IN THE SUPREME COURT OF MISSISSIPPI
No. 2006-DP-00441-SCT

TERRY PITCHFORD — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

Grenada County Circuit Court No. 2005-009cr

REPLY BRIEF OF APPELLANT

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Introduction

Defendant does not gainsay the principle that, while all litigants are entitled to have a fair trial, none is entitled to a perfect one. *Blake v. Clein*, 903 So.2d 710 (Miss. 2005). Nor does he dispute that, under this principle, even a criminal conviction that deprives an individual of life or liberty may upheld where error has occurred so long as that error is "harmless," i.e. can be shown beyond a reasonable doubt NOT to have contributed to the outcome in the matter. *Bruton v. United States*, 391 U.S. 123, 135, (1968); *Brown v. State*, 995 So.2d 698, 704 (Miss. 2008), *Sand v. State*, 467 So.2d 907 (Miss. 1985). This is no more, and no less, than what is required by the Constitution. *Chapman v. California*, 386 U.S. 18, 24 (1967).

In the instant matter, the repeated assertions by the State that any error that occurred is harmless seem to relate only to harmlessness relative to the evidence supporting the guilt phase verdict of conviction. This ignores entirely this Court's commitment in cases where the death penalty has been imposed to evaluate the prejudice of an error not only with respect to evidence of guilt, but also with respect to possible effects on the jury respecting sentence. *Stringer v. State*, 500 So.2d 928, 957 (Miss. 1986). Hence, the cumulative effect of errors or misconduct in a death penalty case may require reversal even where the individual errors might otherwise pass muster under that standard, or be harmless even cumulatively in a case where a death sentence had not been imposed, *Ross v. State*, 954 So.2d 968, 1018-19 (Miss. 2007); *Flowers v. State*, 947 So.2d 910, 940 (2007) (*Flowers III*) (Cobb, P.J., concurring).

This is because under the Mississippi's sentencing statute even one juror having a reasonable doubt about imposing a sentence of death would result in that sentence not being imposed, Miss. Code Ann. §99-19-101(3). Therefore even otherwise harmless errors – especially errors of prosecutorial misconduct or overreaching, either alone or in combination

with "near errors" of the same nature – are likely to be prejudicial even where evidence of guilt would be adequate to support a conviction notwithstanding the error. *Stringer,* 500 So.2d at 947; *Flowers v. State,* 842 So.2d 531, 564 (Miss. 2000) (*Flowers II*). *See also Wiggins v. Smith,* 539 U.S. 510, 537-38 (2003) (finding prejudice where matters not presented in mitigation of sentence merely "*might well* have influenced the jury's appraisal" of whether or not the death penalty was warranted) (emphasis added).

Further, the State's repeated apparent concession of the substance of error and reliance on procedural bar ignores this Court's fierce commitment to reverse – no matter how strong the evidence of guilt may be or how disappointing to the hopes of resolution to the victims of crime – under the plain error doctrine, especially where the misconduct or error has deprived the accused of a fundamentally fair trial or affected his fundamental rights as to either culpability or sentence. This is not merely to vindicate rights of the accused, but to preserve the integrity of the administration of justice, as well. *Flowers II,* 842 So.2d at 564-5, *Stringer,* 500 So.2d at 931 (citing *Hill v. State*, 72 Miss. 527, 534 (1895)). *See also Brown,* 995 So.2d at 404-05; *Flowers III,* 947 So.2d at 927; *Williams v. State*, 794 So.2d 181, 187 (Miss. 2001); *Mickell v. State*, 735 So.2d 1031, 1035 (Miss.1999), *Griffin v. State*, 557 So.2d 542, 552 (Miss.1990); *West v. State*, 485 So.2d 681 (Miss.1985), *Wood v. State*, 257 So.2d 193, 200 (Miss.1972) (all reversing for plain error).

Terry Pitchford respectfully submits that the errors and misconduct raised in this appeal are exactly the kinds of things that this Court has in the past deemed prejudicial to criminal accuseds, and particularly to persons sentenced to death, and to the integrity of the justice system as a whole. Those errors therefore, individually and cumulatively, warrant reversal of the conviction and sentence in this matter, whether preserved below (as in most instances they were) or on the basis of plain error.

I. THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM

A. Batson Violation

The Defendant preserved his *Batson* claim by timely making his *Batson* objection at the time of the strikes, and by renewing it before the jury was empanelled and again in his Motion and Amended Motion for New Trial. Tr. 321-24, 331, R. 1250, 1262. At the time of the initial objection, he expressly requested that that the trial court make findings on the basis of all relevant circumstances, not merely on the reasons articulated by the State. Tr. 324. At the time the *Batson* motion was renewed prior to the seating of the jury, the trial court expressly found that the *Batson* claim had been preserved for review and reiterated its final, albeit erroneous, ruling on that claim. Tr. 331. The State's heavy reliance on procedural bar is therefore entirely without support in the record.

The Brief of Appellant (hereafter "Pitchford's Brief") sets forth in detail why this properly preserved objection was erroneously denied by the trial court, itemizing how the implausible and/or racially disparately applied reasons proffered by the prosecution for its purge from service on the trial jury of all but one African American venire member who came up for their consideration but were not also used to strike comparable white prospective jurors.[1] Nothing that the State presents in its Brief of Appellee (hereafter "State's Brief") suggests that the facts on which this claim is based are untrue, or that the trial court ever put forth any explanation of why it found those reasons to suffice not only to articulate a non-racial reason for the strike but also to affirmatively establish the plausibility of the reason advanced and the absence of racial discrimination under the totality of the circumstances as required by the 14th Amendment. *Snyder* v. *Louisiana*, --- U.S. ----, 128 S. Ct. 1203 (2008); *Batson v. Kentucky*, 476

[1] Appendix A to Pitchford's Brief, updated with the juror numbers by which the State refers to venire members its brief, is reproduced as Exhibit A to this brief.

U.S. 79 (1986).

The most striking evidence of discrimination in this case is the hugely disparate treatment of black and white venire members by the prosecutor during voir dire and jury selection. The State makes no attempt to justify or refute any of it. Disparate treatment is perhaps the most important indicator of racial discrimination in the panoply of "indicia of pretext" established by this Court for assessing *Batson* claims. *Flowers v. State*, 947 So.2d 910, 917 (Miss.2007) (*Flowers III*) (identifying numerous instances of such disparate treatment that were at least "suspect" *see* 918-19, 921, 926, 928, 930 n.9, and reversing for two of them, one as a matter of plain error, concluding that, "[t]hough a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the State continues to exercise challenge after challenge *only upon members of a particular race*). *Id.* at 937 (emphasis supplied). [2]

Nor was there any attempt to refute or explain away the history of discriminatory jury selection by this particular DA's office. *See Flowers III*, 947 So.2d at 938 (reversing, after the trial in the instant matter, a conviction for *Batson* violation by same District Attorney in a case

[2] How and why each of the individual juror strikes was the product of disparate treatment is discussed in detail in Pitchford's Brief at 15-26. The overall pattern these individual disparities create is also telling. *Every* black prospective juror struck by the State shared with at least one white prospective juror accepted by the State one or more of the traits the State cited as a "non-racial" reason for striking the black juror. Similarly, all but four of the traits identified by the State as "non-racial reasons" for having struck black prospective jurors were shared by one or more identified white venire members accepted by the State. One of the remaining four reasons, being late back from lunch, was also shown by the record to be shared with other unindividuated jurors, and was specifically found by the Court to be no impediment for particular African American juror who was stricken to serve as a juror. Tr. 318. Such strikes are especially suspect. *See Snyder* v. *Louisiana*, --- U.S. ----, ---128 S. Ct. 1203, 1211 (2008). The other three traits claimed to be "non-racial" -- allegedly suffering from mental problems, or being a known drug user, or having a history of speeding tickets -- obviously became significant to the State only after it was called upon to explain away a glaring pattern of racial discrimination. These things had not been asked about in the juror questionnaire, the contents of which the State had previously expressly approved, Tr. 5 and no one involved believed these things to be of enough import to voir dire any venire member about these topics. It seems inconceivable that none of the whites on the panel had ever had mental problems, used drugs or, certainly, hadn't had multiple speeding violations in his or her relative youth. Lack of voir dire on a particular topic that is later used as a "non-racial reason" for a strike is, in and of itself, evidence that the claimed reasons are mere pretext. *Lynch v. State*, 877 So.2d 1254, 1272 (Miss. 2004).

tried before the instant one). *See also* trial court ruling granting defense *Batson* challenge to this prosecutor's strike of an African American venire member, Hon. C.E. Morgan, III, Circuit Judge, Montgomery County. Tr. 1349, 1356-64 in Supreme Court record, MSSC No. 1999-DP-01369-SCT, decided on other grounds *Flowers v. State*, 842 So 2d 531 (Miss. 2003) (*Flowers II*) (neither side claiming *Batson* error on appeal). This, where it exists, powerful corroborative evidence of racial discrimination in jury selection in a particular case. *Miller- El v. Dretke*, 545 U.S. 231, 236 (2005), *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003). *See also Johnson v. State*, 792 So.2d 253, 257 (Miss. 2001) (acknowledging that even without an affirmative right to a jury racially proportionate to the county's population racial makeup, racial proportion of the final jury is relevant to the totality of the circumstances analysis leading to ultimate conclusion concerning discrimination or lack of it).

Rather than dispute what happened, the State asserts that because the non-racial reasons cited by the State have not been rejected as invalid reasons by this Court as a matter of law in other cases, *Stevens v. State*, 806 So 2d 10310, 1048 (Miss. 2001) requires that this Court defer to the trial court's finding of no discrimination regardless of how strong the evidence of record supporting a finding of discrimination may be. In that it is mistaken. The deference accorded by *Stevens* is not to the non-racial nature of reasons themselves. Those reasons are only the first step in the process by which the trial court is supposed to arrive at a final determination. Deference is accorded that final determination, *but only where* the trial court has undertaken third step process of determining under "all the relevant circumstances" whether the reason is both plausible and the actual reason for the strike, and also making specific findings about why it has made that determination. *Id.* at 1047. Where the court has not done that, there are no findings to defer to and the reviewing court must make the final assessment itself, or remand for that process to occur in the trial court. *Snyder*, 128 S.Ct. at 1209; *Walker v. State*, 937 So.2d

955, 957-58 (Miss. Ct. App. 2006), *Puckett v. State*, 737 So.2d 322 (Miss. 1999).[3]

The State's only other argument -- that this Court is procedurally barred from considering the *Batson* claim – is also not dispositive. Any deficiencies in the record are the product of trial court error, not the default of the defendant. Upon the Defendant's timely *Batson* objection, the trial court properly found that the act of striking all available four black jurors tendered to it in the selection process so far was enough to require the state to give reasons for those strikes. Tr. 323. However, once that was done, the trial court erroneously pretermitted the Defendant from making any rebuttal to those reasons and disregarded the Defendant's request that the trial court make a final totality of the circumstances analysis required under *Batson*. Tr. 324.

Instead, recognizing that the issue had been as fully preserved as it was willing to permit, Tr. 331, it made a final ruling of non-discrimination solely on the basis of the reasons as articulated by the State and without permitting rebuttal or considering the totality of the circumstances, and took a similar approach when *Batson* objection was renewed at the conclusion of the striking process but before the jury was empanelled.[4] This default is not

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[3] *Booker v. State*, 5 So.3d 356 (Miss. 2008) is not to the contrary. In *Booker*, a closely divided Court gave deference to the trial court's decision despite evidence that would have supported a finding of discrimination, but only because the trial court had held third step proceedings when the matter was raised on motion for new trial and entered findings explaining how the record supported a finding of no discrimination, "thereby distinguishing this case from *Snyder*, wherein . . . the trial judge simply allowed the challenge without explanation.") 5 So.2d at 360, n.8. Four justices would have reversed for, *inter alia, Batson* error, despite the presumption in favor of the trial court's findings. *Id* at 362-69.

[4] For example, ruling on the second of four challenged strikes: "I find that to be race neutral. *And you [State] can go forward.*" Tr. 325. Ruling on the final challenged strike: "The Court finds that to be race neutral as well. *So now we will go back and have the defense starting at [tendered juror] 37.*" Tr. 326. When the objection was reiterated prior to empanellment, the trial court expressly acknowledged that it had been earlier preserved, "You have already made it in the record so I am of the opinion it is in the record," Tr. 331 but also pretermitted any further development of the record: "For the reasons previously stated, first the Court finds there to be no -- well, *all the reasons were race neutral as to members that were struck by the district attorney's office. And so the, the Court finds there to be no Batson violation." Id.* The requirement that a party must make an exception to preserve an objection made and ruled on by the trial court for appellate review was long ago abolished in Mississippi. Miss. Code Ann. § 9-13-31 (1972) ("provided objections are duly made and noted, no exceptions need be taken, either for the purposes of appeal or otherwise"). *See also* Miss. R. Civ. P. 46, Comment (noting that Rule 46 and § 9-13-31 both "conform[] to traditional Mississippi practice").

default on the part of the Defendant, but rather is trial court error in failing to follow this Court's clearly established process for determining these claims, which require *at the least* a remand to complete the process. *Puckett v. State*, 737 So.2d 322 (Miss. 1999).

Nor did the trial court itself, as it is required to do even in the absence of affirmative evidence of pretext being offered by the proponent of the *Batson* challenge, offer any explanation of why it was accepting the reasons on the basis of the record as it was then before it. *Snyder*, 128 S. Ct. at 1212. This failure not only deprives the trial court of presumptive deference to its determination, but is reversible error in and of itself where, as here, the record establishes that the reason was implausible and likely a mere pretext for discrimination. *See Miller El v. Dretke*, 545 U.S. at 252 (*Batson* "requires the judge to assess the plausibility of that reason in light of all evidence bearing on it"); *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986); *Stewart v. State*, 662 So.2d 552, 557-58 (Miss. 1995).

Even assuming *per arguendo* that the defendant's failure to insist that the Court revisit its clear final determination of the issue or to make a post-ruling attempt to itemize the numerous incidences of disparate treatment documented in the record before the trial court does constitute procedural default, it does not prevent this Court from taking remedial action under the plain error doctrine where a defendant's fundamental rights are affected. *Flowers III,* 947 So.2d at 927 ("Because the error in upholding the strike . . . affects a substantial right, we apply the plain error rule to find that a *Batson* violation occurred." (citations omitted)). *See also Brown v. State*, 995 So.2d 698, 404-05 (Miss. 2008).

