by counsel, as the State argues in response to Claim IV on ineffective assistance of counsel, did not have authority to enter into stipulations. And any attorney who litigates a suppression claim and then without any conceivable strategic gain stipulates to the admission of the evidence at issue would be rendering ineffective assistance of counsel. See generally Bigner v. State, 822 So.2d 342 (Miss. Ct. App. 2002); Joshua v. Dewitt, 341 F.3d 430 (6th Cir. 2003) (counsel ineffective for failing to move to suppress evidence) and United States v. Stephens, 609

F.2d 230, 233 (5th Cir. 1980) (stipulation by counsel not ineffective assistance of counsel "so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy").

Goff's agreement to stipulate to a long list of evidentiary items, T. 661-63 (Ex. 31-63), which included the items taken from his automobile was interrupted by a long rambling and somewhat incoherent motion by him aimed at excluding this evidence. T. 666-66. Goff, as set forth in Issue II of the opening brief and noted by the State in its Response, then attempted to object to this evidence on at least two other occasions and then raised his objection to the admission of evidence seized from his automobile at the hearing on Motion for New Trial. T. 1087. Goff's conduct does not evidence a decision to waive or withdraw a prior motion and ruling but rather demonstrates why he should not have been representing himself.

For these reasons and those set forth in the opening brief and in argument to the trial court Goff's conviction should be reversed and the cause remanded for trial without this evidence.

II. THE CIRCUIT COURT ERRED IN PERMITTING GOFF TO ACT AS HIS OWN ATTORNEY AT TRIAL.

The State's first error in response to this claim is its reliance on Godinez v. Moran, 509 U.S. 389 (1983) and Faretta v. California, 422 U.S. 806(1975). Based on these decisions the State claims that "[t]he standard for determining a defendant's competence to waive counsel and represent himself at trial is the same standard for competency to stand trial." *Brief of Appellee* at 16. The holdings of these cases have been limited by the intervening decision of the Supreme Court of the United States in Indiana v. Edwards, 128 S.Ct. 2379 (2008).

Edwards like Goff sought to represent himself at trail. The trial court found Edwards competent for trial but not for self-representation. Id. at 2382-83. The Indiana Supreme Court felt compelled by Feretta and Godinez to reverse the trial court. Id. at 2383. The United States

Supreme Court granted certiorari review and held that the United States Constitution permits states to insist upon representation by counsel for those who are competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves. Id.

In reaching this conclusion the Supreme Court validated this Court's holding in Howard. Clearly as set forth in Goff's opening brief the trial court not only had the authority to limit the right of self-representation, in this case it had the responsibility. To the extent the trial court and the attorney general here on appeal believed that the holding in Howard setting forth a higher standard for self-representation than for competency to be tried was contrary to the federal constitution the Supreme Court of the United States has now answered that question.

In addition to the mistake of law, the State relies heavily on comments made by trial counsel. These comments lack credibility. As demonstrated in the opening brief, counsel contradicted himself in claiming both an ability to communicate with Goff and difficulty communicating. And most profoundly he claimed to have consulted with Dr. Van Rosen and reviewed Van Rosen's report yet he misrepresented the significant findings of the doctor.

Edwards does not require states to adopt a higher standard but because Mississippi has adopted the Howard standard well before the trial of this case, that standard must now be followed to comport to the due process clause of the federal and state constitutions. For these reasons and those set forth in the opening brief, pursuant to Howard, Goff's conviction must be reversed for a new trial.

III. THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO PROVE THAT JOSEPH GOFF IS GUILTY OF CAPITAL MURDER.

The State proclaims that the evidence shows Goff took Brandy Yates wallet. *Brief of Appellee* at 24. This is simply not true. There is not a scintilla of evidence to suggest the wallet was ever in the hotel room. All evidence shows that the wallet was placed in the automobile by

Mrs. Yates and that Goff was unaware of it being there.

