2006-DP-00441-SCT

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Terry Pitchford, Defendant/Appellant
Death Row
Parchman, MS 38738

Ray Charles Carter, Esq.
Alison Steiner, Esq.
Counsel for Defendant/Appellant
Office of Capital Defense Counsel
510 George St. Suite 300
Jackson, MS 39202

Marvin L. White, Jr., Esq.
Pat McNamara, Esq.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Hon. Joseph H. Loper, Jr., Presiding Judge
P.O. Box 616
Ackerman, MS 39735

Doug Evans, Esq., District Attorney
P.O. Box 1262
Grenada, MS 38902

This the 29th day of October, 2008

Attorney for Terry Pitchford

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STATEMENT OF ISSUES

I. WHETHER THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM AND REQUIRES REVERSAL OF MR. PITCHFORD'S CONVICTION AND SENTENCE OF DEATH.

A. *Whether The State Discriminated On The Basis Of Race In Its Peremptory Strikes In Violation of Batson v. Kentucky*

B. *Whether The Trial Court Otherwise Deprived Defendant Of A Jury Comprised As Required By The Sixth And Fourteenth Amendments.*

C. *Whether The Trial Court Erred In Precluding The Defense From Questioning Prospective Jurors Concerning Their Ability To Consider Mitigation*

II. WHETHER 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. *Whether The Trial Court Erred In Failing To Grant A Continuance Of The Trial*

B. *Whether 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*

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

IV. WHETHER 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.

V. WHETHER 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.

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

VII. WHETHER 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.

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

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

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

XI. WHETHER 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

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

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

XIV. WHETHER 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 (H) FROM DS-17

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

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

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

STATEMENT OF THE CASE

[The record of the Circuit Clerk of Grenada County cited by page number as "R."; the Supplemental Volume filed 8/18/08 by page to "R. Supp. 2,". The transcript is cited by page number as "Tr." The transcript of post-trial proceedings in "Supplemental Vol.1 of 1 filed 1/28/08" is cited by page number as "Tr. Supp." Exhibits from the trial are cited as Ex. and S or D and number. The Record Excerpts are cited by Tab number as "R.E.".]

Procedural History

Terry Pitchford was indicted on January 11, 2005 in a single count indictment charging Capital Murder. R. 10. R.E. Tab 1 He was appointed local counsel and arraigned on February 9, 2005. R. 24. At that time local counsel requested the appointment of additional counsel R. 22. On June 15, an order appointing the Office of Capital Defense Counsel was filed. R. 175-76. Both parties filed pretrial motions. R. 42-213; 970-1011; 1021-22. Trial was set by the court for February 6, 2006. R. 211. Defendant filed a motion for Continuance on January 19, 2006. R.867-954; 1045-85. It was heard along with all other pending pretrial motions on February 2, 2006, and denied. Tr. 32-54. R.E. Tab 4. Evidentiary hearings were held on Defendant's pretrial motions to suppress a gun found in his vehicle and to suppress his statements to police after his arrest, and they were also denied. Tr. 94-119, R.E. Tab 5 (ruling on motion to suppress gun), 119- 56, R.E. Tab 6 (ruling on motion to suppress statement).

Jury selection commenced on February 6, 2006 and the culpability phase of the trial was completed with a guilty verdict on February 8. Tr. 166-652; R. 1169. The penalty phase was held on February 9, and resulted in a jury verdict of death. R. 1234-35. The Court entered its Judgment and Order Imposing the Death Sentence immediately thereafter. R. 1236-3, R.E. Tab 3. Defendant timely filed his Motion for New Trial on February 17, 2006, as amended, February 24, 2006, R. 1248-52; 1261-62, which were denied by the trial court on March 1, 2006. R. 1264-65. Timely Notice of Appeal, Designation of Record, and Certificate of Compliance were filed on March 6, 2008.

While the appeal was pending, this Court remanded the matter to a Special Judge of the Circuit Court for proceedings regarding correction of the record. Supp. Tr. 1-63. The record was further corrected to include record pages omitted by scriveners or copying error. R. Supp 2. adding previously omitted record pages 1251(A) and (B), and 1262(A), (B), and (C).

Statement of Facts

At approximately 7: 30 on the morning of November 7, 2004, Rubin L. Britt was found shot dead at his place of business, a convenience store called Crossroads Grocery, located on Highway 7 in Grenada County, Mississippi. Tr. 348, 365-66. A cash register, some cash, and one of two guns kept at the store, a 38 caliber revolver loaded with "rat shot" pellets, were determined to be missing. R. 349-50. Various shell casings and a live shell were observed on the floor of the store and later collected and sent to the Mississippi Crime Laboratory for examination. They were determined to be casings from two different guns – bullet shell casings from a 22 caliber weapon, and a live shot shell and shot shell casings from a 38 caliber weapon. Tr. 357-58, 483-99, 531-53.

When news got out about the shooting and apparent robbery, police received information from various citizen sources. A neighbor and part-time employee of the store that she had seen a "very clean" silver Mercury with tinted windows riding up and down and pulling in and out of the parking lot of the store earlier that morning. Tr. 375-76. Another store customer gave similar information. Tr. 479-83.

Paul Hubbard and Henry Ross, employees of a business located behind the Crossroads Grocery, also came forward, bringing with them a man Hubbard knew named Quincy Bullins. Hubbard and Ross reported that approximately a week and a half earlier they had stopped Quincy Bullins and a second man with something in their hands covered by towels heading towards the store. Tr. 584-86. Hubbard also reported that Bullins told Hubbard that Bullins and

his companion were "fixing to hit the store." Hubbard, however, told them leave and they did. Tr. 587. Hubbard also saw a "grey Chevy Caprice" with someone sitting on the hood parked nearby, but could not identify that person at all. Tr. 585-86. The State made no attempt to have him identify Mr. Pitchford as that person at trial. Tr. 586-89.

Quincy Bullins was questioned separately from Hubbard and Ross. He was at first reluctant to tell the police anything, Tr. 528-29. reminded of what Mr. Hubbard knew, Bullins admitted to the earlier attempt and identified the person with him that morning as DeMarcus Westmoreland and that they were both armed. Tr. 527. He also gave the police Terry Pitchford's name as the person waiting at the car and claimed that Terry was who had put him and Westmoreland up to the robbery, and had provided Quincy with the gun Quincy was using. Tr. 524. Westmoreland was brought in and, again after some initial reluctance, admitted his part in the attempted robbery with Quincy, also implicating Pitchford, though not also suggesting Pitchford was going to get someone else to do it later until almost a year later. Tr. 450-55. Both Quincy Bullins and DeMarcus Westmoreland testified against Mr. Pitchford at trial. Both also acknowledged that they did so in order to help themselves out with respect to the conspiracy charges they were facings as a result of the earlier attempt. Tr. 460, 527.

After obtaining Mr. Pitchford's name, GCSO Detective Gregory Conley and four other officers went to Mr. Pitchford's home. There, they found a vehicle similar to the one described by other witnesses. With the permission only of Shirley Jackson, Mr. Pitchford's mother and co-owner of the vehicle, and over resistance from Mr. Pitchford, police made a warrantless search the vehicle and found a 38 caliber pistol loaded with "rat shot" shells. They arrested Mr. Pitchford at that time. Tr. 493-97. A witness later identified this pistol as the one he had given to Mr. Britt for use in his store. Tr. 468-70.

Pitchford gave a total of six separate statements to police. In the first three, taken the day

of his arrest he denied any participation in the November 7. Tr. 502-06 In three others, taken the next day, he admitted that he had gone to the Crossroads Grocery to rob it with Eric Bullins, but consistently denied personally shooting Mr. Britt, and instead said Eric Bullins, who had a 22 or 25 caliber weapon, shot Mr. Britt after he saw Mr. Britt with a gun. Tr. 508-09, 568-578. Mr. Pitchford signed a single Miranda Warning/Waiver form on November 7. Ex. S-52 He affirmatively did not sign the Miranda Warning/Waiver form tendered to him on November 8. Ex. S-60.

The State presented all this evidence at trial. It also adduced expert testimony from Dr. Steven Hayne identifying the cause of death as three wounds from projectiles consistent with a .22 caliber weapon and injuries to Mr. Britt from "rat shot," and authenticating two projectiles and some shot and shot capsule recovered from the decedent and his clothes, Tr. 397-44. A firearms examiner connected the empty 38 shells found at the store and the pellets recovered by the pathologist to the 38 found in Mr. Pitchford's car, and confirmed that some of the empty casings from the store and projectiles recovered by the pathologist were consistent with having been fired from a 22. Two jailhouse snitch informants also testified that Pitchford had admitted to participation in the robbery and murder to them, though the accounts that each reported were somewhat inconsistent. Tr. 426-49; 562-68.

Defendant was convicted of Capital Murder. Tr. 652, R. 1169 After a penalty phase, which was held despite the unavailability of defendant's psychiatric expert to testify, Mr. Pitchford was sentenced to death. Tr. 657-812, R. 1234-35.

SUMMARY OF THE ARGUMENT

Terry Pitchford was denied his Sixth and Fourteenth Amendment right when he was tried by a racially discriminatorily selected jury in violation of *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) The jury selected was also infected by racial discrimination resulting from the death

qualification process in violation of *Lockhart v. McCree*, 476 U.S. 162 (1986). In addition, four prospective jurors removed in the death qualification process were eligible to serve under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The trial court also unconstitutionally restricted voir dire of the jury regarding their ability to consider mitigation of sentence.