Finally, the State's invocation of procedural bar also ignores that *Batson* violations are never matters of mere procedure, or exclusively related to the defendant's right to a fair trial. Race discrimination not only deprives the defendant of his fundamental right to a fair trial before a fairly constituted jury, it also violates the rights of the prospective jurors and of the system of

justice as a whole to be free from racial discrimination. *Powers v. Ohio*, 499 U.S. 400, 407-11 (1991). The Supreme Court therefore vests in the courts an obligation to eradicate such discrimination of their own accord:

> The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. *Rose v. Mitchell*, 443 U.S. [545,] 555 [(1979)]. [The] prohibition on discrimination in the selection of jurors . . . makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an *affirmative duty* to enforce the strong . . . constitutional policies embodied in that prohibition. *See Peters v. Kiff*, 407 U.S. [493,] 507 [(1972)] (WHITE, J., concurring in judgment); *see also id.*, at 505 (opinion of MARSHALL, J.).

Powers, 499 U.S. at 415-16 (emphasis supplied; internal quotation marks and string cites omitted).

Since the trial court failed to carry out that duty in the instant matter, this Court is clearly empowered to do so. *Snyder*, 128 S. Ct. at 1211-12 (noting that disparate treatment of white jurors was properly considered on appellate review even though not raised in the trial court because the entire venire had been questioned on the subject matter and that questioning revealed the disparity in the record). *See State v. Snyder*, 750 So.2d 832, 840 and n.10 (La. 1999) (establishing that the defendant in *Snyder* made no claim in the trial court of disparate treatment of comparable whites to support his objection or rebut the prosecutor's articulated reason).

Because the prosecutor in the instant matter was, as he has been found to have done before, "violating the principles of *Batson* by racially profiling jurors," and turning the voir dire and jury selection process in this case into "an exercise in finding race neutral reasons to justify racially motivated strikes," Mr. Pitchford is entitled to a new trial. *Flowers III,* 947 So2d at 937, 939. *See also Powers* 499 U.S. at 411 (1991) ("racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process . . .and places the fairness of a criminal proceeding in doubt"); *Manning v. State*, 765 So.2d 516, 521 (Miss. 2000) ("the harmless error

standard has no place in the *Batson* analysis'); *Walker v. State*, 937 So.2d 955, 957-58 (Miss. Ct. App. 2006).

B. Witherspoon-related violations

Pitchford preserved his objection to the racial discrimination resulting from the *Witherspoon* process by making it prior to the court's releasing any of the individuals identified as *Witherspoon* ineligible at a time when the trial court could have corrected the error. Tr. 315-16. The objection to all cause strikes made by the Court or the State was reiterated in Mr. Pitchford's Motion and Amended Motion for New Trial. R. 1249, 1261.

The State's contention that an individual objection to excusing each *Witherspoon* ineligible venire member is required to maintain an objection to the cumulative effect of that process makes no sense. As even the case relied on by the State in its argument points out, disproportionality resulting from systematic error is the gravamen of the forbidden conduct being challenged by this objection, not the subjective motivation for the exclusion of each particular venire member excluded (as in a *Batson* challenge). *Yarbrough v. State*, 911 So 2d 951 (Miss. 2005) (quoting *Duren v. Missouri*, 439 U.S. 439, 364 (1977)). *See also Peters v. Kiff*, 407 U.S. 493 (1972); *Castenada v. Partida*, 430 U.S. 482 (1977) The objection could not be made until the process had been completed and its effect known.

The instant matter is distinguishable from *Yarbrough* on the merits, however. There, in a general petit jury composition challenge, this Court found that "[the defendant] failed to prove that the black population of Neshoba County was not fairly or reasonably represented in the venire." 911 So.2d at 956. Here, as was invited to the attention of the trial court when this motion was renewed, along with the *Batson* objection, immediately prior to the empanelment of the jury, Tr. 331, the disproportion of the jury racial makeup to the population from which the venire was drawn was expressly shown. Moreover, in the instant matter, the systematic

exclusion operated not only on the final composition of the jury, but in how the venire members themselves were disproportionately treated. They have an independent right to be allowed to serve without being systematically discriminated against. *Powers*, 499 U.S. at 407-09.

As to the exclusion from service, as *Witherspoon* ineligible, of four jurors who had expressed an ability, despite their scruples regarding the death penalty, to follow the instructions of the court and consider it if a sentencing hearing were required, the objection to this exclusion was subsumed in the Motion and Amended Motion for New Trial. Supp. R. 1249 (¶ 6), 1251(A) (¶ 19), 1261 (¶ 6), 1263(A)(¶19).

This also affected a fundamental right of the Defendant and may be reviewed either on the basis of the Motion for New Trial, or if not that, for plain error, even in the absence of a contemporaneous objection. *Brown v. State,* 995 So.2d 698, 704-05 (Miss. 2008); *Williams v. State,* 794 So.2d 181, 187 (Miss. 2001). Trial before a fairly constituted jury is among the most fundamental of the guarantees accorded to a criminal accused under the Constitution. *Groppi v. Wisconsin*, 400 U. S. 505, 509 (1971). Moreover, even if, due to the lack of contemporaneous objection, it cannot of its own accord be the basis for reversal of the case, it can still contribute to the accumulation of errors which, though not reversible individually, collectively require it. *Ross v. State*, 954 So.2d 968, 1018-19 (Miss. 2007); *Flowers v. State*, 947 So.2d 910, 940 (2007) (*Flowers III*) (Cobb, P.J., concurring).

On the merits of this claim, Mr. Pitchford relies on the facts, law and argument contained in his brief in chief at 28-29. The State's arguments are inapposite to the Defendant's claims or unsupported by applicable law or the facts of record and thus do not undercut it. In addition, to the extent that the precedent of this Court is contrary to the Defendant's position here, Defendant respectfully submits that such precedent is inconsistent with the correct interpretation of the United States Constitution, and this Court should alter or overrule that precedent and adopt the

interpretation consistent with the Defendant's arguments in his Brief.

C. Improper Limitation on Voir Dire Concerning Mitigation

Defendant made several pretrial motions to obtain the right to voir dire fully on mitigation and other matters. *See* Motions 28, 29, and 30, R. 977-985. All were heard and overruled. Tr. 73- 80. He attempted to conduct voir dire on ability to consider mitigation during his voir dire of the panel, but repeated objections to his doing so were made by the State and sustained by the Court. Tr. 283-87. These matters were renewed in his new trial motions. R. 1263(A)

The State's argument that the defendant was allowed sufficient voir dire on mitigation under *Morgan v. Illinois*, 504 U.S. 719 (1992) misapprehends the argument being made by the Defendant here, and consequently fails to meet it. Indeed, possibly because of this misapprehension, the lengthy excerpts from the voir dire that the State quotes in its Brief at 20-24 actually reinforce the ways in which the limitations placed on his voir dire undercut the Mr. Pitchford's fundamental right under the Eighth Amendment to have a jury which could "give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence" in the event a sentencing proceeding were held. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007).

The issue raised by Mr. Pitchford is not whether the defendant was allowed use, or get prospective jurors to say, the words "consider mitigating evidence" during the voir dire process. Clearly, as the State asserts, those words were said many times in the quoted portions of the record. Permitting that, however, does not satisfy the requirements of the Constitution. *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (expressly finding that "the mere mention of 'mitigating circumstances' to a capital sentencing jury [does not] satisfi[y] the Eighth Amendment. Nor . . . is [it] constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence.).

The error raised by the Defendant here is that the trial court's rulings not letting the defendant discuss the nature of the mitigation he was going to be presenting effectively deprived him the voir dire that sufficiently explored the prospective jurors' ability to "give meaningful effect" to or make a "reasoned moral response" to all the kinds of mitigating evidence that the defendant is permitted to offer, *Abdul-Kabir*, 550 U.S. at 264, or to be able to carry out their obligation under the Mississippi statutory scheme "to balance aggravators against mitigators." *Foster v. State*, 639 So.2d 1263, 1275-76 (Miss.1994).

Nothing in the State's arguments or the record quoted by it in its brief makes the restrictions on voir dire imposed by the trial court consistent with the dictates of the United States Supreme Court. In a series of decisions over the past decade that Court has reiterated not only that there are "virtually no limits" on the kind of evidence that a defendant may offer in mitigation of his sentence concerning himself, *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) but also (in the context of instructing the jury) the affirmative duty trial courts to ensure that the jury meaningfully considers and gives full effect to that evidence. *Id.*, *Penry*, 532 U.S. at 797. Where the trial court impedes the jury from doing so, no matter how powerful the evidence of guilt or of statutory aggravation warranting a death sentence that the sentencing jury ultimately had before it, the sentence must be reversed and resubmitted to a jury that has not been impeded in its ability to give meaningful consideration to *all* of the mitigating evidence the defendant wishes to offer. *Smith v. Texas*, 550 U.S. 297, 315-16 (2007). *See also Abdul-Kabir* 550 U.S. at 250, 254, 259, 262, 264 (2007) (reiterating that if the trial court does not facilitate such meaningful consideration by the jury "the sentencing process is fatally flawed"). It is useless to require the court to instruct the jury on specific mitigators if the parties are not permitted to discover and eliminate jurors incapable for whatever reason, of meaningfully considering them. *Morgan*, 504

U.S. at 734.[5]

By limiting the defendant to only asking the jury "if they would consider mitigating factors or would they be automatically disposed to the death penalty" Tr. 286, the trial court erroneously restricted the defendant from doing anything in voir dire beyond merely mentioning mitigating circumstances in the abstract, and completely impeded his ability to question the jurors about whether they could give meaningful consideration to the kind of mitigating evidence he anticipated they would have to consider. *Tennard* 542 U.S. at 285. Without being able to explore this in voir dire, the defendant's right not to be tried by jurors who could meaningfully consider and give full effect to mitigation would be "rendered nugatory." *Morgan*, 504 U.S. at 734. This impediment to seating a jury that could do its duty in that regard requires reversal of at least the defendant's death sentence, if not his conviction. *Abdul-Kabir*, 550 U.S. at 264, *Smith v. Texas*. 550 U.S. at 315-16.

II. THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A FULL, COMPLETE AND ADEQUATELY DEVELOPED DEFENSE AND/OR TO HAVE HIS COUNSEL RENDER CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN DOING SO

A. The Trial Court Erred In Failing To Grant A Continuance Of The Trial

Mr. Pitchford preserved this error by way of written pretrial motions, ore tenus reassertion prior to the commencement of trial, and in his Motion and Amended Motion for New Trial. R. 867-954; 1045-85; Tr. 32-38; 338-39 R. 1249-52. 1261-63; Supp. R. 1251(A) and (B), 1263 (A), (B), (C). Where, as in the instant matter, the Defendant's counsel identifies with specificity multiple reasons why, no matter how much time he has had, he needs additional time

[5] For example, though trial court properly instructed on the statutory mitigator of young age, it expressly denied Pitchford the chance to inquire of any jurors whether they had experiences or beliefs that might prevent them from giving such information "full effect" as the mitigator it is statutorily intended to be. Tr. 285. Such things might include a moral or religious belief that children and youths are not mentally or morally different from adults (which is what undergirds the legislative judgment to make age a statutory mitigator), or an experience of having been victimized by a young person, and being unable to set those things aside in deliberating sentence.

or resources to present an adequate defense, delay of the trial until such time as that can be accomplished is the only remedy available and denial of the continuance is an abuse of discretion. *Lambert v. State*, 654 So 2d 17 (Miss. 1995). The determination of whether a trial court abused its discretion in denying a continuance must be made on a case by case basis and implicates not only state rules of procedure, but also state and federal constitutional protections. *Fulks v. State*, --- So.3d ----, ----, (Miss. 2009), 2009 WL 2183064 at *4, No. 2007-KA-01572-SCT at ¶ 12 (Miss. July 23, 2009) (not yet released for publication).

In *Lambert*, this Court concluded that the trial court had abused its discretion in denying a continuance, notwithstanding the trial court findings that counsel had been appointed for several months prior to trial, tried the defendant in another count and filed several pretrial motions. It reversed the conviction and remanded the case for a new trial, expressly finding that "[c]ounsel's representations to the court that he was not adequately prepared should have been given greater weight." 654 So 2d at 22 (also noting that the trial court had erred by ignoring the fact that "[t]his case does not involve just a single reason for the continuance but several").

In the instant matter the State makes no argument that the reasons advanced in support of the continuance by Mr. Pitchford's counsel were untrue, only that the trial court was entitled to disregard them. In this it is wrong. The need for a continuance in the instant matter is, if anything, even more compelling than in *Lambert*. As in *Lambert*, counsel in the instant matter raised multiple reasons for seeking the continuance. He announced his own unpreparedness and documented in detail exactly what, including his own competing obligations and his last minute receipt of expert information, had prevented him from completing the requisite investigation and preparation, Tr. 33-47, R. 1047-49.

In addition, counsel in the instant matter went further. He supported Mr. Pitchford's continuance request not only with his own representations, but also by the affidavits of two

other individuals with particular expertise regarding death penalty defense, one from a Mississippi death penalty practitioner the concerning very specific additional preparation that was needed *in the instant matter* to properly prepare for a death penalty trial in Mississippi. R. 1068-71 (Affidavit of Robert McDuff), the other from a leading national expert in mitigation preparation relating specifically how each of those additional preparation steps was related to meeting the constitutional standards for minimally effective death penalty representation established by the U.S. Supreme Court in *Wiggins v. Smith,* 539 U.S. 510 (2003) and its progeny, R. 1082-85 (Affidavit of Russell Stetler).

The trial court failed to take any of these circumstances account. Nor did it credit the unrefuted representations by the Defendant's counsel concerning why this made him unprepared to proceed. Instead it erroneously substituted its own judgment of what was and was not needed to prepare for this matter for that of the counsel working on it. Tr. 50-55. This was clearly an abuse of discretion, led to significant omissions in the defense presented at both the guilt and penalty phases of the trial and requires reversal as a remedy. [6]

This Court has been particularly diligent in protecting a death sentenced defendant's constitutional right to have his counsel fully investigate and prepare to present an effective penalty phase defense when the claimed error is that the defense counsel failed to seek or take the necessary time to do this. *See Doss v. State*, --- So.3d ---, ---- (Miss. 2009), 2009 WL 3381810, No. 2007-CA-00429-SCT at ¶¶ 6-32 (Opinion on Motion for Rehearing, Oct. 22,

[6] As in *Lambert*, the trial court relied heavily on the length of time counsel had been appointed on paper to improperly ignore his claims of unpreparedness, without considering unrefuted record facts about what still needed to be done despite that period of appointment and the competing obligations of counsel during the appointment period. Nor did the trial court recognize that that one of the most significant pieces of evidence related to mitigation – the results of a long-awaited evaluation by doctors at the Mississippi State Hospital that "raised a whole host of new questions, problems and issues that competent counsel must investigate" T. 1058, 1083 – had not even come into existence until less than two weeks before the scheduled trial, and clearly required additional investigation and expert assistance that could not be completed in the time available. R. 1058-1061.