In support of its theory the state asserts that testimony from the sentencing phase indicates Goff stole the wallet. First, only evidence presented during the trial phase can be considered in determining the sufficiency of the evidence. In any event the "evidence" argued by the State in footnote 6 of the *Brief of Appellee*, that Goff stated he "left her $500" does not indicate that the money was ever in the motel room, only that he believed it was in the room. That it was in fact in his car the whole time is conclusively proven by the physical evidence. There can be no intent to take something you do not know you are taking.

Finally, the State's attempt to compare this case to Knox v. State, 805 So.2d 527 (Miss. 2002), *Brief of Appellee* at 25, fails. Knox is clearly and readily distinguishable. There was no evidence that Knox and Mrs. Spears had any connection prior to her death, in fact Knox denied knowing Spears. Knox at 530. Knox's possession of Mrs. Spears' keys could not be explained in any rational way other than that Knox took them from her.

To the contrary in this case all evidence indicates Goff did not knowingly take Yates' wallet. Goff and Yates not only knew each other, they were traveling together. The evidence conclusively shows she drove up to the motel and around to the room and in that there is no evidence that the wallet was ever brought into the room the evidence shows she left it in the automobile unbeknownst to Goff.

For these reasons and those set forth in the opening brief the conviction of Goff must be reversed.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. DEFENSE COUNSEL FAILED TO TIMELY INVESTIGATE GOFF'S POTENTIAL MENTAL HEALTH CLAIMS AND PROVIDED INACCURATE INFORMATION TO THE TRIAL COURT.

As discussed above and in the opening brief, trial counsel (later stand-by counsel)

provided contradictory information to the court concerning Goff's mental state. He not only contradicted himself he misrepresented the findings of the psychologist he belatedly had evaluate Goff. Contrary to the state's assertion, there was no "extensive investigation." While counsel should not be held ineffective for failing to move forward on an issue for which he had no basis, Powers v. State, 883 So.2d 30 (Miss. 2003), counsel is ineffective when he fails to accurately apprise the court of a psychologist's findings regarding competency and where he makes a decision to forgo an insanity defense prior to an evaluation. This conduct is particularly prejudicial in this case where in the psychologist later testified at sentencing that the defendant "was in the midst of a bipolar disorder psychotic episode" the night Mrs. Yates was killed. T. 1045.

B. FAILURE TO VOIR DIRE JURORS ON EFFECT OF VIEWING ON CRIME SCENE PHOTOGRAPHS ON THEIR DECISION REGARDING PENALTY.

C. FAILURE TO OBJECT TO VICTIM IMPACT AT VOIR DIRE, IN OPENING STATEMENT AND IN TESTIMONY AT THE CULPABILITY PHASE.

D. FAILURE TO OBJECT TO JURY COMPOSITION.

E. FAILURE TO OBJECT TO PROSECUTOR'S IMPROPER QUESTIONING ON VOIR DIRE, IMPROPER CLOSING ARGUMENT ON JUROR "PROMISE" AND ARGUMENT OUTSIDE THE RECORD.

F. COUNSEL ERRED IN REQUESTING SENTENCING INSTRUCTION 5, D-1A.

G. MISHANDLING OF STATE WITNESS

H. TRIAL COUNSEL'S CUMULATIVE PERFORMANCE WAS CONSTITUTIONALLY INEFFECTIVE.

In response to sub-claims B. through H. the State asserts that Goff is prohibited from raising ineffective assistance of counsel because he was allowed to represent himself. *Brief of Appellee* at 26-27. In reaching this conclusion the state overstates this Court's holding in Estelle v. State, 558 So.2d 843 (Miss. 1990). The holding in Estelle must be limited to those cases in which "stand-by" counsel limits his role in a case to advisory.

"Once advisory counsel exceeds his role as advisory counsel and exercises a degree of control appropriate for legal representation, a defendant may assert an ineffective assistance of counsel claim 'within the limited scope of the duties assigned to or assumed by counsel.'" Downey v. People, 25 P.3d 1200, 1204-05. "To the extent that advisory counsel participates beyond his limited role in a defendant's representation, his performance as counsel must meet the standards enumerated in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." Id.