When Defendant informed the trial court that his counsel could not, within the time scheduled before trial, complete the constitutionally required investigation and trial preparation to prepare an effective defense to this capital case in which death was being sought, the trial court abused its discretion in failing to grant him a continuance to complete that preparation. It also abused its discretion in failing to delay the sentencing proceeding when defendant expert psychiatrist was unable to testify, thus further denying him the right to put on a complete and effective mitigation case.

The prosecution engaged in misconduct by examining witnesses on matters not in evidence, and arguing facts not in evidence, and making improper "in the box" and "send a message"-type exhortations to the jury, and eliciting and arguing inflammatory matters before the jury in both stages of the proceedings. At the penalty phase, it not only argued these things, but also attempted to argue additional aggravating circumstances that were not show by the evidence or properly instructed to the jury. The trial court failed to adequately curb the prosecution in this regard, and in general exhibited an overall bias against the defense that rendered a less than fair and impartial tribunal in this matter.

The trial court erroneously permitted the state adduce unduly prejudicial testimony with little or no probative value from two jailhouse snitches, and having done so, failed to properly instruct the jury on how to regard that testimony. It also failed to grant a mistrial when one of those witnesses testified to entirely improper and inadmissible matters.

In violation of the Fourth Amendment, it admitted into evidence a gun that was the

product of an invalid warrantless search and other fruits of that poisonous tree. It erroneously admitted statements from the defendant taken in violation of his Fifth, Sixth and Fourteenth Amendment rights, as well. Similarly, it unconstitutionally allowed the State to make its case on the basis of inadmissible prior bad acts and other crimes of the defendant. It also violated the Due Process clause when it permitted Dr. Steven Hayne to testify as an expert witness after Dr. Hayne perjured himself as to his professional qualifications, and erroneously permitted him to offer purported expert testimony that were not within his field of expertise.

At the culpability phase, erroneously granted a peremptory instruction on the robbery element of capital murder by failing to give the jury a requested lesser offense instruction on non-capital murder, and erroneously failed to give an instruction about inferences required by *Sandstrom v. Montana*, 442 US 510 (1979). It also gave fatally defective cautionary instructions about informant and accomplice testimony. Each of the foregoing errors, individually and cumulatively, require reversal of the conviction here.

The death sentence returned by this same jury was fatally flawed, even assuming *per arguendo* that the conviction itself was not. In addition to depriving the Defendant of the right to have his expert witness testify, it also erroneously limited the lay mitigation testimony and evidence the defendant was able to obtain and present. On the other hand, it permitted the State to adduce unduly inflammatory victim impact testimony beyond the scope of *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), allowed a witness to present hearsay testimony in the form of a letter from a non-testifying third party in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), and gave the State the opportunity to give a closing argument at the conclusion of the State's penalty phase case before the Defendant presented his own.

The jury was also unconstitutionally instructed at the penalty phase. The instruction given failed to include a mitigating circumstance that had been established. It did not properly

limit the consideration of aggravators other than those specifically limited. It failed to fully apprise the jury that the non-death sentence it was considering would preclude any release from custody in the future, that it could return a life sentence even if it found that mitigating circumstances did not outweigh the aggravating ones, or about the statutory consequences of returning a verdict failing to agree on sentence.

The sentence was also unconstitutional under the Eighth Amendment because Mississippi's lethal injection procedure has not been demonstrated to meet the criteria of *Baze, et al. v. Rees*, 553 U.S. __ , 128 S.Ct. 1520 (2008), because duplicative aggravators, none of them pled in the indictment, were used to make the defendant eligible for the death penalty, and because it is disproportionate to sentences given to other offenders in this case and similar cases.

These errors, individually and cumulatively require reversal of at least the sentence imposed and a remand to the circuit court for a new sentencing proceeding.

ARGUMENT

Standard of Review

Capital murder convictions and death sentences are reviewed on direct appeal under a "heightened scrutiny" standard of review. *Walker v. State*, 913 So.2d 198, 216 (Miss. 2005); *Balfour v. State*, 598 So. 2d 731, 739 (Miss.1992) (citing *Smith v. State*, 499 So. 2d 750, 756 (Miss.1986)). "[P]rocedural niceties give way to the search for substantial justice, all because death undeniably is different." *Hansen v. State*, 592 So. 2d 114, 142 (Miss.1991).

Under this standard of review, this Court, *inter alia*, considers trial errors for the cumulative impact; applies the plain error rule with less stringency; relaxes enforcement of its contemporaneous objection rule; and resolves all genuine doubts in favor of the accused. In sum, what may be harmless error in a case with less at stake becomes reversible error when the

penalty is death. *Walker v. State*, 913 So.2d at 216 (citing *Irving v. State*, 361 So. 2d 1360, 1363 (Miss.1978)). *See also Fisher v. State*, 481 So. 2d 203, 211 (Miss.1985).

I. THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM AND REQUIRES REVERSAL OF MR. PITCHFORD'S CONVICTION AND SENTENCE OF DEATH.

The right to a fair trial by a panel of impartial, indifferent jurors governs every criminal case "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). The jury must also be selected without racial discrimination or other invidious exclusions from service, *Batson v. Kentucky*, 476 U.S. 79 (1986); *Lockhart v. McCree*, 476 U.S. 162, 175-76 (1986) and, in a capital case, be able to properly consider not only imposition of the death penalty, but also mitigation of it. *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Morgan v. Illinois*, 504 U.S. 719 (1992); *Tennard v. Dretke*, 542 U.S. 274, 287 (2005). In the instant case the defendant's rights in all these regards were seriously compromised. His conviction and sentence must, therefore, be reversed.

A. *The State Discriminated On The Basis Of Race In Its Peremptory Strikes In Violation of Batson v. Kentucky*

Over two decades ago the United States Supreme Court held that the equal protection clause of the United States Constitution forbids parties from using race – or assumptions about a prospective juror attitudes based on race – as the basis to peremptorily strike otherwise eligible venire members from serving on a trial jury. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986), *See also Snyder v. Louisiana*, --- U.S. ---, 128 S.Ct. 1203 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (both refining standards for determining violations); *Williams v. State*, 507 So. 2d 50 (Miss. 1987) (adopting *Batson* as the law in this state); *Flowers v. State*, 947 So. 2d 910, 938 (Miss. 2007) (*Flowers III*) (each juror "must be evaluated on his/her own merits, not . . . on supposed group-based traits or thinking.")

Terry Pitchford is African-American. The prosecuting attorney in Mr. Pitchford's trial peremptorily struck all but one of the otherwise qualified African-American venire members presented to him for acceptance as jurors and, when challenged, articulating only pretextual or inherently suspect reasons for doing so. Tr. 321-24. This same prosecutor has previously been held by this Court to have engaged in racially discriminatory jury selection practices, *Flowers III*, 947 So. 2d at 936-39. His conduct in the instant case was likewise racial discrimination in violation of *Batson*, and it was error for the trial court to permit it to occur. [1]

Because there is rarely direct evidence of invidious motivation, there is always the "practical difficulty of ferreting out discrimination in selections discretionary by nature" *Miller-El*, 545 U.S. at 238. *Batson* therefore establishes a three stage inquiry which permits circumstantial evidence to establish unconstitutional discrimination during jury selection. *Batson*, 476 U.S. at 98; *Snyder*, 128 S. Ct. at 1207; *Williams* 507 So. 2d at 52; *Flowers III*, 947 So. 2d at 917. The evidence relevant to this inquiry in the instant matter is summarized in Appendix A to this Brief, bound herewith.

At the first stage, the defendant makes out a prima facie case of discrimination. This may itself be established circumstantially, and from the conduct of the prosecutor in exercising his strikes in the case at issue alone. *Johnson v. California*, 545 U.S. 162, 170 (2005). Striking a disproportionate number of the minority members in the venire is generally sufficient to make the prima facie case, as is using a disproportionate number of the strikes actually employed on minorities or any other practice that results in a jury disproportionate to the venire from which it

[1] In addition to this Court's findings in *Flowers* III, in 1999, the trial judge presiding over an earlier trial of Mr. Flowers found that this prosecutor had racially discriminated in peremptorily striking a black juror and ordered that the stricken juror be seated on the jury – the only black to serve on that jury. See Record of Mississippi Supreme Court Case No. 1999-DP-01369-SCT at Tr. 1356-64 (conviction and sentence reversed on other grounds, *Flowers v. State*, 842 So. 2d 53 (Miss. 2003) ("*Flowers II*").

is drawn. *See Miller-El*, 545 U.S. at 240-41; *McFarland v. State*, 707 So.2d 166, 171 (Miss.1997); *Flowers III* 947 So. 2d at 936. In Mr. Pitchford's case, the trial court found the requisite facts existed when the State struck four of the five African-American prospective jurors presented to it. Tr. 323-24.

Once a *prima facie* showing is found, the burden shifts at the second stage to the State to proffer a race-neutral justification for the strike. The State need not, at this stage, offer proof of either the veracity or legitimacy of these reasons, and may rely on a wide range of reasons. *Lockett v. State*, 517 So.2d 1346 (Miss. 1987). Nonetheless, this is not a "mere exercise in thinking up any rational basis" for its strike. *Miller-El*, 545 U. S. at 252. The reason must, at the very least, be inherently non-discriminatory. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); *McGee v. State*, 953 So.2d 211, 215-16 (Miss. 2007).