2009), *Ross v. State*, 954 So.2d 968, 1005-07 (Miss. 2007). In the instant case, defense counsel attempted to comply with his constitutional obligation to investigate and prepare by seeking the time necessary to do so, but the trial court prevented it. It is no less a violation of the defendant's constitutional rights when the trial court thwarts a defense counsel's efforts to comply with this obligation than it is when counsel fails to make those efforts at all. *See Lambert,* 654 So 2d at 22. *See also State v. Citizen*, 898 So.2d 325, 338-39 (La. 2005) (finding that Sixth Amendment right to counsel requires suspension of prosecution upon application of defendant until such time as sufficient funding to permit adequate compensation of counsel to prepare for trial is identified). [7]

The State's contention that, despite the shortcomings resulting from the denial of the continuance, there was no prejudice to the defendant or manifest injustice is unfounded. In support of this contention, the State cites *Simmons v. State*, 805 So.2d 452 (Miss. 2004). *Simmons*, is, however, inapposite to the instant matter. In *Simmons*, two separate requests for continuance were made. Both dealt with meeting guilt phase evidence that was not primarily significant to the capital count of Mr. Simmons indictment (the robbery-murder of a male decedent), but rather to proof of a non-capital count of the indictment (the rape of the decedent's female friend, who testified at the trial). *Id.* at 470-71.

With respect to the first request in *Simmons*, a one day extension was actually *granted* to consult with a DNA expert about newly received expert evidence that linked defendant to the

[7] As the State correctly recognizes, ineffective assistance of trial counsel, *per se*, cannot be either litigated or waived on direct appeal where, as here, trial counsel handles the direct appeal. Miss. R. App. P. 22; *Lynch v. State*, 951 So 2d 549 (Miss. 2007). In suggesting that this is what is being argued here, however, the State misapprehends the nature of the error asserted. Mr. Pitchford is not raising a freestanding claim of ineffective assistance of counsel. He is asserting trial court error in failing to grant defendant's counsel and his investigative staff the time needed to adequately investigate and prepare the case in the manner the constitution requires in order to adequately protect the defendant's rights where he faces a death sentence. The standards for what amounts to prejudice in that preparation, which must be shown for a continuance denial to be reversible, Miss Code. Ann. § 99-15-29, has been established largely in effectiveness cases and Mr. Pitchford therefore must establish his claim using that standard.

rape. The Defendant effectively made use of that assistance in cross examining the state's witness. No manifest injustice was found to result from denying a longer delay where the defendant neither called that expert to testify, nor sought to have that expert perform independent DNA testing. *Id.* at 484.

The only basis for the *Simmons* second continuance request, which was denied, was the need to meet a recently changed version events given by the female friend about whether or not a co-defendant, whose trial had been severed from that of Mr. Simmons, had also raped her during the events in question. No manifest injustice was found in denying that request because the defendant was able to cross examine the witness regarding the trustworthiness of her testimony as a whole in light of the inconsistencies this represented, but the question of whether he acted alone or in concert with his co-defendant was otherwise irrelevant to the issue of whether Mr. Simmons himself was guilty of the rape, a crime that was not the capitalizing felony. *Id.* at 485.

By contrast, the instant case involved a single count capital murder indictment and most of what the defendant asked for a continuance for his counsel to do dealt with matters pertaining to mitigation of sentence, all of which required additional work and travel to complete. This included completing the investigation of the defendant's family, social and mental health history in both Mississippi and California and obtaining potential witnesses who could effectively present the mitigating information and who could explain damaging matters that might otherwise weigh against the defendant in sentencing Tr. 34-38, R. 867-954, 1045-85. These tasks form the core of preparation for the sentencing phase, and where they are left undone for any reason, as they were in the instant matter due to the failure of the trial court to grant the continuance, reversal of at least the sentence is required. *Doss,* at ¶¶ 6-32 *Ross*, 954 So.2d at 1005-07. *See also Wiggins* 539 U.S. 510 (finding that the Constitution requires more investigation than receiving a single mental health professional's report); *Rompilla v. Beard*, 545 U.S. 374 (2005)

(finding that the Constitution requires investigation of negative information that may be used against defendant at sentencing before determining sentencing strategy).

Where, as here, the error pertains to matters affecting mitigation of sentence, the standard for prejudice is not whether the outcome likely *would* have been different in the absence of the error, but whether the absence of the error *might* have tipped the balance against imposing a death sentence for even one juror. Miss Code Ann. § 99-19-101(3). *See Wiggins*, 539 U.S. at 537-38; *Ross,* 954 So.2d at 1018 ("all genuine doubts about the harmlessness of error must be resolved in favor of the accused because of the severity of the punishment."). *See also Brown v. State*, 995 So.2d 698, 704 (Miss. 2008) (reversing for plain error).

The instant case did not present a fact situation – killing an adult during a capitalizing violent felony – that inevitably, however legally inexcusable the defendant's conduct is or however painful the loss is to the loved ones of the victim, garners a death sentence, even when such cases are submitted to a jury for sentencing consideration. *See, e.g., Spires v. State*, 10 So.3d 477 (Miss. 2009), *Lattimore v. State*, 958 So.2d 192 (Miss. 2007) *Hudson v. State*, 977 So.2d 344 (Miss. Ct. App. 2007), *Young v. State,* 981 So.2d 308, (Miss. Ct. App. 2007), *Duplantis v. State*, 708 So.2d 1327 (Miss. 1998), *Larry Tyrese Minter v. State*, 2009-TS-00922-COA, presently pending on appeal from Circuit Court of Harrison County, District 1 Case # B2401-07-00648 (sentence of life in prison without parole entered on unanimous jury verdict after penalty phase trial); *Emerson Osborne v. State,* No. 2009-TS-00658-SCT, presently pending on appeal from Circuit Court of Bolivar County, District 2 Case # 2007-028-CR2 (same).

Even the prosecutor in this matter agreed that this particular crime did and does not need to be punished by a sentence of death. The co-defendant who was identified as carrying the pistol that actually fired the fatal shot was allowed to plead guilty to the lesser offense of

Manslaughter and received a sentence of only 40 years, with the possibility of parole and other early release. Mr. Pitchford was likewise offered the opportunity to enter a guilty plea to capital murder and receive life in prison without parole rather than the death penalty. Tr. 1-3; 7-31. [8]

Under these circumstances, the denial of the Mr. Pitchford's pretrial Motion and Amended Motion for Continuance and his post-trial New Trial motion renewing the continuance error, was an abuse of the trial court's discretion which caused manifest injustice to the defendant's right to have his counsel prepare, investigate, strategize and present an effective mitigation of sentence case. Mr. Pitchford respectfully submits that his sentence, at least, must be reversed as a result.

B. The Trial Court Erred In Failing To Grant A Delay Of The Sentencing Proceedings to Permit a Necessary Mitigation Witness to Be Present to Testify

The record in this matter reflects the trial court's knowledge of unavailability of the witness, and that the trial court was actually requested to, and did, verify the unavailability with the court whose subpoena was preventing the witness from attending. Supp Tr. 35-37. Defendant preserved this claim of error in his Motion for New Trial and Amended Motion for New Trial. R. 1250, 1262. In the event that this is deemed insufficient due to the special circuit judge's finding that no contemporaneous request for continuance was made, the defendant seeks reversal on the basis of "plain error" *See* Brief of Appellant at 40. There is nothing "spurious" about asserting plain error and where it is prejudicial, as it was here, and such plain error might have made the difference between life and death, it can and should be the basis for reversal of a

[8] Mr. Pitchford was successfully qualified to enter a plea, Tr. 17-24 and tendered one that would have met the requirements of *North Carolina v Alford*, 400 U.S. 25 (1970), but not the desires of the State and trial court that he either acknowledge the truth of everything in the proffer or give an account of the crime that otherwise amounted to an admission of guilt as a condition of the plea. The plea colloquy was abruptly pretermitted by the trial court at that point. Tr. 30-31. Arguably, the trial court's permitting the State to pursue the death penalty under these circumstances is unconstitutional vindictiveness for defendant's having asserted a constitutional right, *Ross v. State*, 480 So.2d 1157, 1161 (Miss.1985) even in the absence of a presumption of such. *Alabama v. Smith*, 490 U.S. 794 (1989).

conviction by this Court. *Flowers v. State*, 842 So.2d 531, 551-53 (Miss. 2003) (*Flowers II*). *See also Ross,* 954 So.2d at 1018, *Brown*, 995 So.2d at 704.

The unavailability of the only expert who could offer mitigation testimony about the interaction between the defendant's family and social history, psychological makeup and age that no other expert could provide to the jury, Supp Tr. 30-31, 33-34, is something that might have tipped the balance in this matter and, refusing to grant the mere 24 hours that was needed to get him before the jury was a clearly erroneous abuse of discretion resulting in manifest injustice that warrants reversal of at least the death sentence rendered in the instant matter. *Stringer v. State*, 500 So.2d 928, 931 (Miss. 1986). It clearly cannot be said beyond a reasonable doubt that under the circumstances of the instant matter, denying the jury the opportunity to consider this testimony did not contribute to the verdict of death. *Brown,* 995 So.2d at 704.

III. PROSECUTORIAL MISCONDUCT AND THE TRIAL COURT'S FAILURE TO CURB IT DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

The State opens its argument on this point with a blanket assertion that "Pitchford never raised any objection at trial or in his motions for new trial that the prosecution had engaged in misconduct," State's Brief at 29. This is at best hyperbole. The State actually later concedes several. State's Brief at 34-35. Others were cited to in Mr. Pitchford's brief in chief. *See* Pitchford's brief at 43-44, 52 (citing to Tr. 379, 390-92, 415-18, 453, 473, 530, 565 (improper examination of witnesses at guilt phase), 709-10 (improper examination of witnesses penalty phase), 648, 799 (other improper penalty phase arguments)) and/or raised by way of new trial motion. R. 1249-52. 1261-63; Supp. R. 2 1251(A), 1263(B). This approach by the State is, however, indicative of its failure to comprehend either the law or facts that compel reversal here.

This Court's powerful commitment to preventing prosecutorial misconduct was given eloquent voice nearly 115 years ago and has been reiterated over the ensuing century when subsequent prosecutors, including the very prosecutor whose misconduct is being raised in the

instant matter, have failed to heed it:

> The fair way is the safe way, and the safe way is the best way in every criminal prosecution. The history of criminal jurisprudence and practice demonstrates, generally, that if everyone prosecuted for crime were fairly and fully conceded all to which he is entitled, and if all doubtful advantages to the state were declined, there would be secured as many convictions of the guilty, and such convictions would be succeeded by few or no reversals. *Johnson v. State,* 476 So.2d 1195, 1215 (Miss.1985) (citing *Hill v. State*, 72 Miss. 527, 534, 17 So. 375, 377 (1895)).

Flowers v. State 842 So.2d 531, 564 (Miss. 2003) (*Flowers II)* (noting that "the State had more than ample evidence with which to try its case against Flowers" but that its election to engage in "prosecution overkill" nonetheless required reversal). *See also Stringer v. State*, 500 So.2d 928, 931 (Miss. 1986) (stating that that "[f]ar too many cases, like this one, are reversed for errors in prosecutorial conduct which are not difficult to anticipate or correct"); *Hales v. State*, 933 So.2d 962 (Miss. 2006) (declining to reverse in non death case, but noting that "the prosecutor's actions unnecessarily jeopardized what was otherwise a solid evidentiary case. Therefore, for future reference we take this opportunity to point out that prosecutors can avoid such a quandary by taking the fair and safe route regarding inadmissible evidence during trial").[9]

Where such misconduct impairs the fundamental rights of a defendant, as it did in the instant case, a conviction and/or sentence obtained in the proceedings in which it occurred must be reversed for plain error even in the absence of a contemporaneous objection in order to ensure

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[9] Other decisions reversing for prosecutorial misconduct and quoting *Hill* include *Thomas v. State*, 474 So.2d 604, 606 (Miss. 1985) *overruled by legislative action on other grounds* (urging trial judge to likewise act in accordance with *Hill*); *Wiley v. State*, 449 So.2d 756, 763 (Miss. 1984) (vacating death sentence and remanding for a new sentencing proceeding stating that "we admonish prosecutors throughout the state that the convictions they strive to achieve are secure only when they confine themselves to argument tolerated under our rules of criminal jurisprudence. To step behind these rules, as did the argument in this case, is asking for a mistrial"); *Roberson v. State*, 185 So.2d 667, 670 (Miss. 1966) (finding misconduct by the trial judge in an unobjected to exclamation, stating that "The officers of a court, and especially the judge, district attorney and sheriff, because of the attributes of the offices they hold, unconsciously exert tremendous influence in the trial of a case, and they should be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions"); *Borroum v. State*, 22 So. 62, 64(Miss. 1897) (invoking *Hill* to reverse for denial of continuance requested so defense witness could be made available).

that the constitutional rights of the accused, personally, are protected. *Brown v. State*, 995 So.2d 698, 404-05 (Miss. 2008); *Ross v. State* 954 So.2d 968, 1002 (Miss. 2007); *Mickell v. State*, 735 So.2d 1031, 1035 (Miss.1999), *Griffin v. State*, 557 So.2d 542, 552 (Miss.1990); *Wood v. State*, 257 So.2d 193, 200 (Miss.1972). This is the only way that this Court can keep its commitment that, however apparently guilty a defendant is, or how painful to the survivors of victims of crimes not having a final conviction and sentence of someone for their loved one's death may be, "[o]ur solemn duty is to guarantee a fundamentally fair trial to the state of Mississippi and all criminal defendants" *Stringer*, 500 So 2d at 931. *See also Flowers II*, 943 So 2d at 564.

In addition to the rights of the parties to any particular case, the fair administration of justice itself, and the integrity of the judicial system, also requires no one in the system be allowed to "ignore the *Hill* admonition to be fair."