In a case such as this where "stand-by counsel" conducted jury selection (sub-claims B. through E.), handled jury instructions (sub-claim F.) and cross-examined the witness at issue in sub-claim G., a defendant may bring a claim of ineffective assistance of counsel to the limited extent counsel exercises authority, discretion and control.

For these reasons and those presented in the opening brief this case must be reversed.

V. THE PROSECUTOR COMMITTED MISCONDUCT IN IMPROPER QUESTIONING ON VOIR DIRE, IMPROPER OPENING STATEMENT ON VICTIM CHARACTER, IMPROPER INTRODUCTION OF VICTIM CHARACTER EVIDENCE AT THE CULPABILITY PHASE AND IMPROPER CLOSING ARGUMENT ON JUROR "PROMISE" AND ARGUMENT OUTSIDE THE RECORD.

The state's assertion of procedural bar to prevent this Court's review of pervasive prosecutorial misconduct is in applicable. Randall v. State, 806 So.2d 185, 210 (Miss. 2001) ("in cases of prosecutorial misconduct, we have held 'this Court has not been constrained from considering the merits of the alleged prejudice by the fact that objections were made and sustained, or that no objections were made.'" Mickell v. State, 735 So.2d 1031, 1035 (Miss. 1999). Due to the repeated nature of the prosecutor's conduct in this case, the State's waiver argument is without merit."); Payton v. State, 785 So.2d 267 (Miss. 1999) (reviewing claim of prosecutor misconduct in argument despite failure to object).

This claim must be reviewed on the merits and for the reasons asserted in the opening

brief the convictions must be reversed.

VI. THE REFUSAL OF THE TRIAL COURT TO GRANT AN INSTRUCTION EMBODYING THE THEORY OF DEFENSE CONSTITUTES REVERSIBLE ERROR.

In response the State completely ignores the United States Supreme Court holding in Holmes v. South Carolina, 547 U.S. 319 (2006). The state claims "Goff admits" his theory of defense instruction "has no basis in law." *Brief of Appellee* at 48. And that his "'theory' is nothing more than the slinging about of innuendo and conjecture." *Brief of Appellee* at 51.

The State's position is profoundly wrong. Trial counsel stated the instruction was based on "general principles" of law. That was May 2005. In May 2006 the United States Supreme Court applying those "general principles" of law found that the constitution was violated where a defendant is not allowed to introduce such third-party guilt. Holmes supra.

Joseph Goff's theory of defense was that James Yates and not Goff killed Brandy Yates. This theory was not only supported by Goff's statement to police, introduced as Ex. S-70, but also through other witnesses. Yates admitted to past domestic violence that included police responding T. 584. Detective Lambert elaborated on this evidence. T. 786. The defense also elicited evidence indicated Yates provided contradictory information to the detective. T. 843.

Based on this evidence Goff was entitled to Instruction D-16. No other instruction included this theory of defense. The failure to instruct the jury on this defense requires reversal of this case. Chinn v. State, 958 So.2d 1223 (Miss. 2007); Giles v. State, 650 So.2d 846 (Miss. 1995); Hester v. State, 602 So.2d 869, 872-73 (Miss. 1992).

For these reasons and those set forth in his opening brief Goff's conviction must be reversed.

VII. THE TRIAL COURT ERRED BY REFUSING TO GRANT A PROPERLY SUBMITTED CIRCUMSTANTIAL EVIDENCE (TWO THEORY) INSTRUCTION.

Goff stands by the argument presented in the *Opening Brief of Appellant.*

VIII. GOFF'S EXECUTION BY LETHAL INJECTION, UNDER THE CURRENT MISSISSIPPI PROTOCOL, WOULD VIOLATE THE FIRST AND EIGHTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, CORRESPONDING PROVISIONS OF THE MISSISSIPPI CONSTITUTION, AND STATE LAW.

The State asserts this claim is procedurally barred and faults Goff for failing "to submit any sworn proof as required by Mississippi Code Annotated § 99-39-9(1)(e)." *Brief of Appellee* at 53. Of course this Code section only applies to post-conviction proceedings thus Goff could not have submitted such evidence. This claim was presented on direct appeal because this Court had held that challenges to this method of execution must be brought on direct appeal. See, e.g., Jordan v. State, 918 So.2d 636, 661 (Miss. 2005).