If it is not facially non-discriminatory, no further inquiry is needed. Discriminatory motivation is deemed established; its taint is deemed to infect the entire process; and that single act of discriminatory jury selection requires immediate reversal of any conviction obtained from the tainted jury. In *McGee* this Court reversed a conviction as a matter of plain error where one of several reasons advanced by the prosecution for the strike mentioned the venire member's sex as contributing to the decision to strike. 953 So.2d at 215-16 (Miss. 2007) (citing *J.E.B. v. Alabama*, 511 U.S. 127, 139-41 (1994); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n. 14 (1977), *Duplantis v. State*, 644 So.2d 1235, 1246 (Miss.1994) and holding on the basis of that precedent that the single identified instance of invidious purpose infected "the entire judicial process" and negated any other reasons propounded). At least one of the reasons advanced in the instant case was facially discriminatory. *See* Appendix A at 3.

Even if the reason is not deemed to be facially discriminatory at the second stage, its

validity – including its accuracy, plausibility and the credibility of the prosecutors claim that he actually used it, and not race as its basis – is subjected to scrutiny at the third stage. *Randall v. State* 716 So.2d 584, 588 (Miss.1998 ("A facially neutral reason at step two however, is not always a non-pre-textual one for step three."). At the third stage the inquiry is whether the totality of the circumstances establish that the reasons advanced – although facially race neutral – were pretextual, and the decision was, therefore, "motivated *in substantial part* by discriminatory intent." *Snyder*, 128 S.Ct. at 1212 (emphasis supplied), *Batson*, 476 U.S. at 98; *Williams* 507 So. 2d at 52; *Flowers III*, 947 So. 2d at 917.

The pretext inquiry "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. at 252 (citing *Miller-El v. Cockrell*, 537 U.S. at 339; *Batson* 476 U.S. at 96-97, 106 S.Ct. 1712); *Snyder*, 128 U.S. at 1208 ("[s]tep three of the Batson inquiry involves an evaluation of the prosecutor's credibility"). If the circumstances place the credibility of the prosecutor or the plausibility of his justifications in doubt, then a finding of pretext, and reversal of the conviction, is warranted. *Id.*

The inquiry examines the reasons *as they were actually propounded at the time* to see if they are masks for racial discrimination, rather than the real reason for the strike.

> If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El, 545 U. S. at 252. ("[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reason as best he can and stand or fall on the plausibility of the reasons he gives."); *Flowers III*, 947 So. 2d at 936-39.

In determining pretext the following things must, as a matter of law, be considered "indicia of pretext" that cast suspicion on the bona fides of the articulated reasons:

> 1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; 2) the failure of voir dire as to the characteristic cited; 3) the characteristic cited is unrelated to the facts of the case; 4) lack of record support for the stated reason; and 5) group based traits.

Lynch v. State, 877 So.2d 1254, 1272 (Miss.2004). The reasons articulated by the State for removing four of the five available blacks from the jury panel in Mr. Pitchford's case are replete with these indicia of pretext, including in most instances disparate treatment of white venire members. *See* Appendix A.

The listed indicia are not exclusive. Anything that suggests an invidious motivation affected the strike—including things that established the prima facie case or were inconsistent at the second stage – must be taken into account. *Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995). *See also Miller-El*, 545 U.S. at 252 (inherent implausibility of articulated reason); *Randall* 716 So. 2d at 588-89 & nn. 2-5 (same); *Flowers III*, 947 So. 2d at 929, 936 (strong prima facie case; disparity of jury composition with composition of county or of venire drawn from it; "suspect" reasons advanced for strikes found valid on other grounds). These additional indicia of pretext are also present in many of the strikes made to eliminate blacks from sitting on Mr. Pitchford's jury as well as in the State's overall conduct in striking the jury. [2]

Flowers III contains an exceedingly thoughtful discussion of the *Batson* problem. It expresses a well founded frustration that racial discrimination in peremptory strikes had not been eradicated despite having been condemned for over two decades, *Flowers III*, 947 So. 2d at 937

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[2] Batson does not require that an historical pattern of discrimination be shown to establish discrimination, if there is a history of discriminatory behavior on the part of the prosecutor whose strikes are under scrutiny in a particular matter, that history may be used as support for a finding of discrimination as well. See *Miller El v. Dretke*, 545 U.S, at 236; *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003). In the instant case we have that history. *Flowers III*, 947 So. 2d at 938 (finding by this Court); MSSC No. 1999-DP-01369-SCT at Tr. 1356-64 (finding by trial judge).

(agreeing that "racially-motivated jury selection is still prevalent twenty years after *Batson* was handed down.") (citing *Miller-El*, 545 U.S. at 273 (Breyer, J., concurring) and suggesting that

> [w]hile the *Batson* test was developed to eradicate racially discriminatory practices in selecting a jury, prosecuting and defending attorneys alike have manipulated *Batson* to a point that *in many instances the voir dire process has devolved into an exercise in finding race neutral reasons to justify racially motivated strikes.*

947 So. 2d at 937 (citations and internal quotation marks omitted) (emphasis supplied).[3]

In uncharacteristically blunt terms, the decision characterizes the problem as attorneys "racially profiling jurors" during jury selection and not only reverses the conviction and sentence obtained as a result of this racial profiling in the case under review, but suggested that further systemic corrective action might be in order if such conduct persisted in future. *Id.* at 939.

In *Snyder*, 128 S.Ct. 1203, the United States Supreme Court took a similar hard line when it reversed the conviction and death sentence of the defendant because of racial discrimination by the State in exercising its peremptory strikes even though the State had articulated non-racial reasons, some of them unrebutted, for each of the strikes, the trial court had accepted those reasons, and the State court of last resort had deferred to that determination. 128 S.Ct. at 1212. Justice Alito's majority opinion, joined by Chief Justice Roberts and five others, reiterated its discomfort at using scattershot fallback reasons to justify a strike after one reason cited by the State for it has been found to be pretextual. It therefore expanded the prohibition against appellate courts saving strikes by looking beyond what was actually articulated at the time to include, in addition to reasons that had not been mentioned at all by the State, some non-racial

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[3] Though *Flowers III* is a plurality opinion, the concurring justice agrees that "[t]he plurality has provided a very thorough and instructive analysis of the *Batson* process, which should be useful, not only to the prosecutors who will be trying this case upon remand, but also to all prosecutors and defense attorneys alike, as they engage in future jury selection arguments," 947 So. 2d at 940 (Cobb, P.J. concurring).

justifications that were not susceptible to capture in a written transcript—such as a prosecutor's alleged observation of things like demeanor or nervousness of a particular juror. It found that although such demeanor-based justifications were not then being held invalid *per se*, the justification could not be retrospectively credited or deferred to by an appellate court, even if it had not been expressly rebutted, if there was no on the record contemporaneous record evidence or finding regarding its existence. 128 S. Ct. at 1208-12. Lower courts have found *Snyder* to require more scrutiny of the facts on both the trial and appellate court level. [4]

For Mr. Pitchford's February 2006 trial, a special venire of 350 people was summoned from the registered voters of Grenada County. One-third (40) of the 122 individuals returning jury questionnaires and appearing upon their summonses were African-American. After excusals for statutory or other cause unrelated to the case itself, 35 (36%) of the remaining 96 veniremen were black. R. 349-862, R.1107. These proportions were not statistically significantly different from the racial makeup of the population of Grenada County.[5] However, by the end of the process, of the 14 jurors empanelled to actual try Mr. Pitchford, only one was black. [6]

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[4] *See Haynes v. Quarterman*, 526 F.3d 189, 197-202 (5th Cir. 2008) (granting COA on *Batson* challenge in light of *Snyder*); *People v. Collins*, 187 P.3d 1178, 1183-84 (Colo. Ct. App. 2008) (finding *Batson* violation where some articulated reasons for a strike were found to be pretextual, and others, though unrebutted, were not expressly credited by trial court); *State v. Cheatteam*, 986 So.2d 738, 743-45 (La. Ct. App. 2008) (discussing the changes in the legal landscape wrought by, *inter alia*, *Snyder*). *See also Pruitt v. State* 986 So. 2d 940, 947-51 (Diaz, J., dissenting).

[5] In 2006, the population of Grenada County, Mississippi was approximately 40% African-American, Tr. 331. *See also* http://quickfacts.census.gov/qfd/states/28/28043.html

[6] The fact that the State permitted one black juror to be seated does not vitiate either a prima facie or ultimate finding of discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 250 (2005) A single discriminatory act in an otherwise nondiscriminatory jury selection process is sufficient to establish *Batson* violation. *Johnson v. California*, 545 U.S. 162, 169 n.5 (2005); *McGee*, 953 So.2d at 214 In the instant matter, the lone black juror was seated only after it was evident that the trial court would, as it in fact did when the challenge was made immediately thereafter, have to find that a prima facie *Batson* showing had already been made. Tr. 321-24.