> [W]ere we to ignore our well-established and long-standing case law concerning admissibility of evidence-were we to ignore our decision in Flowers I-were we to ignore our constitutional oaths-we could simply turn our heads and affirm [the defendant's] conviction and sentence of death. However, this we cannot and will not do. We must do that which our allegiance to the law requires us to do.

Flowers II, 943 So 2d at 564-65.

In his brief in chief, Mr. Pitchford identifies sixteen separate acts of prosecutorial misconduct, three during guilt phase witness examination, seven during guilt phase argument, three during examination of the defendant's penalty phase witnesses, and three during its closing argument at the penalty phase. The State makes no merits response at all to some of these acts, and only partial merit responses to most of the others, apparently conceding that much of the claimed misconduct occurred. Instead, it relies on procedural bar or lack of prejudice to prevent it being redressed in this Court. *Walker v. State*, 913 So 2d 198 (Miss. 2005), *Goodin v. State*, 787 So.2d 639, 653 (Miss. 2001).

This approach ignores not only the multiple places where the Defendant did make

contemporaneous objections, but also this Court's commitment reversing where the constitution and fair administration of justice require it, regardless of the likely guilt of the defendant. *Stringer*, 500 So 2d at 931. *See also Flowers v. State*, 947 So.2d 910, 940-41, Miss. 2007 (*Flowers III*) (Cobb, J. concurring in reversal for cumulative error, including prosecutorial misconduct, in the trial held after the reversal and remand ordered in *Flowers II)*; *Flowers II*, 943 So 2d at 564.

The State makes no merits response to any of the claimed prosecutorial misconduct in direct examination of witnesses during the guilt phase. There were multiple objections to this pattern of conduct; all were overruled or ignored by the trial judge. *See* Tr. 379, 390-92, 415-18, 453, 473, 530, 565; R. 1249-52. 1261-6; Supp. R. 2 1251(A), 1263(B). The complained of misconduct consisted of the prosecution systematically leading and coaching its witnesses during direct examination, eliciting improper opinion testimony from its experts, and asking police and lay witnesses questions about matters without a factual basis in the actual evidence. Tr. 376, 378-79, 390-92, 400-401, 411, 415-17, 430, 447-48, 453-54, 473, 505-09, 522-25, 530, 564-65, 567, 571-73. This misconduct was part and parcel of an effort to make it look to the jury like the defendant's statements were more internally inconsistent and more incriminating than they really were, and to make the unreliable codefendant and informant testimony appear more corroborated by both lay and expert testimony than it really was. *See Flowers v. State,* 773 So.2d 309, 326-28 (Miss. 2000) (*Flowers I*) (involving misconduct in examining witnesses at guilt phase by same prosecutor who prosecuted the instant matter).

As is more fully set forth in Defendant's brief in chief, this misconduct, particularly the prosecutor's injecting facts not in evidence and leading during his direct examination of the police officers about defendant's statements – which were discussed by the officers, but never introduced into evidence, apparently the customary *modus operandi* of this DA's office, *Id.* –

was particularly egregious.[10] These examinations, in particular, clearly bore prejudicial fruit at the penalty phase, where the jury was evidently trying to sort out what the statements actually said from the misleading questions being asked about them, and asked for copies of the statements themselves. Tr. 809. However, since the statements were not in evidence, the jury was instructed to rely on what was – which included the improper questionning. Tr. 810.

Given all of the foregoing, it certainly cannot be said beyond a reasonable doubt that the examination of the police officers did not contribute to at least the death sentence imposed. Hence, prejudice clearly ensued, resulted in the denial to defendant of a fair trial and requires reversal, either on the basis of the many objections made and denied, or on the basis of plain error. *Brown*, 995 So.2d at 704; *Flowers I*, 773 So.2d at 329-30. *See additionally* Pitchford's Brief at 44-48.

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[10] *See, e.g.* Tr. 509 (suggesting in a question that defendant claimed he didn't know who did it when the statement the officer was testifying about was one where Mr. Pitchford acknowledged being there with a companion with the intent to rob, but withdrawing from the scheme before the robbery occurred); Tr. 571 (suggesting that a statement by the defendant which the recounted as Mr. Pitchford's having said that entered the store with co-participant Eric Bullins, but then left without committing the robbery was telling the officer "that they both committed the robbery and murder together"); Tr. 505 (suggesting that Mr. Pitchford acknowledged taking a .38 pistol loaded with shot that morning from the store, whereas Mr. Pitchford consistently claims to have purchased it earlier).

Similar efforts were used not only to "tee up" his improper closings that would be based on these mischaracterizations, but also to improperly engage in actual argument by way of the leading questions. *See, e.g.,*

Q: [D.A. Evans]: *So through three statements he has given inconsistent versions*; is that right?
A: [Officer Greg Conley]: Yes
Q: But he never admits any involvement in the crime in all of those statements?
A: Yes
Tr. 507 (emphasis supplied)

Q: So in that statement he is admitting that him and Eric went to the store to rob it, that he had a 38 in his pocket. *The only 38 involved is going to be the one that came out of the store; is that correct?*
A: That's correct
Q: *So it would have been kind of hard to have that one in his pocket when he walked into the store, wouldn't it?*
A: Yes, sir.
Tr. 508-09 (emphasis supplied)

Q: Okay. So basically he gave you a version. *He changed it a little when Greg came in. Then he changed it again when it was just you some.*
A:[Officer Robert Jennings]: That's correct.
Tr. 573 (emphasis supplied).

The State also mounts no defense on the merits to the prosecutorial misconduct in the penalty phase cross examination of two of defendant's mitigation witnesses, his mother and sister (the latter over a contemporaneous objection, Tr. 709-10), regarding purported specific acts of school related misconduct during his childhood and youth. These questions were not relevant to any question in issue at the penalty phase: The witnesses did not testify on direct examination to anything about specific acts of conduct by defendant while in school that opened the door to these questions, nor at any time did Mr. Pitchford ever attempted to establish by any means that he had NOT been disciplined at school. Tr. 708-09, 714-19. Nor was this information relevant to either of the two aggravating circumstances the state attempted to establish – robbery for pecuniary gain, and killing to escape detection and conviction. R. 1205-06.

This Court has recognized that in a death penalty case, where the prosecution attempts, by way of ostensible impeachment, to put inflammatory evidence of little or no relevance before the jury, the sentence resulting from it, if not the entire conviction, must be set aside. *Lester v. State*, 692 So.2d 755, 781-82 (Miss.1997) *overruled on other grounds, Weatherspoon v. State*, 732 So.2d 158 (Miss.1999); *Walker v. State*, 740 So.2d 873, 883-86 (Miss.1999). Moreover, these questions did not bear any but the remotest relevancy to impeaching the credibility, knowledge base or bias of the witnesses. Instead, it is otherwise improper evidence being introduced under the "guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." *Harrison v. State*, 534 So.2d 175, 178 (Miss.1988) (citations omitted) (emphasis in original); *Foster v. State,* 508 So.2d 1111, 1115 (Miss.1987). *See also* Pitchford's Brief at 49.

Acknowledging that contemporaneous objections *were* interposed to two other incidents of misconduct in witness examination at the penalty phase – cross examination Dominique Hogan, the mother Mr. Pitchford's son, about alleged acts of misconduct, extra-relationship sex and fighting,

between herself and Mr. Pitchford when they were a dating couple Tr. 688-90 and the inflammatory question of Mr. Pitchford's sister Veronica suggesting that losing a father to cancer, where "at least [Mr. Pitchford] had a month" to see him before he died was "better than somebody just being murdered and their family not [having that time]" to say goodbye, Tr. 711 – the State did make an attempt to argue that these were not error. Neither of these arguments holds water.

As to the questioning of Ms. Hogan, a contemporaneous objection clearly covered both subject matters, and went not only to the lack of a good faith basis to ask these questions at all, but also to their calling for "damaging and inflammatory speculation," Tr. 689, their lack of substantive relevancy to any issue before the court; [11] the fact that the basis for asking the questions constitutionally inadmissible hearsay evidence (the defendant's unmirandized statements given to psychiatrists Bailey and McMichael in preparation for trial rather than for treatment purposes);[12] and the impropriety of the questions as improper character based impeachment of the witness herself. [13]

The trial court's finding that the prosecutor had a factual basis for asking the question from reports from the Mississippi State Hospital and a private consulting psychiatrist that neither party called as a witness is not dispositive of the question of whether inquiring about it was prejudicial misconduct. Tr. 691. While it may mean the question was not asked in subjective bad faith, such questioning is still improper because its primary purpose is to put highly prejudicial, and otherwise inadmissible hearsay evidence about the defendant before the jury *Lanier v. State,*

[11] "MR. CARTER [Attorney for Defendant]: I object to the relevance of it, Your Honor." Tr. 690

[12] "MR. CARTER [Attorney for Defendant]: My response to that, Your Honor, would be that Dr. Bailor's [sic] statement is hearsay. Reb McMichael's statement is hearsay. Whatever Mr. Pitchford says cannot be used to cross examine this witness." Tr. 690.

[13] "MR. CARTER [attorney for Defendant]: Your Honor, let me just say too that you didn't give me a chance to finish my objection. . . . [I]t is not all right for him to ask her whether or not she had another boyfriend or whether she was -- had ever went out with somebody else or talked with somebody else. That's certainly not proper. That is meant to try to make this woman, to call some kind of question about her character which is not even proper." Tr. 691-92

533 So.2d 473, 486-90 (Miss. 1988) (reversing because of cross examination of witness on basis of report by non-testifying Whitfield doctors who conducted mental health exam). Because the evidence being introduced in this means is testimonial hearsay, the Sixth Amendment confrontation clause is also implicated. *Davis v. Washington*, 547 U.S. 813 (2007), *Crawford v. Washington*, 541 U.S. 36 (2004). *See also Estelle v. Smith*, 451 U.S. 454 (1981) (use at sentencing of unmirandized statements given by criminal defendants during court ordered mental health examinations violates defendant's 5th and 6th Amendment rights to silence and to counsel). Indeed, even if the evidence on which the question was based would have been admissible if offered by way of other witnesses, the fact that the State did not in fact offer it is enough to require reversal for prosecutorial misconduct in inquiring into it. *Flowers I,* 773 So2d at 330-31 (finding penalty phase misconduct for asking one of defendant's mitigation witness about alleged prior bad acts of defendant which could have been, but were not, established by other means).

The contemporaneous objection that this irrelevant inquiry was of such an inflammatory and speculative nature as to be unduly prejudicial, and therefore also improper, is also clearly valid. Tr. 689-92. The witness never testified about his character or conduct towards her during her intimate relationship with him.. Her testimony went only to Pitchford's parental relationship with their common child. Tr. 685-97. Hence her testimony did not open the door to discussing the subject at all. There was no claim by Mr. Pitchford through any other witness that he had a good character as a romantic or domestic partner as mitigation of sentence in any other way, either. R. 1206 (jury instruction itemizing mitigation to be considered and expressly not mentioning anything about that aspect of his life).

Nor is the existence of acts of promiscuity or possible domestic violence relevant to the only two aggravating circumstances – robbery for pecuniary gain, and escape from detection –

on which the jury was instructed. R. 1206. Hence, as with the irrelevant inquiries of his mother and sister, these questions of his child's mother were merely an attempt to introduce inflammatory evidence of little or no relevance before the jury. This requires that the sentence resulting from it be set aside. *Lester v. State,* 692 So.2d 755, 781-82 (Miss.1997) ; *Walker v. State*, 740 So.2d 873, 883-86 (Miss.1999). *See also* Miss. R. Evid. 403.

Moreover, such questioning was, as the defendant's objection pointed out, not proper impeachment of witness herself under Miss R. Evid. 608. Tr. 691-92. These questions did not go at all to her character for truthfulness, which is the only kind of character impeachment of witnesses permitted under this rule or its companion Rule 609. *See Hopkins v. State*, 639 So.2d 1247, 1252 (Miss. 1993), *McInnis v.State*, 527 So.2d 84, 87 (Miss.1988) (noting that the rules allow evidence of prior bad acts "for the purpose of attacking the credibility of the witness *and for no other*. The issue with respect to which [the evidence] must be relevant, if it is to be admissible, is [to the] propensity for truthfulness as a witness") (emphasis supplied).

The inflammatory questioning of Veronica Dorsey is equally indefensible. Even assuming *per arguendo* that victim impact testimony can be elicited from anyone other than the actual victim/survivor him or herself, such evidence is very limited in its scope. Certainly, it is admissible only where it is presented in a non-inflammatory way that does not incite the jury to inject undue emotion into its sentencing decision. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (expressly recognizing that the due process clause provides a remedy against inflammatory presentation of victim impact testimony), *Branch v. State*, 882 So. 2d 36, 67 (Miss. 2004). *See also Blue v. State*, 674 So.2d 1184, 1225 (Miss.1996) (requiring that jury decide sentence on things other than "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"). Presenting it an unduly inflammatory manner is reversible prosecutorial misconduct in and of itself, even if the same facts presented in some other manner might be

acceptable. *Shepard v. State,* 777 So 2d 659, 661-62 (Miss. 2001).

Contrary to the State's argument, the inflammatory nature of the question is exactly the objection that was made, and it was made not only expressly on that basis at the time, but the record also reflects that the comment not only could have created, but actually did create an emotional outburst in the courtroom that required judicial admonishment. Tr. 711-12.[14] The State's reliance on *Goodin v. State*, 856 So2d 267, 284 (Miss, 2003), for the proposition that the grounds cited in the trial court were different from the argument in this Court is therefore misplaced. In *Goodin*, the grounds on which defendant relied at trial were narrow, hearsay rule

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[14] The entire relevant exchange is as follows:

Q. [District Attorney Evans] That is better than somebody just being murdered and their family not --
MR. CARTER [Attorney for the Defendant]: Your Honor, that is absolutely improper question and he knows it.
THE COURT: I'll overrule the objection.
MR. CARTER: Your Honor, somebody - -
Q. You can answer the question.
MR. CARTER: May we approach, Your Honor?
(MR. EVANS, MR. HILL AND MR. CARTER APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE JURY.)
MR. CARTER: If the Court -- maybe the Court can't hear. Somebody in the back of the courtroom is talking and answering questions. And it is somebody with the victim's family. When I objected and said that question was improper. Somebody in the back said no, it is not. Would the Court please advise --
THE COURT: I did not hear it, but --
MR. CARTER: I heard it before too.
THE COURT: I am not disputing what you said. I am not in the least bit. I was just saying I did not. But if you said it, I do not question it. I was going to say if, if, if you heard something, I will admonish the members of the audience at this time to refrain from any statements.
MR. CARTER: Yes, sir. Thank you.
(THE BENCH CONFERENCE WAS CONCLUDED.)
THE COURT: I want to make it clear to everybody in the courtroom that they are not to make any comments about anything that is going on. You are a spectator and observer, guest of the Court. And you are not to make any comments. You are not to make any noise at all during this process. You can proceed.
MR. EVANS: Thank you, Your Honor.
Q. (By Mr. Evans:) Him having about a month before his daddy died is a lot better than a family that doesn't have any time, that family member is just shot down and murdered, isn't it?
A. I agree.
Tr. 711-12

exception questions of law, and bore no relation to the additional grounds raised on appeal. Here, as the record makes clear, the objection at trial, erroneously overruled by the trial judge, was exactly what is complained of on appeal.