In light of the State's argument in response and this Court's review of similar claims on the merits on post-conviction review despite failure to raise the claim on direct appeal, Bennett v. State, --- So.2d --- (Miss. 2008), No. 2006-DR-1516-SCT (August 28, 2008) at ¶ 20, Goff reserves review of this claim until post-conviction review if that becomes necessary. Havard v. State, 928 So.2d 771 (Miss. 2006).

IX. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE THE INDICTMENT FAILED TO CHARGE A DEATH-PENALTY ELIGIBLE OFFENSE.

Goff stands by the argument presented in the *Opening Brief of Appellant*.

X. ERROR IN SUBMITTING CERTAIN AGGRAVATING FACTORS.

Goff stands by the argument presented in the *Opening Brief of Appellant*. Further, the procedural bar asserted by the State has no application to this claim. Manning v. State, 765 So.2d 516 (Miss. 2000) (challenge to aggravating circumstances cannot be procedurally barred because of statutory obligation to review aggravators).

Moreover, the State misreads the case of Meeks v. State in addressing the challenge to the "great risk of death" aggravator. The State's assertion that "Meeks clearly stands for the opposite proposition of what Goff proclaims," *Brief of Appellee* at 65, is wrong. The State takes the dicta from Meeks well beyond what this Court said.

The passage from Meeks relied on by the State does not in any way suggest that the

prosecution could have chosen burglary as the underlying felony and used kidnapping as an aggravating circumstance and as a separate count. Whether the conduct separately prosecuted as Count II is also relied on as the "underlying felony" of the capital charge or only as an aggravating circumstance is of no consequence because just as the underlying offense is an element of the charge of capital murder so is the aggravating circumstance. See Ring v. Arizona, 536 U.S. 584 (2002); Kansas v. Marsh, 126 S.Ct. 2516 (2006); Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000); Berry v. State, 703 So. 2d 269, 284-85 (Miss. 1997); White v. State, 532 So. 2d 1207, 1219-20 (Miss. 1988); Gray v. State, 351 So. 2d 1342, 1349 (Miss. 1977).[1]

XI. THE SENTENCE OF DEATH IS DISPROPORTIONATE WHEN COMPARED TO OTHER CASES IN WHICH THE DEATH PENALTY HAS BEEN IMPOSED IN MISSISSIPPI TAKING INTO CONSIDERATION THE UNIQUE CHARACTERISTICS OF JOSEPH GOFF.

Goff stands by the argument presented in the *Opening Brief of Appellant.*

XII. CUMULATIVE ERROR REQUIRES REVERSAL OF THE CONVICTION AND SENTENCE IN THIS MATTER.

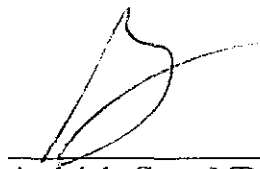
Goff stands by the argument presented in the *Opening Brief of Appellant.*

[1] The constitutional basis is set forth in detail in Issue X of the *Opening Brief of Appellant.* Issue X concerns the requirement of inclusion of aggravating factors in the indictment but is premised on aggravators as elements of the death penalty offense, the basis of the double jeopardy claim raised in this issue. This constitution principle, that aggravators are elements necessarily proven before a death sentence may be imposed, is beyond dispute.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the *Original Brief of Appellant* and such other reasons as may appear to the Court on a full review of the record and its statutorily mandated proportionality review,[2] Joseph Goff respectfully requests this Court reverse the conviction and death sentence.

Respectfully submitted this the 8th day of September, 2008.



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[2] Miss. Code § 99-19-105(3)(c).

CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage pre-paid, by United States Mail, a true and correct copy of the above Reply Brief to:

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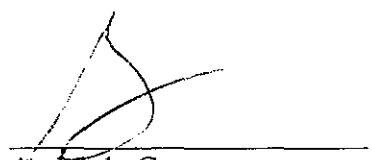
This the 8th day of September, 2008.



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