The almost lily-white jury was achieved by the prosecutor accepting 16 of the first 18 white venire members tendered to him while simultaneously, in four consecutive strikes, eliminating four of the five African-American venire members who were sitting beside them, often for reasons that had not bothered the state when they were also applicable to the accepted whites. Tr. 321-22. Appendix A. After that, again with remarkable lack of attention to details that it deemed relevant to its strikes of black venire members, the State accepted 9 of the next 10 whites on the panel. Tr. 326. Tr. 326-29; R. 1104-09 (judge's strike list). *See also* R. 395-401, 471-74; 479-80, 515-18; 631-34; 715-18. The Defendant made his objection to this process at the time the State exercised its strikes, and renewed it prior to the seating of the jury and in his motion for new trial. At all times, the trial court erroneously failed to conduct the necessary third step inquiry and erroneously denied the *Batson* objection. Tr. 322-32, R. 1250, 1262. This is legal error,. *Miller-El v. Dretke*, 545 U.S. 231 (2005) (reversing without remand).

Because the record in the instant case clearly establishes the pretextuality of the reasons advanced for each of the four discriminatorily stricken jurors, this court can, and should, itself find the totality of the circumstances establish a *Batson* violation and reverse the conviction without a remand for further trial court action as it did in, *e.g. Flowers III, McGee. Burnett v. Fulton*, 854 So.2d 1010, 1016 (Miss. 2003).

Venire Member 48, Carlos Fitzgerald Ward

The reason given for the peremptory strike exercised by the State against Venire Member 48, Carlos F. Ward. Tr. 322, a 22 year old black man, was discriminatory on its face and requires reversal for that reason alone. *McGee* 953 So.2d at 215-16. The entire record made by the State in support of this strike (including the trial court's ruling that the strike was proper without completing the required *Batson* process) was as follows:

> MR. EVANS: Juror number 5 is juror number 48 on the list, a black male, Carlos Ward. We have several reasons. One, he had no opinion on the death penalty. He has a two year old child. He has never been married. He has numerous speeding violations that we are aware of. *The reason that I do not want him as a juror is he is too closely related to the defendant.* He is approximately the age of the defendant. They both have children about the same age. They both have never been married. *In my opinion he will not be able to not be thinking about these issues, especially on the second phase. And I don't think he would be a good juror because of that.*
>
> THE COURT: The Court finds that to be race neutral as well. So now we will go back and have the defense starting at 37.

Tr. 325-26 (emphasis supplied).

The State here expressly admits that Mr. Ward's close demographic resemblance to Mr. Pitchford is what motivated the strike. It is clear from the four corners of the reason given that it was the entire panoply of those demographics, and most particularly Mr. Ward's race, not merely his age, marital status and age of his child that were on Mr. Evans mind when he decided that Mr. Ward wouldn't be a good juror from the State's point of view. [3] Reversal is thus warranted for that reason alone without proceeding any further *McGee*, 953 So.2d at 215-16 *See also Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); *State v. Harris*, 820 So.2d 471 (La. 2002) (reversing conviction and death

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On the basis of responses during general voir dire, is clear that Mr. Ward and Mr. Pitchford are not related to each other by blood or marriage and that the prosecutor was using the term "related" to mean the demographic similarities, not any sort of actual kinship. Tr. 188-93.

[3] On their face, the prosecutor's words make it clear that "closely related" is meant to expand upon the articulated non-racial or gender demographics which the two men had in common, not merely rehash them. Mr. Evans further elaboration that he worried that the similarities might affect the juror's ability to deliberate at the penalty phase because he would instead be "thinking about these issues" similarly makes no sense if the issues of concern to him were limited to age, marital status and age of children. Sentencing instructions to which the prosecutor interposed no objection actually *required* deliberation at the penalty phase about at least the defendant's age and the fact that he was the father of a young child as mitigating sentence. Tr. 726-38; 768-77. R. 1206. The state did not cite any concern that the similarities would bias the juror against imposing a death sentence.

sentence for similarly stated reason).

Even if there could be doubt about the facially discriminatory meaning of Mr. Evans proffered demographic reasons without looking beyond his words, the evidence of pretext is overwhelming and requires reversal. *Randall*, 716 So.2d at 588. The State accepted 11 white venire members who shared at least one of the demographic characteristics Mr. Evans said he found unacceptable in Mr. Ward. Six of them shared more than one.[9]

The record also establishes other indicia of pretext. These are also group-based traits. There was no voir dire of Mr. Ward or any other jurors regarding these things or whether they would affect the juror's ability to serve. Appendix A at 2-3. The State's purported concern with ability to deliberate is implausible given the actual circumstances known to at the time it made

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[9] 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.
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)
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)
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 d.p. opinion (Juror 5, R. 1104) R. 817-18
Tramel, Nathalie Drake, young children, no d.p. opinion, R. 805-06; Tr. 255; (Alt. 1, R. 1104)
Parker, Lisa, similar age, young children, R. 699-701, (tendered by State Tr. 321)
Wilbourn, Lisa, similar age, child same age, R. 835-37 (Alt. 2, R. 1104) ;
Sherman, Michael, similar age, child same age R. 761-63; (tendered by State Tr. 321)

the strike. *See Snyder*, 128 S.Ct. at 1212. There is thus abundant evidence that this articulated reason was pretext for a strike based on race. *McGee*, 953 So.2d at 215-16; *Flowers III*, 947 So. 2d 910.

The other reasons articulated for striking Mr. Ward – that he had numerous speeding violations and that he had expressed no opinion on the death penalty, Tr. 326 – are rendered spurious by disparate treatment of comparable whites and substantial proof that undercuts the credibility of the assertion that the State actually cared at all about this.

On the speeding violations, the juror questionnaire asked about criminal charges and convictions, but specifically, with the assent of the State, excluded speeding or traffic violations from what venire members were required to report. R. 352-53, Tr. 4. Given that it had not asked for this information on all venire members when it could have done so, it is also evident that if the State actually did research Mr. Ward's traffic offense history it was interested only in him, and not in the rest of the panel. There is also no record proof or evern reference to a court docket establishing that these offenses acually existed. This justification is thus unsupported by the record, implausible, and like the demographic one, based on disparate treatment of this black panel member from white ones.

As to the lack of opinion on the death penalty, this Court has previously held that the State's use of death penalty attitudes to justify striking blacks renders the whole process "suspect," if it fails to strike white jurors with similar death penalty attitudes. *Flowers III*, 947 So. 2d at 935-39. The state did exactly that here, accepting two white jurors who had answered their questionnaires in identical fashion to Mr. Ward. This, is a record sufficient to establish that

this reason for the strike of Mr. Ward is also pretextual.[10] This Court must therefore reverse. *Id.*

Venire Member 30 -- Linda Ruth Lee

The first black venire member presented to the State, and the first one it struck, was Linda Ruth Lee, a 26 year old black female. R. 635. Tr. 324-25. Like over half of the white venire members the State found acceptable, Ms. Lee's jury questionnaire showed that she "generally" though not "strongly" favored the death penalty R. 638. The State offered the following as its sole purported non-racial reasons for striking Ms. Lee:

> MR. EVANS: Yes, sir. S-2 is black female, juror number 30. She is the one that was 15 minutes late. 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. Juror number S-3 –
>
> THE COURT: That would be race neutral as to – as to that juror.

Tr. 324-25. As with Mr. Ward, the trial court conducted no further inquiry. Had it done so, it would have had to conclude that the stated reasons were pretextual.

The first reason cited, late return from lunch is not factually disputed. However, the record concerning it also establishes without dispute that the tardiness was fully explained by the juror and accepted by the court as being the result of her having to walk to and from the courthouse at lunchtime because she had no car. Tr. 239-40. In fact, when the State attempted to have this individual (though not any of the several other jurors who were late back from lunch that day, Tr. 238-39) removed for cause, the trial court found the tardiness to be irrelevant to her service, and actually commended Ms. Lee for "trying real hard to fulfill her civic duty as a

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[10] White venire members with same lack of opinion on death penalty accepted by State:
Ward, Laura Candida (Juror 5, R. 1104) R. 818 (no relation to Carlos Ward Tr. 212-19)
Tramel, Nathalie Drake (Alternate 1, R. 1104) R. 806; Tr. 255
Both of these individuals also have young children, one of the demographic characteristics cited by Mr. Evans as a putative reason for its strike of Mr. Ward.

juror." Tr. 318. This record explanation made her tardiness that day completely without pertinence to Ms. Lee's ability to serve as a juror. The jury was going to be sequestered. They would be transported in a group by the bailiffs to and from the courthouse not only at lunch time, but at all times, so there is no possibility this could happen during trial.

This reason is invalid in the same way way the one rejected by the Supreme Court for the strike of the black juror in *Snyder* was invalid. In *Snyder*, the State attempted to justify the strike of a black juror because the juror had mentioned a concern that lengthy jury service would prevent him from completing his student teaching obligations. The prosecution in *Snyder* contended that it feared this would lead the juror to not deliberate carefully, and possibly to go for a compromise lesser verdict, and had stricken him for that reason, not because of his race. As in the instant case, however, the record in *Snyder* established that the prosecutors fears were unfounded. Subsequent inquiry had established that the *Snyder* juror's teaching obligations would not be interfered with if the trial was a short as the state had already told the court it would be, and the fact that a compromise verdict would require all 12 jurors to agree made the reason even less persuasive. The Supreme Court therefore found the justification in *Snyder* to be specious, 128 S. Ct. at 1211. This Court should do the same with the State's first reason for striking Ms. Lee.