The State takes a similar approach to the prosecutors improper "in the box" penalty phase argument long ago condemned by this Court in *Stringer v. State,* 500 So.2d 928, 938-39 (Miss. 1986). It does not deny that the prosecutor twice told the jury the final closing, when no rebuttal was possible, that it was there to impose the death penalty and not a sentence of life imprisonment. He opened his argument with the statement that "*y'all know what you are here for*. The law is clear in this state. The death penalty is an appropriate punishment," Tr. 799, and reiterated it later that "it would make y'all's decision easy if you just said well, we will just go ahead and sentence him to life. *But that is not your job*." Tr. 804-05)

Defendant expressly objected to this argument when it first occurred. The objection was overruled with a ruling that clearly gave the prosecutor permission to reiterate it when he did. Tr. 799. This should be sufficient to overcome any procedural bar to considering this misconduct, especially since the exact language of the second statement was also raised as misconduct in Defendant's Motion and Amended Motion for New Trial, ¶ 28, Supp. R. 1251 (A), 1261(B). *Hodges v. State*, 912 So.2d 730, 751 (Miss.2005). Given its nature it may, in any event, be reviewed on the basis of plain error. *Stringer*, 500 So.2d at 938-39; *Griffin v. State*, 557 So.2d 542, 552-53 (Miss.1990)

Nor does the State dispute the clearly erroneous and prejudicial nature of the argument by the prosecution at the penalty phase that the autopsy photos showed that the crime was "brutal" and that therefore "this is the type of crime that the death penalty is for." Tr. 804. Though the words "heinous, atrocious and cruel" were not actually spoken, this argument was basically an argument that this statutory aggravating circumstance ("HAC") should be considered by the jury

without either legally sufficient evidence to support submitting that aggravator to the jury and, more importantly, without the required cautionary instruction when the potentially inflammatory HAC aggravator is submitted for their consideration at all. *Clemons v. Mississippi*, 484 U.S. 738(1990); *Knox v. State*, 805 So.2d 527, 533 (Miss.2002); *West v. State*, 725 So.2d 872 (Miss. 1998); *Taylor v. State*, 672 So.2d 1246 (Miss. 1996). Pitchford's Brief at 52.

Although there was not a contemporaneous objection to this particular statement, the Defendant had been vigorously objecting to the improper nature of the District Attorney's argument throughout the closing; the objections were not only overruled on all occasions, but Defendant's counsel was frequently met by personal admonition from the trial court for having made them at all. Tr. 799, 800, 802-03.

Further, after what turned out to have been the final objection was overruled, the District Attorney demanded a bench conference, apparently for no purpose other than to issue a threat of physical reprisal against Mr. Pitchford's counsel for making his objections, Tr. 802, and to have the objection overruled once again in disparaging terms. Tr. 802-03.[15] After that, Mr. Pitchford attempted no more objections. The two improper exhortations – the second "in the box" argument and the backdoor HAC argument – occurred immediately thereafter. Tr. 804.

Even if these objections are not sufficient to overcome the contemporaneous objection rule, both of these improper exhortations by the prosecutor, whether considered individually or

[15] Both state and defense counsel were threatened with jailing for this exchange. Mr. Pitchford's counsel immediately accepted both the overruling of his objection and the admonishment and attempted to resume his seat. The trial court nonetheless detained counsel at the bench and further dressed defense counsel down with a lecture on how to make an objection. Tr. 802. However, when the defense attempted to comply with those instructions and requested the record be read back to document his objection the trial court pretermitted that effort, justified the State's argument, and again overruled the objection. Tr. 803. Under the circumstances, Mr. Pitchford had no choice but to rely on his prior objections to encompass the entire improper tenor of the State's closing argument, which the trial court was clearly going to let proceed. For the the next few minutes that argument continued as it had since the time of the first objection, a tissue of inflammatory, improper argument aimed at exciting only passion and prejudice in the jury, rather than deliberate consideration of sentence. Tr. 804-07.

in combination with each other or with the multiple other acts of misconduct throughout the argument and the trial, are exactly the kind of behavior warrants reversal on the basis of plain error. *Stringer*, 500 So.2d at 938-39; *Griffin v. State*, 557 So.2d 542, 552-53 (Miss.1990). It certainly cannot be said that the misconduct beyond a reasonable doubt did not contribute to the sentence of death imposed by the jury who heard it. *Brown*, 995 So.2d at 704. *See also Wiggins*, 539 U.S. at 537-38.

The State makes a partial merits defense of the prosecutor's inflammatory and evidentiarily unsupported personal opinion in guilt phase closing that Mr. Pitchford, who had not testified at trial, was "as close to a habitual liar as I have ever seen." Tr. 649. State's Brief at 32. The claimed record support for that statement expressly made to the jury is purported contradictions within Mr. Pitchford's out of court statements, whose content had been introduced exclusively through the testimony of the officers who took them.[16] The statements were not themselves introduced, nor had Mr. Pitchford testified at trial. The State's only rationale for this inflammatory attack is that it was proper rebuttal to arguments by the defendant that co-defendant and informant witness testimony was untruthful and motivated by desires to help themselves with the prosecution in resolving matters concerning their own criminal conduct. *McNeal v. State*, 551 So.2d 151 (Miss. 1989), State's Brief at 32.

This rationale, however, ignores entirely that the use of those statements as the basis for calling Mr. Pitchford an habitual liar was an improper comment on the defendant's failure to testify, and thus clearly an error. *Griffin v. State*, 557 So.2d 542, 552 (Miss. 1990)

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[16] As is noted above, the testimony by which these officers provided this evidence was separately tainted by misconduct which attempted, by asking questions that mischaracterized their actual contents, to exaggerate the contradictions within them, which also means that the argument is similarly tainted to the extent that it relied on those mischaracterizations. *See* n. 10, *supra*. *See also Flowers v. State I*, 773 So 2d 309, 329-30 (Miss. 2000)(this D.A.'s misuse of defendant's statements in closing is reversible error); *Flowers v. State II*, 842 So.2d 531 (Miss. 2003) (Same, re argument from information improperly solicited from witnesses on cross examination).

> This Constitutional right has been construed by this Court to have been violated, not only when a direct statement is made by the prosecution as to the defendant's not testifying, but also by a comment which could reasonably be construed by a jury as a comment on the defendant's failure to testify. *Jimpson v. State*, 532 So.2d 985, 991 (Miss.1988); *Livingston v. State*, 525 So.2d 1300, 1305-08 (Miss.1988); *Monroe v. State*, 515 So.2d 860, 865 (Miss.1987); *Bridgeforth v. State*, 498 So.2d 796, 798 (Miss.1986); *Wilson v. State*, 433 So.2d 1142, 1146 (Miss.1983); *Davis v. State*, 406 So.2d 795, 801 (Miss.1981).

Griffin, 557 So.2d at 552. Because this error affects a fundamental right, it is subject to reversal on basis of plain error, even in the absence of a contemporaneous objection. *Id.*

Moreover, comment on non-testifying defendant's out of court statements can likely never be justified as "invited error" even where those statements are in evidence. *Davis v. State*, 970 So.2d 164, 172 (Miss. Ct. App. 2006) (citing *Livingston v. State*, 525 So.2d 1300, 1306 (Miss. 1988) and *West v. State*, 485 So.2d 681, 688 (Miss. 1985)). Even if the invited error doctrine could be invoked, it would have to be limited to circumstances where the defendant had argued that the statement in evidence itself actually said something that the statement did not say, and not to rebut arguments about the credibility of other witnesses. *Davis*, 970 So.2d at 172-73.

Even if the State were not making an improper comment on the defendant's failure to testify and could defend its inherently unreliable witnesses' version of events and general truthfulness by commenting on inconsistencies in defendant's competing account of the events, this still does not open the door to the state arguing the general *character* of the defendant for truthfulness as calling him an "habitual liar" did. Instead it is, in the argument context, improperly using impeachment of a witness other than the defendant as a "guise for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible" concerning the character of the defendant. *Flowers I*, 773 So.2d at 326-27; *Harrison*, 534 So.2d at 178; *Foster v. State,* 508 So.2d at 1115. What is improper and prejudicial to present evidence about is clearly equally improper and prejudicial to argue to the jury. Moreover, even if the defendant's character for truthfulness were proper rebuttal to a defendant's argument questioning

the veracity of other witnesses, there was no supporting evidence of record to support that argument. The State recognized this when it withdrew the cautionary instruction required when such evidence was adduced. Tr. 608-10.[17]

The State also makes no response to the undisputed legal precept that "a prosecutor is forbidden from interjecting his personal beliefs regarding the veracity of witnesses during closing argument." *Evans v. State*, 725 So.2d 613, 673 (Miss. 1997) (citing *United States v. Young*, 470 U.S. 1, 5, 18-22, 10 (1985); *Dunaway v. State,* 551 So.2d 162, 164 (Miss.1989) (prosecutor who referred to defense expert as "a whore" committed error); *Tubb v. State,* 217 Miss. 741, 743-45, 64 So.2d 911, 912-13 (1953) (prosecutor who tells jury during closing argument he knew the State's witnesses were telling the truth commits error which may be reversible). The "habitual liar" comment clearly transgresses this precept and was part of a pattern of misconduct that warrants reversal of the conviction.

The State made a similar ineffective attempt to defend the trial court's permitting the prosecutor, over the objection of the defendant, and immediately after the habitual liar comment, to make the inflammatory and factually tenuous argument at the guilt phase that "we would have had two more dead people" if the crime had occurred even a few minutes later. Tr. 649. This is argument inciting prejudice and fear by appealing to a jurors fears for themselves or other bystanders even if there were some basis for an inference in that regard. *Shepard*, 777 So.2d at 661. The error lies not in whether or not there were some basis to infer this, which is the State's only

[17] Since the defendant did not testify, the State could not, and did not, attack his character for truthfulness in any of the limited ways permitted by Miss R. Evid 608. Nor for the same reason, could or did the Defendant attempt to support it by any of the means at his disposal had he testified and the State attacked it. *Id.* There was no attempt to impeach Mr. Pitchford's character under any of the limited exceptions permitted by the rules for an accused who does not testify, either. M.R.E. 404. *Nicholson v. State*, 704 So.2d 81 (Miss.1997). The limitations on how and when such evidence can be admitted are very strong specifically because the undue prejudice such evidence, ordinarily irrelevant to any actual issue in the case, can induce in a jury. MRE 404 Comment (a). *See also Rubenstein v. State*, 941 So.2d 735, 761-65 and nn. 13,14 (Miss. 2006) (reaffirming that "no person may be convicted upon his reputation or character" and requiring instruction to jury to cure any errors in this regard).

defense of the remark. The error lies in the inflammatory nature of the argument itself: Preying on jurors fears for themselves or other community members not harmed by the crime is a bell very difficult to unring, much less to prove beyond a reasonable doubt that it did not affect the outcome. *Brown* 986 So.2d at 275, *West*, 485 So.2d at 689-90.[18]

The State also asserts without any supporting citation, that there was an evidentiary basis for the State's arguing at both the guilt and penalty phases that Pitchford was the person who fired the fatal shot at both phases of the trial. Tr. 649, 734. State's Brief at 31. There is in fact no such support. The only evidence directly stating who carried the 22 from which the State claimed the fatal shot was fired was that it was carried by Quincy Bullins in his aborted attempt to rob the store a few days earlier, Tr. 524, and by Quincy's cousin Eric Bullins the morning of the crime. Tr. 573. The only evidence concerning a weapon carried by Mr. Pitchford concerns a .38 loaded with birdshot. Tr. 508, 493-95. Hence, there was in fact no evidentiary basis for arguing at either the guilt or penalty phases that Mr. Pitchford was carrying the 22, and the error requires reversal because of prejudice to both the guilt and sentencing proceedings. *Flowers II*, 842 So.2d at 554-57.

At the guilt phase, this argument was made in the State's final closing when no rebuttal from Defendant was possible, Tr. 849, and in combination with the prosecutor's misrepresentation and manipulation of the facts in witness examinations clearly prejudiced the defendant's conviction. *Flowers I*, 773 So.2d at 329-30. *See also Randall v. State*, 806 So.2d 185, 212-14 (Miss.2001); *Shepard*, 777 So.2d at 661, *West* 485 So.2d at 689-90, *Augustine v. State*, 201

[18] Perhaps if this were the only improper thing said during the argument, the error would not be reversible. But given the context, it clearly was part and parcel of a cumulatively erroneous and prejudicial course of prosecutorial misconduct, and reversal is warranted here, particularly for the improper resonance this phase it likely had at the penalty phase. *Forrest v. State* 335 So 2d at 903, There, this argument would clearly have been improper, since the jury was not being permitted to consider the aggravating factor of creating risk to many people. Indeed, the fact that the legislature had to affirmatively make this an aggravating factor relating to sentence when it could be established beyond a reasonable underscores its complete impropriety as argument at the guilt phase.

Miss. 277, 28 So.2d 243, 244-47 (1946).

The State's claim that the accomplice liability instruction renders the question of who had the gun irrelevant, and any argument about without evidentiary support it not prejudicial ignores the huge prejudice the repetition of this argument caused when it was reurged at the penalty phase. Tr. 734. In that iteration, it went to the heart of the *mens rea* finding the jury had to make to even consider the death penalty. Miss. Code Ann. § 99-19-101 (7), *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). Given the importance of these findings to sentencing it clearly cannot be shown beyond a reasonable doubt that impossible that this argument did not affect that verdict.

The State concedes that the issue of departure by a trial court from its role as neutral and detached tribunal is properly raised by way of Motion for New Trial. Its assertion that Mr. Pitchford failed to do so in "any of his motions for new trial," State's Brief at 36, is simply wrong. As Mr. Pitchford's brief in chief pointed out at 55, n.36, the Defendant's Amended Motion for New Trial specifically raises exactly the same argument as is raised in this claim of error. Supp. R. at 1263(B) (Supplemental Record volume filed 8/18/08 in response to Mr. Pitchford's request to correct the record filed with this Court and served on, inter alia, the State on 7/28/08).[19] Hence the State's reliance on failure to raise this matter by way of Motion for New Trial as a procedural bar to consideration of this claim is without merit.

The State's substantive response to the allegations is equally inadequate to defeat this claim of error. The State legitimately (though conclusorily) responds to one part of Mr. Pitchford's argument by reference to its claim that prosecutorial misconduct had not occurred at

[19] Paragraph 31 of the Amended Motion for New Trial states as follows: "That the cumulative effect of the court's various rulings in favor of the prosecution and against the defendant showed the court was likely not a neutral and detached tribunal as required by law, or was more interested in a speedy conclusion of this trial than in seeing that justice, due process, or the equal protection of the law were accorded the defendant" Supp. R. 1263 (B)

all. Hence, it argues, the trial court's failure to stop it could not be evidence that it was not a detached and impartial tribunal. However, there is no response to Mr. Pitchford's extensive record citations to incidents relating to matters not involving prosecutorial misconduct, also cited in support of the claim of judicial bias. Mr. Pitchford – fully mindful of his obligations under the rules – has been scrupulous to raise this claim of error solely with reference to the record facts he contends support it, and without any disrespectful or contemptuous language towards or about the trial court or the trial judge personally. In lieu of a similarly tempered fact-based response, however, the State resorts to disparagement of Mr. Pitchford apparently for having raised the issue at all, employing inflammatory language in doing so that would, if it were employed in an appellate brief about a trial court arguably transgress Miss. R. App. P. 28(k) or if used in a pleading in a civil case likely be strikeable under Miss. R. Civ. P. 12(f) as scandalous or impertinent.

Because no substantive response was made by the State to Mr. Pitchford's arguments concerning judicial bias, other than to incorporate its arguments that no prosecutorial misconduct occurred in the trial court which are fully responded to, *supra*, Mr. Pitchford relies on the arguments in his brief in chief on this point and respectfully submits that they, whether standing alone, or as a result of the cumulative error they are part of, establish error and warrant reversal of his conviction by this Court.

IV. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO SEE IMPROPER DISPLAYS OF EMOTION FROM NON-TESTIFYING AUDIENCE MEMBERS IN THE COURSE OF BOTH PHASES OF THE PROCEEDINGS.

Undue emotional responses from the courtroom audience, can, if communicated to the jury, deprive a defendant of his constitutional right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940). The failure of the trial court to properly redress such displays in the instant matter, whether provoked by specific

prosecutorial misconduct or occurring without it, is independent error requiring reversal here. *Stringer v. State*, 500 So.2d 928 (Miss.1986); *Fuselier v. State,* 468 So.2d 45 (Miss.1985).

The State's assertion that there were no such displays rewrites the record of the trial. Even the trial court acknowledged that at least one was of sufficient severity at the penalty phase to require intervention, Tr. 711-12. However, contrary to the State's assertion that the admonishment given by the court to the *audience* on this occasion was sufficient to redress the problem, the Court's failure to also determine the effect on the jury and instruct it to disregard the emotion violates this Court's long standing requirements. *Bell v. State,* 631 So.2d 817, 819-20 (Miss. 1994); *Snow v. State,* 800 So.2d 472, 485 (Miss. 2001). Even the case the State relies on to support its claim of no error on this point agrees that such curative instructions to the jury are required. *Walker v. State*, 671 So.2d 581, 620 (Miss.1995)

Nor does the State's argument that this error was not sufficiently preserved hold water. This Court has recently reaffirmed that making a pretrial motion denied by the trial court preserves the issue raised in that motion for review even in the absence of a contemporaneous objection when it happens at trial. *Goff v. State*, 14 So.3d 625, 640 (Miss. 2009). Defense counsel filed a pretrial motion seeking to have the trial take action to prevent such outbursts R. 170-72. The trial court, denied the motion, but stated that it would take corrective action regarding such outbursts brought to its attention at trial. Tr. 70-71.

In keeping with that order, Mr. Pitchford brought two such incidents to the trial court's attention, alluding in both cases to a continuing pattern of such disruptive behavior. On neither occasion did he receive sufficient corrective action or instruction of the jury, and he seeks redress of those errors here. Tr. 432-34; 711-12. The State's contention that this following of the trial court's ruling was insufficient to preserve the error for review is therefore without merit.

V. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER INHERENTLY UNRELIABLE TESTIMONY OF A JAILHOUSE INFORMANT OR IN FAILING TO GIVE THE REQUESTED REQUIRED CAUTIONARY INSTRUCTION CONCERNING IT

The State's only argument on this point is that Defendant is procedurally barred from raising his claim that the trial court improperly permitted two jailhouse snitches to testify. It asserts that the testimony was taken "without objection from the defense" at the time the evidence was offered, State's Brief at 41, 44. [20] It makes this claim despite the fact that the Defendant had made a pretrial motion seeking to exclude this testimony which was called up for hearing and denied by the court prior to trial. R. 990-92. Tr. 83-84. This Court rejected an identical claim in *Goff v. State*, 14 So.3d 625 (Miss. 2009), holding instead that:

> Presentation of issues by means of motions in limine offers opportunities to expedite trials, eliminate bench conferences, avoid juror annoyance and permit more accurate rulings.... When, as here, a specific evidentiary issue is presented to the trial court in advance of trial, the primary purposes of the contemporaneous objection rule-to permit the trial court to accurately evaluate the legal issues and to enable the appellate court to apprehend the basis of the objection-are satisfied. Requiring an additional formal objection and ruling in all cases would undermine the benefits provided by the motion in limine procedure.

Id. at 640 (quoting *Kettle v. State*, 641 So.2d 746, 748 (Miss.1994). Clearly the claim that these witnesses' testimony was too unreliable and prejudicial for the jury to hear was fully preserved.

The State's further contention that the defendant's motion – which claimed that this testimony was not sufficiently reliable under this Court's long established standards set forth in *McNeal v. State*, 551 So. 2d 151 (Miss 1989) and *Dedeaux v. State* , 87 So. 664 (Miss. 1921) and did not therefore pass due process muster-- did not also subsume include the claim that the probative value of the testimony was outweighed by its prejudice is similarly unfounded. The gravamen of the *McNeal/Dedeaux* objection is exactly that, and the weighing process required by

[20] The State's only factual or legal support for that claim is to reproduce the entire direct testimony, apparently to demonstrate the absense of any such objections at trial, though the quoted matter actually does include, despite the representation, an objection from the defendant to at least one aspect of it. Tr. 55. States Brief at 41-48.

Rule 403 is no different from that required under *McNeal/Dedeaux*. The only distinction is that because snitch testimony is so unreliable *McNeal/Dedeaux* does not make a cautionary instruction optional as Rule 403 does. The possibility of prejudice is so great that the trial court is *required* to give one where a snitch testifies. *Moore v. State*, 787 So2d 1282 (Miss. 2001).

The cautionary instruction given here, S-5, R. 1122, despite the State's assertion to the contrary, did not do all that was required because it omitted the explanation to the jury of *why* it was being asked to view the testimony with caution – i.e. the witness's self interest – which is what the defendant's rejected proposed instructions D-10 and D-11 did. R. 1132-33. As this Court noted in *McNeal*, the mere fact that a witness has testified or a prosecutor has represented that no express promise was made as a quid pro quo for the testimony of the snitch, does not dispose of the need to remind the jury why it must regard his testimony with suspicion. Such a witness "is the sort of witness whose testimony ought generally be viewed with caution and suspicion *even in the absence of any proof of a leniency/immunity agreement.*" *McNeal*, 551 So. 2d at 158 (quoting *Barnes v. State*, 460 So.2d 126, 132 (Miss.1984)) (emphasis supplied).

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN JAILHOUSE INFORMANT JAMES HATHCOCK TESTIFIED TO INADMISSIBLE AND PREJUDICIAL MATTERS.

In the instant matter, the mistrial was sought after Mr. Hathcock deliberately testified to the inflammatory and inadmissible information of unrelated criminal conduct by the defendant, allegedly selling Mr. Hathcock drugs. The State does not seem to address the gravamen of Mr. Pitchford's claim, which is that this information was not admissible for any of the purposes permitted by Miss Rule. Evid. 404(b). In recognition of the special prejudice that giving the jury this kind of information can create, the Mississippi Rules of Evidence expressly anticipate that it will not be sprung on the jury or the other side without pretrial judicial determination of its admissibility. Mr. Pitchford made pretrial motions asking expressly for notice of this kind of

information under the rule, Tr. 54, and separately for the exclusion of this witness's testimony altogether, Tr. 83. Though the State did not reveal this information at the hearings on these motions, Tr. 54-56, 82-85 when it came out at the trial, the State made no attempt to defend its admissibility and claimed to have expressly cautioned the witness not to mention it. Tr. 441.

Where the witness has apparently defied instructions or not been so instructed, this kind of information is so prejudicial that the only cure is having a new jury, not exposed to the damaging and inadmissible information, hear the case anew. *Campbell v. State*, 750 So.2d 1280, 1283 (Miss. Ct. App. 1999) (noting that the problem "should have been easily prevented through the State instructing its witnesses to refrain from interjecting any extemporaneous matters.") *See also Tucker v. State*, 403 So.2d 1274, 1275 (Miss.1981); *Killingsworth v. State*, 374 So.2d 221, 223 (Miss.1979); *Sumrall v. State*, 272 So.2d 917, 919 (Miss.1973); *Sumrall v. State*, 257 So.2d 853, 854 (Miss.1972); *Cummings v. State*, 219 So.2d 673 (Miss.1969); *Ladnier v. State,* 254 Miss. 469, 182 So.2d 389 (1966); *Brown v. State*, 224 Miss. 498, 80 So.2d 761 (1955); *Pegram v. State,* 223 Miss. 294, 78 So.2d 153 (1955); *Floyd v. State,* 166 Miss. 15, 148 So. 226 (1933).

In the context of all the other improprieties going on during this trial, permitting the jury which had been exposed to this clearly improper testimony to deliberate either guilt or sentence clearly caused irreparable prejudice to the defendant's case and makes the denial of the mistrial motion error. *Campbell*, 750 So.2d at 283, *Parks v. State*, 930 So.2d 383, 386 (Miss. 2006).

VII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE OBTAINED THROUGH A WARRANTLESS SEARCH OF DEFENDANT'S AUTOMOBILE AND THE FRUITS OF THE POISONOUS TREE THEREOF

The State seems to have entirely missed the basis on which Defendant claims error here. Although denying a motion to suppress evidence may be upheld on conflicting testimony if there is substantial credible evidence to support it, the trial court determination will not be upheld if the trial court "*applied an incorrect legal standard*, committed manifest error, or made a decision

contrary to the overwhelming weight of the evidence." *Anderson v. State*, 16 So.3d 756, 758 (Miss. Ct. App. 2009) (*citing Moore v. State* 933 So.2d 910, 914 (Miss. 2006))(emphasis added).

The defendant's main argument here, to which the State makes no response, is that that under even under the undisputed facts as described by the State, the search was improper as *a matter of law* under *Georgia v. Randolph*, 547 U.S 103, 115 (2006) and the trial court therefore applied an incorrect legal standard. The State concedes that the police relied on the consent by the co-owner of the vehicle to the search, and that the defendant himself was attempting to prevent the search so strenuously that he had to be physically restrained in order for the search to take place. Tr. 132. State's Brief at 56. There is nothing in the record to contradict the testimony of the officer conducting the search that he went forward with the warrantless search solely on the basis of that co-owner consent, and that in its absence he would have sought a warrant. Tr. 106. Where police rely in this fashion on the consent of a co-owner to overcome the objection of the defendant to the search, the evidence, however probative or useful to the prosecution, and however apparently guilty the defendant is, must be suppressed, even though the police did not have the benefit of the *Randolph* decision when they made the decision to proceed without a warrant. *U.S. v. Sims*, 435 F. Supp. 2d 542, 545 n. 4 (S.D.Miss. 2006).

Nor does the State's argument in this case address the main factual issue argued by Mr. Pitchford on this point, that the Court failed to consider the unrefuted evidence of revocation of consent by the defendant's conduct, not only by his declining to sign the written consent for but, more importantly, by his vigorously immediately thereafter demanding that no search of his vehicle take place, and physically interfering with the search. Tr. 98, 100-01, 232, 496-97. Under Mississippi law such conduct renders the consent suspect and vitiates any prior consent given. *Graves v. State*, 708 So.2d 858, 863 (Miss. 1997) (*quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 226-28 (1973). The trial court ignored that legal standard in concluding that valid

consent had been given, and the conviction must be reversed as a result.

VIII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENTS GIVEN BY DEFENDANT TO LAW ENFORCEMENT OFFICERS AFTER HIS ARREST

As this Court recently reiterated in the very case cited by the State in support of is argument on this point of error, the Fifth Amendment protection against self incrimination requires that a defendant *not only* be advised of his right not to speak to police but *must also waive that right*, and he must do *both* of these things every time police initiate a new contact with him or her. *Chamberlin v. State*, 989 So.2d 320, 334 ¶¶ 42, 46 (Miss. 2008) (citing *Michigan v. Mosley*, 423 U.S. 96, 104 (1975), *Michigan v. Tucker*, 417 U.S. 433, 450, (1974)).

Like Mr. Pitchford, Ms. Chamberlin was questioned several times by police. In the first interrogation, which was initiated by police, Ms. Chamberlin was advised of her rights, but when she declined to waive them questioning of her ceased, as *Miranda* requires it should. *Id.* at 334 ¶ 40. In her second interrogation, also initiated by police, Ms. Chamberlin was both advised of her rights and signed a written waiver of them, and the statements made during it were therefore admissible against her. *Id.* at 334 ¶ 44. Similarly, when officers initiated the third and fourth interviews of Ms. Chamberlin she was both advised of her rights and signed written waivers of them, hence anything she said during them was admissible against her *Id.* at 334 ¶ 47.