The second reason advanced by the prosecutor for striking Ms. Lee – her alleged history of mental problems – is likewise a mere pretext for discrimination based on her race. With respect to this reason, the record establishes most of the "indicia of pretext" and affirmatively calls into question the veracity of this reason and the legitimacy of the prosecutor's claim it was of significance to him in striking her from the jury.

First, there is nothing at all in the record to verify the truth of the hearsay information

upon which the prosecutor claimed to be relying, though the officer named as its source was actually under subpoena returnable to the day of jury selection and could have confirmed it if it were true or really something the State was interested in. R. 215. Failing to make a record when it is possible to do so is suggestive of discrimination in and of itself. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). Second, the prosecutor did not voir dire Ms. Lee or any other juror about whether they suffered from any mental illnesses and/or whether those illnesses were affecting them at the time of the trial. Tr. 239-62. Third, the prosecutor engaged in disparate treatment regarding lateness. Though several other jurors were apparently not back from lunch at the time prescribed by the Judge for their return, requiring a delay in the proceedings, Tr. 238-39 the State made no effort to have anyone except Ms. Lee removed from the jury for that shortcoming. Tr. 307-18. Fourth, to the extent that he presumed anyone who had a history of mental illness would be an unfit juror, the prosecutor was also relying on a group based trait and not the actual status of the individual juror.

Finally, and perhaps most destructive of the credibility of the claim that it was the reason for striking Ms. Lee, the State did not even raise this potentially disqualifying medical condition less than 30 minutes earlier when it was attempting to have Ms. Lee struck for cause for being late to court. Tr. 318. This sequence suggests that the prosecutor simply went looking for another excuse to rid itself of this black juror when the original one was rejected. This scenario is also borne out by the fact that immediately after the court rejected the entire premise of lateness as affecting her ability to serve, the State's attorney requested additional time to prepare before making its peremptory challenges. Tr. 319.

Both reasons advanced for the strike of this juror are therefore clearly pretextual, and the conviction and sentence of Mr. Pitchford must be set aside because of this, as well.

Venire member 31 -- Christopher Lamont Tillmon

Mr. Tillmon's juror questionnaire, R. 799-802, shows that he was a 27 year old black male who, like two white venire members of his age or younger accepted by the State, "strongly favor[ed]" the death penalty. Appendix A at 3. [11] He had also been previously employed in law enforcement. Despite Mr. Tillmon's possession of these highly-desirable-to-the-prosecution characteristics, the prosecutor peremptorily struck him from the jury panel:

> MR. EVANS: S -3 is a black male, number 31, Christopher Lamont Tillmon. 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.
> THE COURT: What was his brother's name?
> MR. EVANS: I don't even remember his brother. He said that he had a brother convicted of manslaughter.
> THE COURT: On that jury questionnaire?
> MR. EVANS: Yes, sir.
> THE COURT: I find that to be race neutral. And you can go forward.

Tr. 325.

While a juror having a relative convicted of a crime can be a legitimate non-racial reason for striking that juror, *Lockett v. State*, 517 So.2d 1346 (Miss. 1987), in this instance it was entirely pretextual because of disparate treatment by the State of two similarly situated white venire members. Appendix A at 1. [12]

This disparate treatment alone is sufficient establish pretext, but other indicia also apply here as well. Neither Mr. Tillmon nor the two comparable whites was questioned on voir dire

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[11] Michael Sherman, Venire Member 17, R. 761-64; Brantley Clark, Venire Member 19, R. 417-20.

[12] Venire member 74, Jeffrey Counts, a 37 year old white male was seated as Juror 12 notwithstanding that his juror questionnaire revealed that he had an uncle who was a convicted felon. R. 479-80, 1104. Tr. 328. The State also accepted white male venire member 65, Henry Bernreuter, whose juror questionnaire disclosed not one, but two, close relatives convicted of serious felonies—a son convicted of burglary and a stepson convicted of forgery. R. 399-400. Tr. 326.

about the convictions or whether they actually bore or did not bear any resemblance to the crime with which Mr. Pitchford was charged. Tr. 239-62. The prosecutor's actual knowledge concerning these matters was revealed on the court's inquiry to be virtually non-existent. It knew nothing about the facts of the manslaughter or even name of the brother. Tr. 325. It is abundantly clear that this strike, too, was motivated more by the race of the juror than any criminal conduct of any of his family members, and the Defendant's conviction must be reversed as a result.

Venire Member 18 Patricia Anne Tidwell

Ms. Tidwell, a 37 year old black female who generally favored the death penalty was the prosecutor's strike S-4. R. 787-90. The district attorney gave two reasons for that strike:

> MR. EVANS: S-4 is juror number 43, a black female, Patricia Anne Tidwell. 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. And also, according to police officers, she is a known drug user.
>
> THE COURT: During voir dire, in fact, I made a notation on my notes about her being kin to this individual. I find that to be race neutral.

Tr. 325. Once again, the trial court conducted no further inquiry. Had it done so, it would similarly have had to conclude that the stated reasons were pretextual regarding Ms. Tidwell, as well.

Ms. Tidwell's juror questionnaire establishes that she has a brother, whose name she did not set forth in the questionnaire, who was convicted of sexual battery, R. 788. She also responded to the State's question directed only at her (the only question it asked of any juror in voir dire in any way related to the issue of convicted relatives) confirming that she had a cousin named David Tidwell. Tr. 261. Beyond that, however, the State's proffered reasons are entirely

without record support beyond the bare assertion by the DA that they exist.[13]

What the record does contain, however, is the same irrefutable evidence of disparate treatment of similarly situated whites Jeffrey Counts and Henry Bernreuter. R. 399-400, 479-80, 1104. Tr. 326, 328. Appendix A at 1. Again, as noted in the discussion of the strike of venire member Tillmon, there was no voir dire of any juror on this topic or its effect on the juror other than the single question confirming that Ms. Tidwell had a cousin named David Tidwell. These two indicia of pretext are enough to reject this as a legitimate reason for the strike.

The second purported reason, the deliberately vague allegation that Ms. Tidwell is, by hearsay from unnamed police officers, a "known drug user" would, absent the privilege accorded participants in legal proceedings, likely constitute actionable libel if disseminated without further verification from the purported police source. *See Journal Publ'g Co. v. McCullough*, 743 So.2d 352, 360 (Miss.1999). The prosecutor does not identify the police officer source for this damaging inside information. However, there were ten Grenada County police officers under subpoena for that very day. R. 251-53. If Ms. Lee were really generally to law enforcement as an illegal drug user, it is inconceivable in a jurisdiction the size of Grenada County that none of these officers could verify that information. However, as with Captain Conley and Ms. Lee, none was called upon. There were no questions about drug use or uncharged crimes on the juror questionnaire, s no voir dire of Ms. Tidwell or of any other juror about illicit drug use or other

[13] In stating his reasons to the Court, the District Attorney appears to confound two different relatives of Ms. Tidwell with each other – a brother, name unknown, who was convicted of sexual battery, and a cousin named David Tidwell who had been charged, though not convicted, of a shooting offense. This would indicate that, as with the relative of struck venire member Mr. Tillmon, the DA probably had little or no personal knowledge about at least the closer relative, the brother, or his offense and casts further doubt on the credibility of these as actual reasons for the strike of Ms. Tidwell.

uncharged crimes, and apparently no general investigation of the venire for these things either.[14]

The totality of the circumstances demonstrates here that both reasons for striking Ms. Tidwell are also pretextual, after-the-fact justifications conjured by a prosecutor whose apparent object was to keep as many blacks off the jury as he could without getting caught under *Batson*.

Other Evidence Of Record That The State Engaged In Discriminatory Jury Selection

In addition to the individual instances of disparate treatment of similar white and black venire members itemized above, the State's overall pattern of jury strikes itself demonstrates disparate treatment. The State used only seven of the 12 peremptory challenges available to it, peremptorily striking 4 of 5 (80%) black jurors on the panel but only 3 of 35 (8.5%) white ones. Tr. 321-29. This is a strike rate over 9 times greater for blacks than for whites, and is thus an affirmative demonstration of discrimination.[15]

Similarly, the State's election to forego using five of its remaining peremptories after it had dealt with all the black venire members further establishes the pretextuality of the reasons it claimed it used for striking blacks. It was during this portion of the process, when there were

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[14] The fact that Ms. Lee had never been arrested or convicted of a drug offense in and of itself calls into question the reliability and veracity of the assertion that she was "known to police" as a user. This unfounded assertion is in contrast to the situation in *Booker v. State*, --- So.2d ----, 2008 WL 4665195 (Miss. 2008) where the prosecutor made very specific representations about prior criminal charges purportedly lodged against the juror and the court in which they were lodged, and the trial court held a full third step hearing on motion for new trial and decided on conflicting evidence that, despite the fact that the information turned out not to have been true, the State had legitimately relied on it. In a 5-4 decision, the majority found it must deferto that finding. However, in the instant case we have neither the specific information nor the third step inquiry. There is thus nothing to defer to, and the record establishing pretext requires reversal. *Snyder*, 128 S. Ct. at 1211.

[15] In the employment discrimination context, this selection rate disparity would itself raise a presumption of discriminatory impact. Regulations propounded by the Equal Employment Opportunity Commission prescribe that selection criteria may be deemed discriminatory -- and require that those criteria be dispensed with unless demonstrably necessary to the job-- when the rate of selection of one race resulting from the use of the criteria is less than 4/5ths of the selection rate of the other. *See* 29 C.F.R. § 1607.4(d). The DA's rate of selecting blacks as jurors in the instant case is barely over 1/10th of his rate of selecting whites.

only white venire members remaining on the panel, that the State, despite having several peremptory strikes remaining, accepted both whites with felons in the family (Jeffrey Counts, Juror 12, R. 479-80; Henry Bernreuter, venire member 65, R. 399-400) and one of the two white jurors who had no opinion, and even affirmative doubts, about the death penalty (Nathalie Tramel, Alt. 1, R. 818, Tr. 255). In addition two of these jurors, and two others accepted at this point, also had young children, and/or had age and/or marital status characteristics that had been cited as reasons for striking black jurors. (Tramel, Counts, Michael Curry, venire member 77, R. 497; Lisa Wilbourn, Alt. 2, R.837). Tr. 326-2. App. A.

Had the State really cared about these things, it would have been able to use its remaining strikes strategically to eliminate at least some of these jurors in favor of panel members further down the list without criminally convicted relatives and with opinions that either generally or strongly favored the death penalty. Tr. 326-29; R. 1107-09 (judge's strike list); 395-98; 471-74; 515-18; 631-34; 715-18 (juror questionnaires of available venire members not reached).

The totality of the circumstances here overwhelmingly demonstrates that the State's peremptory challenges of black jurors were exercised in violation of the Equal Protection guarantees made to both the Defendant and to the rejected venire members by the United States Constitution, and require reversal here. *Powers v. Ohio*, 499 U.S. 400 (1991).

B. *The Trial Court Otherwise Deprived Defendant Of A Jury Comprised As Required By The Sixth And Fourteenth Amendments*

In addition to objecting to the State's racially discriminatory use of peremptories the Defendant also timely objected to exclusions because of the *Witherspoon* death qualification process as a violation of both the fair cross section and equal protection requirements of the United States Constitution. The trial court erroneously denied those claims as well. Tr. 315-19.

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Racial Discrimination as a Result of Death-Qualification Process

At the conclusion of voir dire, the trial court excluded 36 of the 96 otherwise qualified prospective jurors from the jury panel on the grounds that they were philosophically unable to consider imposing the death penalty in the event of conviction. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). R. 307-11. This exclusion disproportionately eliminated black venire members from serving on the trial jury, removing 30 of the 35 (87%) otherwise qualified blacks but only 6 (one of them Hispanic) of the 61 (under 10%) of the otherwise qualified whites. Prior to the elimination of these "*Witherspoon*-excludables," the venire had been 36% African-American, statistically similar the demographics of the general population of Grenada County. After this process, and some additional cause based excusals (entirely of whites) the proportion of blacks on this panel was reduced almost threefold, to less than 13% of a panel in a county that was over 40% African-American. R. 1104-09.

In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court held that the exclusion of people who could not consider the death penalty from trial juries considering a capital defendant's guilt did not, in and of itself, violate the Sixth Amendment's "fair cross section" requirement. *Id.* at 175. However, it did so expressly because such exclusion was NOT, under the facts of that case, the same as excluding people on the basis of immutable characteristics such as race, ethnicity or gender. *Lockhart*, 476 U.S. at 176. [16]

Lockhart does not dispose of, or even address, the issue of whether death qualification

[16] In fact, *Lockhart* expressly reaffirmed the unconstitutionality, under both the Sixth and Fourteenth Amendment, of practices which disproportionately remove people from jury participation on the basis of race, sex, ethnicity or other immutable characteristics. 476 U.S. at 175 (citing *Peters v. Kiff*, 407 U.S. 493 (1972) (equal protection); *Duren v. Missouri*, 439 U.S. 357, 363-364 (1979) (fair cross section); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (same); *Castaneda v. Partida*, 430 U.S. 482 (1977) (affirming the validity of statistical evidence of disproportionate exclusion to establish an equal protection violation)).

under *Witherspoon* which *does* result in disproportionate racial, gender or other ethnic exclusion from of juries or jury venires was permissible. *Lockhart,* 476 U.S. at 176 -177. The instant case, on the other hand, clearly presents this issue. First, the statistically significant disproportionate exclusion of black jurors as a result of death qualification in this case cannot be denied, and in itself establishes a prima facie case that the Equal Protection Clause has been violated. *Castaneda*, 430 U.S. at 495-97 and nn. 15-17. Second, this Court has already condemned this prosecutor for trying to "arbitrarily skew" the racial composition of trial juries, and singled out his use of information elicited as a result of *Witherspoon*-related voir dire as being a troubling and suspect component of that effort. *State v. Flowers, (Flowers III)*, 947 So. 2d 910, 921-28 (Miss. 2007). The conviction must be reversed because it was tainted by this racial discrimination as well.

Improper Removal of Jurors Qualified to Serve Under Witherspoon/Witt

Even assuming, *per arguendo*, that *Witherspoon* death qualification is permissible under the demographic circumstances of the instant case, four of the 36 jurors who were excluded under that process actually did not meet the requirements for such removal. [17]

Like the 32 panel members who did meet the requirements of *Witherspoon* for excusal, each of these individuals expressed scruples about the death penalty on his or her juror questionnaire and confirmed those scruples in general voir dire on the subject that. Tr. 225-28; 247-51. Unlike the other 32 scrupled jurors, however, these four individuals qualified their responses when further questioning put the determination they were to make in the legally required context, *i.e.* that they be able consider both aggravating and mitigating evidence and

[17] The four venire members and the record containing their relevant information are as follows: #3 Rodell Crawford, R. Tr. 247; 266-67; 300-01; #5 Nadine Coleman, R. 478 , Tr. 225, 248, 268, 301-02; #15 Lovie Willis, R. 846 Tr. 225, 249, 269, 302-03; #45 Dora Wesley, R. 830 Tr. 228, 251, 275-76, 302-03.

both available sentencing options, *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Morgan v. Illinois*, 504 U.S. 719 (1992)).

Both stated they could give consideration to both legally permissible sentences in light of the evidence of aggravation and mitigation before them. Tr. 266-76. *See Gray v. Mississippi*, 481 U.S. 648, 653 (1987) (finding that "[a]lthough the voir dire of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty in an appropriate case and the judge concluded that Bounds was capable of voting to impose it."); *accord Russell v. State*, 670 So. 2d 816, 824 (Miss. 1995) (panel member was qualified to serve as juror based on indication in the record that he would impose the death penalty "if the circumstances were bad enough.").

The trial judge undertook individual voir dire of these four panel members and re-elicited their earlier responses, but did so only when, in contravention of the requirements of *Morgan*, and over the objection of the defendant, the judge committed legal error by isolating the query from its proper context and asked only about considering the death penalty standing alone. Tr. 300-03; R. Supp. 2 1263(A).

Based on their answers to the only legally proper questions asked them concerning their ability to comply with the law regarding imposition of the death penalty, these individuals were qualified to serve as jurors under *Witherspoon* and its progeny. A death sentence must vacated where the trial court erroneously excludes even one juror who had conscientious scruples against the death penalty but was still eligible to serve under *Witherspoon* and its progeny. *Gray v. Mississippi*, 481 U.S. 648, 659 (1987) (reaffirming the *per se* rule in *Davis v. Georgia*, 429 U.S. 122 (1976) (*per curiam*)). Under *Gray* and *Davis*, Mr. Pitchford's death sentence must be vacated based on the erroneous removal of any one of these panel members.

C. *The Trial Court Erred In Precluding The Defense From Questioning Prospective Jurors Concerning Their Ability To Consider Mitigation Evidence*

In a capital case, prospective jurors must be examined not only for biases or knowledge of the case, the parties or the witnesses pertinent to the specific facts of the case, but must also be questioned regarding their views on the death penalty, and whether those views would interfere with their being able to fairly consider guilt or innocence and/or to consider everything needed to weigh the sentence options before them *Witherspoon*, 391 U.S. 510, *Morgan*, 504 U.S. 719.

Full voir dire is the key to the parties being able to identify and make cause challenges to jurors who cannot comply with their oaths and consider mitigating circumstances:

> Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

Morgan, 504 U.S. at 733-34 (emphasis in the original).

This includes within it the right to query the jurors about their understanding of mitigating circumstances that might arise in the particular case and their ability to balance those against aggravating circumstances that are expected to be shown. *See, e.g., Foster v. State*, 639 So. 2d 1263, 1275-76 (Miss. 1994) (jurors "properly voir dired on considering the facts and following the law including the critical issue of being able to balance aggravators against mitigators in considering a death penalty.")

In the instant case, the defense attempted to voir dire certain panel members about their understanding of mitigation evidence and that balancing process. It had previously raised its right to do so by way of pretrial motion, and the trial court reserved ruling pending objection by the State at trial. Tr. 74-78. R. 979-81. At trial, the defense merely asked if the juror understood

that mitigation went "to who that person was before your met them" and alluded to Mr. Pitchford's age. The State objected, Tr. 285, notwithstanding that age is a statutory mitigating circumstance on which it was going to ask that the jury be instructed, Tr. 726-38; 768-77. R. 1206. The Court sustained the objection, ruling that "[y]ou can ask them if they would consider mitigating factors or would they be automatically disposed to the death penalty" but restricting any inquiry into any "specifics" beyond that. Tr. 286. The Defense had no choice but to comply for the entire balance of its voir dire. Tr. 297-97.