The only statement before which Ms. Chamberlin did not affirmatively re-waive her right to silence was the fifth and final interrogation. The product of that session was admissible despite no new *Miranda* waiver, but *only* because Ms. Chamberlin was found to have been the initiator of the contact and also of the conversation regarding the crime in question, which permitted further interrogation of her by police without their requiring readministration of such warnings or obtaining a new waiver of them. *Id.* at 334 ¶ 48 (citing *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). *See also Pannell v. State*, 7 So.3d 277 (Miss. Ct. App. 2008) (invocation

of right to counsel gives even further protections, and makes even contact initiated by the accused insufficient to warrant further interrogation about the crime without counsel present if the accused does not himself also initiate the specific subject matter)

In the instant matter, Mr. Pitchford gave several statements, three November 7, 2004, and two (or three [21]) more on November 8, 2004. He waived his right to silence only one time: when he signed a waiver form at 2:38 p.m. on November 7, 2004, shortly after being taken into custody Tr. 120-21 Ex. S-52. The first statement was obtained from him shortly thereafter by Officer Conley and is the only statement obtained on the basis of that waiver, since the interface between Mr. Pitchford and police was completely terminated, and Mr. Pitchford was returned to the holding cell after that. Tr. 122, 129-30. Where there is a temporal and physical break of several hours in the interrogation of this nature, the remoteness in time makes the earlier waiver rights is insufficient to operate as a waiver of those rights with regard to subsequent, separate interrogations and an entirely new waiver be given at least as to any officer initiated contact. *Mosley*, 423 U.S. at 104, *Chamberlin*, 989 So.2d at 333-34.

Two further statements were, however obtained from Mr. Pitchford on November 7 after the conclusion of the first statement that day without, as established by the testimony of the officer himself, obtaining any new waiver of the right to silence. Tr. 121-22. The second statement commenced at 4:45 p.m., possibly initiated by contact from Mr. Pitchford himself, was terminated and Mr. Pitchford again returned to his holding cell. A third statement was given

[21] On November 8, Mr. Pitchford was questioned first by Officer Conely and Investigator Robert Jennings together in a recorded statement, then by Jennings alone briefly in an unrecorded statement into which Conley was called, and finally in a recorded statement by Jennings. If the unrecorded time with Jennings is considered a separate statement there were a total of three, with the final statement being the sixth one given. For purposes of this argument, this is a distinction without a difference. The officers all agree that at no time on that date at did Mr. Pitchford ever waive his right to silence at all, and that he affirmatively declined to do during the Jennings/Conley first statement and once during the unrecorded conversation with Jennings. He also affirmatively invoked his right to silence at the conclusion of his unrecorded conversation with Jennings when Conley came back in the room, and certainly never was advised of or waived his right to silence thereafter. Tr. 123-35, 139-40, 146-47, 151, Ex. 60

after contact with Mr. Pitchford was initiated by an officer some hours later that night (Statement 3). Tr. 122, 129-30. Under *Chamberlin*, therefore at least the third statement must be suppressed because it was newly initiated by the officer at a time several hours after the initial waiver of the right to silence, but without reobtaining a waiver of it. 989 So.2d at 334 ¶¶ 40-47.

On November 8, 2004, the waiver obtained the day before was clearly to remote in time to cover any questioning conducted that day. *Mosley*, 423 U.S. at 104; *Chamberlin*, 989 So.2d at 333-34. When Officer Conley, along with District Attorney's office Investigator Jennings, resumed interrogating Mr. Pitchford at 9:15 that morning one or the other of the officers advised Mr. Pitchford of, *inter alia*, his right to silence, but when tendered the waiver form to sign, Mr. Pitchford affirmatively *refused* to waive it. Tr. 123-35,146-47, Ex. 60. Hence, under *Chamberlin*, questioning of him should have immediately ceased, and even if reinitiated would require both new warning concerning the right to silence and a new waiver of it. 989 So.2d at 334 ¶¶ 40-47. Instead, Conley left the room and permitted Investigator Jennings, who was also a polygrapher, to take over the interrogation alone. Tr. 139.

Jennings testified that while he was alone with Mr. Pitchford he also went over Mr. Pitchford's rights on the unsigned *Miranda* waiver form but agreed that Mr. Pitchford did not sign it for him either. Tr. 139. Nonetheless, he continued the conversation and attempted to obtain the necessary written rights waiver to administer the polygraph examination. Again, Mr. Pitchford did not give him that waiver either orally or in writing Tr. 139-40. Notwithstanding having neither the general *Miranda* nor specific polygraph waivers in hand, Jennings began to discuss the case with Mr. Pitchford by telling him that the polygraph was effectively infallible. This misrepresentation apparently elicited a torrent of information from Mr. Pitchford. Tr. 140. However, when Conley reentered the room to participate in that interrogation, Mr. Pitchford expressly requested that the statement cease. Tr. 140, 151. Apparently understanding that this

was an affirmative invocation of the right to silence, Conley withdrew and questioning ceased for a few minutes. Tr. 141.

However, despite the invocation of the right to silence made while Conley was present, Jennings turned on a tape recorder and resumed the his interrogation of Mr. Pitchford, but, crucially, without even readvising Mir. Pitchford of his rights, and certainly without obtaining any waiver from him of those rights. Tr. 139-43; 146-47, 151.[22] This final statement, was the most damaging of the statements obtained from Mr. Pitchford, but clearly failed to meet the requirements of this Court in *Chamberlin,* or the United States Supreme Court in *Edwards*, *Mosley* and their progeny, for admissibility, since it was not supported by any waiver of the right to silence whatsoever, and was undisputedly officer initiated. Mr. Pitchford's conviction must therefore be reversed.

IX. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE CONCERNING ALLEGED PRIOR BAD ACTS OR OTHER CRIMES BY THE DEFENDANT

The State concedes, as the record requires it must, that this issue was properly preserved by way of pretrial motion and contemporaneous objection at trial. R. 42-45, Tr. 54-56, 337-38. Though the State's argument on this point extends to nearly four pages of single spaced quotations from the record and from the case it cites in support of its position, it ignores this Court's clear jurisprudence on two points.

First, that even where evidence of other crimes may have relevance to the crime in question under Rule 404(b) it may still be excluded under Rule 403, which requires not merely a recitation that its probative value outweighs its prejudicial value but that the record support that conclusion, as well. *See Howell v. State*, 860 So.2d 704, 733 (Miss. 2003) (citing *Foster v. State*,

[22] Both Jennings conversation with Mr. Pitchford about the infallability of the polygraph exam, and his final interrogation of him involved some of the many factual misrepresentations and psychological tricks that rendered the statements obtained not only *Miranda* violations, but also affirmatively involuntary under *Jackson v. Denno,* 378 U.S. 368 (1964). Mr. Pitchford relies on his arguments in his brief in chief on those matters. Pitchford's Brief at 76-78

508 So.2d 1111, 1117 (Miss.1987) (*overruled on other grounds*)), *Flowers v. State*, 842 So.2d 531, 539-40 (Miss. 2003) (*Flowers II*).

Second, and perhaps even more relevant in the instant matter, regardless of how probative to a Rule 404(b) permitted purpose evidence of other crimes may be, it is reversible error to interweave it so thoroughly into the prosecution's case that there is no way to show that the jury did not also consider it for improper and prejudicial purposes as well. *See Flowers v. State* 773 So.2d 309, 325 (Miss. 2000) (*Flowers I*) ("the cumulative effect of the prosecutor's pattern of repeatedly citing to [the other crimes] throughout the guilt phase proceedings leads us to hold that [the defendant] was absolutely denied a fundamental right to a fair trial."), *Flowers II,* at 550. Certainly, where the evidence has been used, as it was here, in the sentencing process, at least the sentence must be reversed. *Stringer v. State*, 500 So.2d 928 (Miss. 1986).

In the instant matter, the record reflects that the information about the defendant's alleged participation in an earlier attempt to rob the same store was entirely based on testimony by the inherently unreliable co-participant witnesses, which is of clearly recognized minimal probative value. Tr. 449-65, 522-31, *See McNeal v. State*, 551 So.2d 151 (Miss. 1989). Hence, in the Rule 403 calculus, it is clearly outweighed by its prejudicial effect notwithstanding the trial court's brief recitation to the contrary in its summary, unexplained ruling admitting the testimony. Tr. 338-39.

Moreover, as in *Flowers I and II*, this information was treated by the prosecution in witness examinations at the guilt phase and in argument at both phases of the trial essentially not as a separate crime, but as part of the same crime for which the defendant was being prosecuted even though it was being treated by them for purposes prosecuting Mr. Pitchford and other defendants as entirely separate crimes in separate indictments. *See, e.g.* Tr. 523-26; 449-54; 625-27; 630-32; 769-71; 773-74. Reversal is therefore required here.

X. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY FROM DR. STEVEN HAYNE.

On the substance of this claim, Mr. Pitchford relies on the arguments in his brief in chief at 82-27. However, because the State's arguments relating to procedural bar are simply unfounded, he responds to them here. This Court's obligation to preservation of an honest, fair system of justice surely gives it the power to reject on the basis of plain error testimony obtained by the State from a perjurious or facially unqualified expert whenever that information is brought to its attention, just as it may sanction other prosecutorial overreach or misconduct. *See Stringer v. State*, 500 So.2d 928, 931 (Miss. 1986), *Flowers v. State*, 842 So.2d 531, 564 (Miss. 2003).

Dr. Hayne has, since the trial in this case, been publically exposed both in this Court and in the public sphere as having overreached his own expertise, the evidence before him, and the standards of his profession. *Edmonds v. State*, 995 So.2d 787, 792 (Miss. 2007), *Treasure Bay Corp v. Ricard*, 967 So.2d 1235, 1242 (Miss. 2007), Radley Balko, *CSI: Mississippi,* Wall St. J. Oct 6, 2007, at A 20. For this Court *not* to reexamine on the basis of plain error a conviction and death sentence obtained in any part on the basis of such testimony would inconsistent with this Court's and the United States Supreme Court's longstanding commitment to preserving the integrity of the system of justice, and according criminal accuseds their right to a fundamentally fair trial. *Groppi v. Wisconsin*, 400 U. S. 505, 509 (1971), *Hill v. State*, 72 Miss. 527, 534, 17 So. 375, 377 (1895).

Moreover, as the State acknowledges (despite its statement elsewhere to the contrary) there was an objection to the scope of the expert's testimony regarding matters outside his expertise preserved during the trial, though the trial court overruled it, Tr. 417-18 expressly argued as error in Mr. Pitchford's brief in chief at 83-84 and n.49. For all of the reasons cited in Mr. Pitchford's brief in chief, therefore, the conviction and sentence must also be reversed for the error in admitting Dr. Haynes' testimony.

XI. THE TRIAL COURT ERRED IN DENYING DEFENDANTS REQUESTED CULPABILITY PHASE JURY INSTRUCTIONS D-9,10,18, 30, AND 34 AND IN GRANTING THE STATE'S CULPABILITY PHASE INSTRUCTIONS S-1, S-2A, AND S-3 IN THEIR ABSENCE

With respect to the errors in the culpability phase instructions, Mr. Pitchford relies on the arguments on this point in brief in chief at 87-90. The State's arguments are inapposite to the Defendant's claims or unsupported by applicable law or the facts of record and thus do not undercut it. In addition, to the extent that the precedent of this Court supports finding no constitutional violation from the giving or failure to give the instructions objected to or sought, Mr. Pitchford respectfully submits that such precedent is inconsistent with the correct interpretation of the United States Constitution, and this Court should alter or overrule it.

XII. THE TRIAL COURT ERRONEOUSLY LIMITED THE MITIGATION EVIDENCE AND ARGUMENTS THEREON THAT DEFENDANT WAS PERMITTED TO PRESENT DURING THE PENALTY PHASE PROCEEDINGS

Mr. Pitchford. respectfully submits that in addition to the arguments raised in his brief in chief at 90-93 on this point, the arguments regarding limitations on voir dire set forth in Argument I.C. of this Reply Brief also support his contention that at least his sentence must be reversed because of the unconstitutional restriction on mitigation evidence imposed on him by the trial court.

To the extent that *Wilcher v. State,* 697 So.2d 1087 (Miss. 1997) and other jurisprudence cited by the State in support of its arguments could be construed to support the exclusion of this mitigation evidence, it should be revisited in light of the Supreme Court's recent holdings in *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007), *Smith v. Texas*. 550 U.S. 297, 315-16 (2007), further elucidating *Tennard v. Dretke,* 542 U.S. 274 (2004), *Smith v. Texas*, 543 U.S. 37 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001), and *Kansas v. Marsh*, -----U. S. ------, 126 S. Ct. 2516, 2526 (2006)).

XIII. THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO PRESENT IMPROPER MATTERS TO THE JURY DURING THE PENALTY PHASE PROCEEDINGS

Mr. Pitchford relies on the arguments set forth in his brief in chief in support of this point of error, and, notwithstanding the State's remarkable claim that he made no citations to where these errors occurred in the record, on the very specific record citations therein to where such error occurred. Pitchford's Brief at 91-93. To the extent that the cases of this Court and other courts cited by the State support its broad interpretation of the scope of testimony permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), Mr. Pitchford respectfully submits this Court should adopt the interpretation of the scope of victim impact testimony consistent with the Defendant's arguments in his brief in chief.

Moreover, the victim impact testimony elicited and argued in this case was part and parcel of the egregious prosecutorial misconduct and overreaching discussed more fully in Argument III of this Reply Brief, *supra*, and even if without such associated misconduct it might be dismissed as harmless error, in the context of this case it is not, and the sentence achieved as a consequence of it must be reversed. *U.S. v. Bernard*, 299 F. 3d 467 (5th Cir. 2003); *Stringer v. State*, 500 So.2d 928 (Miss. 1986).

XIV. SENTENCING PHASE INSTRUCTION 1 VIOLATES MARSH V. KANSAS AND/OR IS DEFICIENT BECAUSE OF THE REFUSAL OF DEFENDANTS REQUESTED SENTENCING PHASE INSTRUCTIONS DS-7, 8, 13, 15, AND MITIGATING FACTOR (g) FROM DS-17

For the most part, Mr. Pitchford relies on the arguments made in his brief in chief regarding sentencing instructions in support of this claim of error and his contention there that in general, the State's restrictive view of what the jury should be instructed on in this case is completely inconsistent with the Eighth Amendment and Due Process. Pitchford's Brief at 95-99. He is also grateful to the State for correcting his scrivener's error and agrees that he is challenging the omission from the final sentencing instruction the mitigating circumstance set

forth as (g) in proposed instruction DS-17, "Mr. Pitchford had mental health problems as a child that were never treated"), not the one denoted as (h) in that instruction. R. 1215

However, the State's assertion that Defendant's proposed sentencing instruction D-15, refused by the trial court, R. 1218, is not only repetitive of the general sentencing instruction S-1 (proposed by the State as SS-1A and adopted by the trial court effectively in its entirety) but also affirmatively improper under *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006) (which actually vacated Mr. Rubenstein's sentence for failure to grant an instruction almost identical to D-15) and *Flowers v. State*, 842 So.2d 531, 556-58 (2003) is to willfully misread the record in this matter, and this Court's opinion in both of these cases. [23]

To dispose of the *Flowers* misreading first. As this Court made clear in *Rubenstein, Flowers* significance on this issue is *not* that it was *improper* to instruct the jury that life *without parole* was a possible sentence, but that, under the amended sentencing laws, it was *proper* to *omit* instructing it on the possibility of life *with* the possibility of parole. *Rubenstein*, 941 So.2d at 791 ¶¶ 261-62 ("Omitting the option of life **with** the possibility of parole would not have been prejudicial to the defendant, and we would have found no error." (citing *Flowers*, 842 So.2d at 558)) (emphasis in original).

The misreading of *Rubenstein* is equally egregious. The relevant sentence of proposed instruction D-15 ("If you the Jury choose to sentence Mr. Pitchford to life imprisonment without the possibility of parole, Mr. Pitchford will never be eligible for parole") is substantially identical to language in one of instructions that *Rubenstein* expressly held it was error *not* to give, 941

[23] On the record in the instant matter, the premise that there is a duplication is simply false and cannot sustain the State's argument even at the threshold. Pitchford's instruction D-15 reads as follows: "If you the Jury chooses to sentence Mr. Pitchford to life imprisonment without the possibility of parole, Mr. Pitchford will never be eligible for parole. Further, his life sentence without possibility of probation or parole canot be reduced or suspended." R. 1218. Contrary to the State's argument this language does not duplicate S-1 (referred by the State in its brief as SS1-A), which simply sets forth that the two possibile sentences under consideration are death and life in prison without parole without making any definition or explanation of the nature of *either* sentence. R. 1205, 1206, 1213.

So.2d at 788 ¶ 244 ("D-10 states: If you sentence defendant to life imprisonment without possibility of probation or parole, defendant will never be eligible for parole or probation."). As this Court goes on to discuss at some length in its reversal of Mr. Rubenstein's death sentence, it is essential that the Court make it clear to the jury that there is absolutely no possibility of release from prison even if a death sentence is not imposed. This Court recognizes that concerns by jurors of even the remote possibility of release could improperly influence them to impose a death sentence, and requires that the Court not permit that to happen. *Id.* at 791-93 and n. 28 especially, ¶¶ 264-65 (citing in to the records in *Wiley v. State*, 691 So.2d 959 (Miss.1997), and *West v. State*, 725 So.2d 872 (Miss.1998) (noting that a life sentence was imposed on remand with proper instructions, *West v. State*, 820 So.2d 668, 669 (Miss.2001)). [24] Moreover, as is also discussed more fully in Mr. Pitchford's brief in chief, for the same reasons the due process guarantees of the Constitution similarly require an instruction making it clear to jurors considering sentence that a life sentence really does mean life without possibility of release. *Simmons v. South Carolina*, 512 U.S. 154, 169-71 (1994).

XV. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE IT WAS IMPOSED AS A MATTER OF LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

The Defendant relies on the arguments on this point in his brief in chief at 99-106. To the extent that the precedent of this Court supports finding no constitutional violation from the challenged matters, Mr. Pitchford respectfully submits that the precedent is inconsistent with the

[24] Because the State failed (presumably because of a cite checking error, and without any intent to mislead) to make a pinpoint citation to where in *Rubenstein* it purportedly found support for its assertion that the language in D-15 is "improper," State's Brief at 88, Pitchford can only speculate on how and why the State got the holding in *Rubenstein* so wrong. Perhaps, in its enthusiasm to find support for its argument, the State adopted language from the *Rubenstein* dissent -- which sets forth the argument made by the State here as its minority view, but that was actually rejected by the majority -- and is the only place where this instruction is ever referred to as "improper," *See* 941 So.2d at 795,798 (Easley, J. dissenting). The *Rubenstein* dissent also reads *Flowers* in the way rejected by the *Rubenstein* majority (but argued by the State in the instant matter) which may also explain the State's misconstruction of *Flowers* in its argument, as well.

correct interpretation of the United States Constitution for the reasons set forth in Pitchford's brief in chief, Mr. Pitchford respectfully submits that this Court should alter or overrule that precedent and adopt the interpretation proposed by Mr. Pitchford's brief.

XVI. THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY AND/OR STATUTORILY DISPROPORTIONATE

Mr. Pitchford is puzzled about how he could have been any more specific about the ways in which his sentence here is disproportionate constitutionally and statutorily, given his own circumstances and those of his crime, and the actual sentences imposed in this case on people of equal or greater culpability to himself in this particular incident.

The co-defendant who actually killed the decedent in the robbery was given a manslaughter plea. Pitchford's Brief at 107 and n. 54. Looked with the objectivity our sentencing scheme requires this Court to use, it is difficult to assert -- even when recognizing how tragic, unnecessary and deserving of punishment the taking of Reuben Britt's life may have been -- that the crime itself it necessarily fell within the "narrow category of the most serious crimes" for which the death penalty is a proportionate punishment, or that Mr. Pitchford, a 19 year old who panicked when his 16 year old companion unexpectedly opened fire during a robbery, was an offender "whose extreme culpability made him 'the most deserving of execution.'" *Kennedy v. Louisiana,* --- U.S. ---,---, 128 S.Ct. 264, 2650 (2008); *Roper v. Simmons,* 543 U.S. 551, 568 (2005), *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). *See also* Argument II, *supra*, (setting forth numerous jury rejections of the death penalty in crimes similar to the instant one)

This Court, too, is scrupulous about enforcing these precepts, and nearly all of the matters where it has reversed the sentence as disproportionate have, like the instant matter, been felony murders where the killing was a tragic by-product of criminal activitiy not undertaken with an intent to murder. *See, e.g. Reddix v. State*, 547 So.2d 792, Miss. 1989; *White v. State*, 532 So.2d

1207 (Miss.1988); *Bullock v. State*, 525 So.2d 764 (Miss. 1987); *Coleman v. State*, 378 So.2d 640 (Miss. 1979).

Mr. Pitchford's argument in the instant matter that his sentence is disproportionate, for the reasons set forth in his brief in chief and here, is not only properly preserved and argued, but is one of great merit, which requires reversal of at least the sentence imposed here.

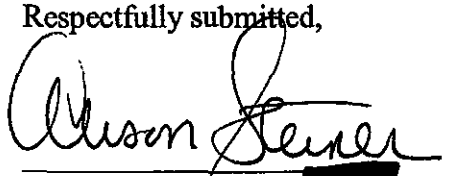
XVII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF THE VERDICT OF GUILT AND/OR THE SENTENCE OF DEATH

Mr. Pitchford incorporates herein the materials set forth in his "Introduction" to this Reply Brief, and respectfully submits that even if none of the errors enumerated above or in his prior briefs warrants reversal in and of itself, the conviction and sentence should nonetheless be reversed for cumulative error as a denial to Mr. Pitchford of his fundamental rights, and to uphold the integrity of the justice system. *Ross v. State*, 954 So.2d 968, 1018-19 (Miss. 2007); *Flowers v. State*, 947 So.2d 910, 940 (2007) (Cobb, P.J., concurring).

CONCLUSION

For the foregoing reasons, as well as such other reasons as may appear to the Court on a full review of the record and its statutorily mandated proportionality review Terry Pitchford respectfully requests this Court reverse the conviction and death sentence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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APPENDIX A to Reply Brief of Appellant: BATSON VIOLATION PEREMPTORY STRIKES
State v. Terry Pitchford
Grenada County Circuit Court

Name & Venire No.	Strike No.	Race /Sex	Age	DP attitude	Reason Given for Strike	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Lee, Linda Ruth Venire No. 30	S-2 Tr. 322	bf	26	b	"She is the one that was 15 minutes late . . . " Tr. 324	Tr. 239-40; 318 (denying State cause strike for this, finding that juror late because has no car but "is trying real hard to fulfill her civic duty as a juror.")	Several other jurors not present when court first attempted to resume. Tr. 238-39.	By Court, of struck juror Tr. 240,318 None of any other venire member	no	
Lee, Linda Ruth Venire No. 30	S-2 Tr. 322	bf	26	b	"She also according to police officer, police captain Carver Conley has mental problems. They have had numerous calls to her house and said she obviously has mental problems" Tr. 324-25	Affirmatively absent. Reason not mentioned in State's earlier motion to strike juror for cause. Tr. 318	Information not sought from or about all jurors (not asked on JQ's).	None of any venire member	no	mental illness
Tillmon, Christopher Lamont Venire No. 31	S-3 Tr. 322	bm	27	a	"He has a brother that has been convicted of manslaughter. And considering that this is a murder case, I don't want anyone on the jury that has relatives convicted of similar offenses." Tr. 325	JQ R. 800	White venire members with felony convictions in family accepted by State: *Counts, Jeffrey Shann* (Juror 12, R. 1104): uncle convicted of forgery. R. 479-80 *Bernreuter, Henry George*, (tendered by State Tr. 326): son convicted of burglary; stepson convicted of forgery. R. 399-400	None of the struck juror. None of accepted comparable whites.	Homicide conviction	people with criminal relatives
Tidwell, Patricia Anne Venire No. 18	S-4 Tr. 322	bf	37	b	" Her brother, David Tidwell, was convicted in this court of sexual battery. And her brother is now charged in a shooting case that is a pending case here in Grenada. " Tr. 325	JQ R. 788; Tr. 261	White venire members with felony convictions in family accepted by State : *Counts, Jeffrey Shann* (Juror 12, R. 1104): uncle convicted of forgery. R. 479-80 *Bernreuter, Henry George* (tendered by State Tr. 326): son convicted of burglary; stepson convicted of forgery. R. 399-400	By State, of struck juror on identity only. Tr. 261. None of accepted comparable whites	no	people with criminal relatives
Tidwell, Patricia Anne Venire No. 31	S-4 Tr. 322	bf	37	b	"And also, according to police officers, she is a known drug user." Tr. 325	none	Information not sought from or about all jurors (not asked on JQ's)	None of any venire member	no	Substance depend-ency

APPENDIX A to Reply Brief of Appellant: BATSON VIOLATION PEREMPTORY STRIKES
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Grenada County Circuit Court

Name & Venire No.	Strike No.	Race /Sex	Age	DP attitude	Reason Given for Strike	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"[H]e had no opinion on the death penalty." Tr. 326	JQ R. 814	White venire members with same lack of opinion on death penalty accepted by State: *Ward, Laura Candida* (Juror 5, R. 1104) R. 818 *Tramel, Nathalie Drake* (Alternate 1, R. 1104) R. 806; Tr. 255	None of the struck juror. By State, of accepted comparable wf Tramel Tr. 255	Witherspoon Morgan inquiry	philosophy on dp
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He has a two year old child . . . . They both have children about the same age." Tr.326	JQ R. 813	White venire members with young children accepted by State: *Sherman, Michael*, (tendered by State Tr. 321) daughter 2 1/2 years old, son 3 months; R. 763; *Wilbourn, Lisa*, (Alternate 2, R. 1104) son 23 month old , R. 837; *Parker, Lisa*, (tendered by State Tr. 321) child 6 year old , R. 701 *Tramel, Nathalie Drake*, (Alternate 1, R. 1104), 4 year old daughter, 5 year old son; R. 808 *Ward, Laura Candida* (Juror 5, R. 1104), daughter 6, R. 817 *Marter, Stephen Abel, Jr.*, (tendered by State Tr. 321) 4 year old son, R. 657; *Curry, Michael*, (tendered by State Tr. 328), 5 year old son, R. 497.	None of the struck juror. None of accepted comparable whites.	no	parental status
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He has never been married. . . . They both have never been married." Tr. 326	JQ R. 813	Unmarried whites accepted by State: *Eskridge,Chad*, never married, R. 527 (Juror 2, R. 1104); *Denham, Kenton L*, divorced, R. 525 (tendered by State Tr. 322); *Counts, Jeffrey Shann*, divorced, R. 481 (Juror 12, R. 1104); *Brewer, Mary Wylene*, widowed, R. 421 (Juror 6, R. 1104	None of the struck juror. None of accepted comparable whites.	no	marital status

APPENDIX A to Reply Brief of Appellant: BATSON VIOLATION PEREMPTORY STRIKES
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Grenada County Circuit Court

Name & Venire No.	Strike No.	Race /Sex	Age	DP attitude	Reason Given for Strike	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He has numerous speeding violations that we are aware of." Tr.326	none	Information not sought from or about all jurors (expressly excluded from JQ questions about criminal history)	None of any venire member on subject	no	
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He is approximately the age of the defendant." Tr. 326	JQ R. 811	White venire members of similar age accepted by State: *Clark, Brantley*, age 22, R. 417, (tendered by State Tr. 321); *Eskridge,Chad*, age 25 R. 527 (Juror 2, R. 1104); *Sherman, Michael*, age 27 R. 761 (tendered by State Tr. 321); *Wilbourn, Lisa*, age 28, R, 835 (Alternate 2, R. 1104); *Parker, Lisa*, age 29, R. 699, (tendered by State Tr. 321)	None of the struck juror. None of accepted comparable whites.	no	age
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"The reason that I do not want him as a juror is he is too closely related to the defendant" on multiple traits. Tr. 326	none	White venire members accepted by State but sharing more than one of the cited traits: *Eskridge,Chad*, similar age, unmarried, R. 527-29 (Juror 2, R. 1104); *Ward, Laura Candida*, young children, no death penalty opinion (Juror 5, R. 1104) R. 817-18 *Tramel, Nathalie Drake*, young children, no death penalty opinion, R. 805-06; Tr. 255; (Alternate 1, R. 1104) *Parker, Lisa*, similar age, young children, R. 699-701, (tendered by State Tr. 321) ; *Wilbourn, Lisa*, similar age, child same age, (Alternate 2, R. 1104) R. 835-37; *Sherman, Michael*, similar age, child same age R. 761-63; (tendered by State Tr. 321),	None of either the struck juror or accepted comparable whites except for by State, of accepted Alternate 1, Tramel,on d p opinion Tr. 255	no	Multiple traits purportedly shared with Defendant