This was clearly error. The questions being asked by defense counsel, went directly to the inquiry the Supreme Court contemplated would be necessary for the parties and a trial court to carry out their duties in empanelling a fair jury within the parameters of *Witherspoon* and *Morgan*. As this Court has noted, even though it would be inappropriate to elicit in voir dire a commitment from jurors to vote one way or the other if certain hypothetical facts are proven, that restriction cannot preclude examination of jurors by attorneys "to probe the prejudices of the prospective jurors to the end that all will understand the jurors' thoughts on matters directly related to the issues to be tried." *West v. State*, 553 So. 2d 8, 22 (Miss. 1989). The seating of even one juror who had not been vetted for his or her ability to fairly consider sentences other than death would vitiate the sentence; this error therefore requires reversal of the sentence in this matter. *Morgan*, 504 U.S. at 729 ("If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.").

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

For over seventy years, the trial courts have been given the duty to assure appointment of capital counsel to the indigent "at such a time or under such circumstances as to [not] preclude

the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. 45, 71 (1932). *See also Strickland v. Washington*, 466 U.S. 668 (1984). Where the death penalty is involved even more stringent obligations of investigation and preparation are imposed. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (adopting ABA Guidelines); *Williams v. Taylor*, 529 U.S. 362 (2000); *Smith v. Dretke*, 422 F.3d 269, 280 (5th Cir. 2005) (granting COA on ineffectiveness claim for failure to investigate criminal and penal history of client); *Anderson v. Johnson*, 338 F.3d 382, 392-93 (5th Cir. 2003) (failure to conduct independent investigation renders counsel ineffective); *Lockett v. Anderson*, 230 F3d 695 (5th Cir. 2000) (two Mississippi death sentences reversed where trial counsel failed to follow investigative leads, gather records and present these to competent experts).

This includes the right to have adequate time for the defense to prepare and reasonable accommodation of the needs of the myriad and distinctive witnesses whose testimony is essential to an adequate defense. In the instant matter, the defense attorney endeavored to obtain all these things from the trial court and was refused them. This, as counsel told the trial court it would when he sought these accommodations, Tr. 46, deprived Terry Pitchford of effective assistance of counsel and requires reversal here.

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

Whether or not to grant a continuance is within the discretion of the trial court, and it is reviewed on appeal under an abuse of discretion standard. *Stack v. State*, 860 So.2d 687, 691-92 (Miss. 2003). However, even where discretion is the standard, in a capital case, the required heightened scrutiny must still be applied, and the discretion examined in that light, "with all genuine doubts to be resolved in favor of the accused." *Walker* 913 So.2d at 216. Where, under the standards of *Wiggins* what is needed by the attorney is additional time to do what the

constitution requires of him to mount an effective defense, it is an abuse of discretion to refuse him that time. *See, e.g. Edge v. State*, 393 So.2d 1337, 1342 (Miss.1981); *Thornton v. State*, 369 So.2d 505, 506 (Miss. 1979); *Lambert v. State*, 654 So.2d 17 (Miss. 1995).

Defendant's continuance request in this matter was made in writing in advance of the trial date and included, as required, a clear and specific, statement of both the factual and legal grounds and the facts for the request. *Stack*, 860 So.2d at 691-92 (upholding denial of continuance because the request was made only ore tenus on morning of trial). The written request was also supported by affidavits concerning those grounds. R. 867-954; 1045-85. At the date which the trial court made available for hearing pretrial motions, the Defendant and reiterated these grounds, Tr. 32-38, expressly representing to the trial court that it would render him ineffective under constitutional standards to have to proceed on the date set for trial. Tr. 46. R.E. Tab 4. He renewed this motion on the morning of trial. Tr. 339 and cited the denial as grounds for a new trial in his motions for that relief as required to preserve this issue for appellate review. R. 1249-52, 1261-63; Supp. R. 2 1251 (A) and (B), 1263 (A), (B), (C).

The ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (February, 2003) ("ABA Guidelines") have been adopted as the standards for representation in capital cases. *Wiggins*, 539 U.S. at 524-25. [18] Hence, they are not merely

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[18] The ABA also addresses the requisites for capital defense in other guidelines:

> [t]he workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea.

ABA, *The Ten Principles Of A Public Defense Delivery System*, February 2002, citing *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also ABA Standards For Criminal Justice: Providing Defense Services*, Standard 5-5.3cmt. (3d ed. 1992). *See also Model Code Of Professional Responsibility*, EC 2-30 (1997); *Model Rules Of Professional Conduct Rule* 1.3 cmt. 1 (1997) ("A lawyer's workload should be controlled so that each matter can be handled adequately.").

aspirational, but are constitutionally required to be followed. Relevant portions of the substantive requirements of these Guidelines were also included in the record on the continuance request. R. 925-54.

As the record on the continuance motion showed, almost the entire burden of putting in the required pretrial preparation attorney time in Mr. Pitchford's case fell to Mr. Carter, whose schedule did not permit him to follow the requirements of these guidelines and complete the extensive investigation into matters relevant to mitigation of sentence in the event the defendant is convicted and found eligible to receive the death penalty, even where there are genuine defenses to guilt and/or to that eligibility which must also be investigated and prepared for presentation to the jury. *See e.g. Ross v. State*, 954 So.2d 968, 992-92 (Miss. 2007). [19]

Affidavits of two experts in the investigation and preparation of death penalty defense, one of them a highly experienced Mississippi practitioner, explained in detail exactly how the circumstances of defense counsel in the case *sub judice* prevented him from fulfilling the minimum standards of investigation and preparation he owed Mr. Pitchford. R. 1067-85. Mr. Carter also, in writing and at the motion hearing on the continuance, described in specific detail what he and his team needed to do to prepare for both phases of the trial and why they had not been able to do it. R. 867-75, 1045-85, Tr. 35-38. R.E. Tab 4.

The trial court disregarded, and even disparaged, this unrefuted evidence, often interrupting counsel's argument regarding the request to do so. Tr. 38-39, 42-45. R.E. Tab 4.

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[19] Ray Baum, the local counsel appointed several months before Mr. Carter was and compensated by Grenada County was, according to his Itemized Statement, able to devote less than 71 hours to the case prior to trial, perhaps because the hourly compensation was so low. R. 1253-57. The conflicting obligations of Mr. Carter, were set forth in detail in the continuance motion, which included a timeline showing how the ten other cases, nine preexisting his appointment in this one, in which Mr. Carter had obligations from the time of his appointment affected his ability to prepare and supported granting the continuance. R. 1047-48.

Instead, the trial court focused on its own desire for speed, finding that there had already been too many continuances (all granted prior to Mr. Carter's initial appearance in the matter by local counsel, and not by Mr. Carter), Tr. 49-54, R.E. Tab 4, and even going so far as to regard the request for time to complete a mitigation investigation as "in effect a concession that there is not much chance of him being found innocent" rather than the process that must precede making any decisions with respect to strategy or concessions of any kind. Tr. 50. R.E. Tab 4. [20] This was error, and renders the denial of the continuance a manifest injustice and a denial of defendant's rights to effective assistance of counsel under the Sixth Amendment, and his due process right to fundamental fairness and to present the defense of his choice. [21]

The actual adverse effect on the guilt phase, and resulting prejudice to the Defendant as a result of the denial of the continuance comes in the cumulative effect of numerous lesser

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[20] Both this Court and the U.S. Supreme Court have made investigation *before* determining what evidence would or would not be useful in mitigation the keystone of effectiveness, *Rompilla* 545 U.S. 374; *Ross v. State*, 954 So.2d 968, 992-93; *Wiggins*, 539 U.S. 510. Mr. Carter thus appropriately focused his factual explication of the need for the continuance on why, for reasons unrelated to his or his team's diligence, this investigation had not yet been completed. Tr. 32-34, Supp. Tr. 25. The trial court, however premised its ruling on ultimate conclusions about whether or not the as yet uncompleted investigation would yield witnesses that were of benefit to a theory of mitigation, at one point disparaging a potential witness from whom he had no other information other than that he had been retained by the defense as a non-credible "hired gun." Tr. 38-45, 53. It went so far as to affirmatively finding opinions of the Mississippi State Hospital mental health evaluation regarding things largely irrelevant to the actual mitigation theories being considered as sufficient for presentation of mitigation, despite the fact that Mr. Carter had specifically disclosed and was planning to call a psychiatrist who had evaluated Mr. Pitchford for other purposes who was going to testify to things that the State hospital people could not. Tr. 40-42, R.E. Tab 4, Supp. Tr. 19-20; 27; 30-31; 34.

[21] The United States Supreme Court has observed that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citing *Chandler v. Fretag*, 348 U.S. 3(1954)). The "denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant's constitutional rights." *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986). *See also Bennett v. Scroggy*, 793 F.2d 772, 774 (6th Cir. 1986) citing, *inter alia*, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (relying on the sixth amendment and due process of law). *Nilva v. United States*, 352 U.S. 385 (1957). *See also Morris v. Slappy*, 461 U.S. 1, 11 (1983) ("an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel").

weaknesses that an attorney would not have if he had not been required by erroneous trial court rulings to make hobson's choices about how to allocate his preparation. *See Moore v. Johnson*, 194 F.3d 586, 619-20 (5th Cir. 1999) (addressing cumulative effect in context of attorney-caused errors at trial).

Because these weaknesses are product of trial court error in denying the defendant's counsel the required time to prepare, they cannot be deemed informed strategic decisions that would vitiate a finding of ineffectiveness if their genesis were soley with counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Any "strategy' that may have entered into these decisions was generated in a context where the lack of time to complete investigation and preparation was created by the trial court's erroneous refusal to accord that time, and to the extent it prejudiced the defendant, requires reversal. *Edge v. State*, 393 So.2d 1337, 1342 (Miss.1981); *Thornton v. State*, 369 So.2d 505, 506 (Miss.1979); *Lambert v. State*, 654 So.2d 17 (Miss. 1995). Some non-exclusive examples illustrate the problem.

Despite having announced ready prior to the commencement of jury selection at 9:00 a.m. the first day of trial, Mr. Carter had to inform the court that he was not fully prepared to begin his opening at 5:00 p.m. that day and renewed his motion for continuance. The trial court did not accord that announcement the courtesy (or possibly the constitutionally mandated deference to a defense attorney's announcement of his inability to proceed at a particular time, *Edge*, 393 So. 2d at 1342) of recessing the case till the next morning, even though it would have added no more than 20 minutes to the next day's proceedings. Tr. 337, 339. This was in fact one of many times the trial court refused to give defense counsel small accomodations requested in

order to deal with the exigencies that the denial of the continuance had placed them under. [22]

Another toll of the denial of continuance was evident at the guilt-phase jury instruction conference. Towards the start of that conference, defense counsel was forced to admit that because of the time pressure the court had put him under, he might have filed duplicate instructions on some points, but "I can't say my mind is working well enough to know." Tr. 594. Instead of working with him in light of what had to have been a painful admission, however, the trial court became increasingly annoyed and pressuring Tr. 604-05. When the defense requested time to respond to a state's instruction about to be hastily drafted, the trial court unleashed an unnecessary torrent of chastisement on him for having not been sufficiently diligent to avoid duplicated or miscaptioned instruction. Tr. 611-12.

Performance by defense counsel was also evidently affected during testimony. When questioning his witnesses, the prosecutor made egregious use of leading questions to "coach" the snitches and the co-participants in a separately indicted conspiracy case into testifying to his satisfaction and to make sure and to present the defendant's statements in a way that elided the information from them that the jury needed to assess whether defendant's degree of participation in the crime itself. Very few objections to this were made by the defendant, and those that were either overruled summarily or simply ignored. Tr. 502-09; 522-25, 530-31; 564 -66, 571-73.

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[22] THE COURT: I don't know with Mr. Carter having had this case for almost a year why he can't be ready for opening statements on the day that the trial is scheduled to commence. So I don't find that motion in the least bit to be well taken. And we will have opening statements, and that will be all we will do until we resume in the morning." Tr. 339. Actually, Mr. Carter had only been appointed and entered his appearance in the matter *sub judice* in June, 2005, somewhat less than 8 months earlier. Other defense requests for even a few minutes to gather counsel's thoughts and comply with the trial court's requests were similarly rejected. *See, e.g.* Tr. 581 (break at 11:30 before commencing defense case) 590, 610 (giving only 5 minutes during instruction conference to review case found by court over lunch hour on which court was relying to refuse previously granted instructions; another 5 prepare instruction to meet one hastily prepared by the State), 704-05 (according only 10 of 15 minutes requested to determine final order and content of mitigation testimony)

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The impediment to preparation of the penalty phase by the lack of a continuance was even more extreme. Because of the short time frame, no witnesses from Mr. Pitchford's paternal family in California were able to be interviewed to possibly testify from a more detached perspective than local family members and add to the jury's understanding of who that father was, and why his death was of such significance to Terry. Tr. 37-38. [23]

The most significant restriction, however, was the inability to present the mental health testimony needed to explain the dynamics of that relationship, as well as other physical and psychological traumas operating on Terry during the nine years between his father's death and the murder of which the jury had just convicted him. Tr. 40-42, Supp. Tr. 19-20; 27; 30-31; 33-34.[24]

Failure to fully investigate and develop such evidence where its presentation is warranted is clearly ineffectiveness in a capital case, whether it is failure of the lawyer to know to do it or of the trial court in giving a lawyer who does know how to do it the time necessary to do so. *See*

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[23] Contrary to the trial court's dismissive assumptions that their lack of connection with Mr. Pitchford would make them irrelevant, Tr. 38-39, they could offer insight into who their father was from a more objective point of view than people who were emotionally invested in Terry, his mother and his full siblings in Mississippi, who did testify, but who were more subject to impeachment because of that emotional investment. Tr. 695-720. Although some teachers who were familiar with Terry's father's presence in Terry's life before his death were able to testify from a slightly more objective perspective, they were not able to share the emotional realities of what the man was like from a son or daughter's perspective. Tr. 673-85.

[24] Mr. Pitchford had been examined by Dr. Rahn K. Bailey regarding how these issues had affected him psychologically, and the doctor provided a preliminary report containing information which the defense would have presented to the jury if Dr. Bailey had been available to testify, Supp. Tr. 30-31, 33-34. However, because the report from the examination at the state hospital whose shortcomings Dr. Bailey was needed to supplement was not available until February 2, 2006, Dr. Bailey had had to make a very hasty visit to Mississippi the week before the trial to do his examination of the defendant. The exigencies of that trip prevented putting him under subpoena. Supp. Tr. 27, 33-34. Nor, even if nor could any subpoena issued that recently have trumped any pre-existing subpoenas to which Dr. Bailey was already subject in other courts, which is what ultimately prevented his appearance at the trial. (See Argument II B., infra).

Wiggins, 539 U.S. at 523-25; *Ross* 954 So.2d at 1006.

Moreover, the too-short time frame that the trial court had erroneously placed on the defense also forced defense counsel to focus more narrowly than he should have done, and to tradeoffs in what he could and could not attend to that he would not have had to make had he been accorded the time he needed to fully prepare, particularly in dealing with the unavaiblility of his penalty phase expert. Supp. Tr. 29, 31, 34.[25] Again, because these errors in strategy or performace were forced upon counsel by the rulings of the trial court, they do not vitiate the ineffectiveness that resulted. Because those rulings worked a manifest injustice on the defendant, the conviction and sentence must be reversed. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Morris v. Slappy*, 461 U.S. 1, 11 (1983); *Lambert v. State*, 654 So.2d 17 (Miss. 1995).

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*

Although there was no express request for a continuance made at the time, Supp. Tr. 61, the record clearly establishes that after court recessed for the day on February 8, 2006, the trial court was made fully aware that the Defendant desired to present the testimony of Dr. Rahn Bailey in support of its mitigation at the penalty phase and that he would be unavailable on February 9, 2006 due to an obligation in another court that day that would not be released from that subpoena by the judge of that court. Supp. Tr. 39-40, 61. Despite that the conflict was not likely to last beyond the single day, the trial court nonetheless ordered that the penalty phase

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[25] Q. And why on the morning, on the record, did you not seek a continuance?
A. [Mr. Carter]:Because I did not believe I would get one. And the second phase of these trials is real important. It takes a toll on me. And I must admit that in the second phase, I might even have tunnel vision. I might be zeroed in on calling witnesses and, and what I plan to ask them and not much else going on around me like to get much attention from me I hate to say.
Supp. Tr. 31.

commence on the day the witness was unavailable, and in fact proceeded on that day.

Because this decision caused prejudice to Mr. Pitchford's penalty phase defense, it was plain error for the trial court not to recess the proceedings in the instant matter to permit Dr. Bailey to be available to testify. *Porter v. State*, 732 So.2d 899, 902-05 (Miss.1999) (violations of fundamental rights are also subject to plain error review); *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991) (plain error will allow an appellate court to address an issue not raised at trial if the record shows that error did occur and the substantive rights of the accused were violated). In a capital case such review may be undertaken even if it would not be appropriate where the death penalty is not involved. *Flowers I*, 773 So 2d at 326.

In this case, the harm was extreme. Dr. Bailey was the only witness who could address the issues he did. Tr. 30. His testimony was about matters not addressed in the hastily done examination by the Mississippi State Hospital ("Whitfield") which had been ordered in September 2005, but not done until January 2006, or reported on till January 26, less than two weeks before the trial setting. R. 1023.[26] Dr. Bailey, on the other hand, focussed his evaluation

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[26] The charge to Whitfield in September 2005, when the order was entered, was to examine Mr. Pitchford on issues of competency, sanity and ability to waive his constitutional rights pertinent to the guilt phase, and to make findings on only three mitigation- relevant issues:

> to be tested to determine whether or not he is considered retarded under the standards set forth by the Atkins case and to determine any mitigating circumstances; especially whether the offense with which the defendant is charged was committed while he was under the influence of extreme mental or emotional disturbance; and whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

R. 177-78 (Order for Psychiatric Examination); R. 1023-24 (Whitfield Report). By the time the examination was conducted, the mitigation investigation that had been done over those four months indicated that the items evaluated by Whitfield would likely not be components of an effective mitigation strategy. The State hospital also made findings related to those irrelevant matters that might, nonetheless, be employed by the State against him. All this was made known to the trial court during the discussion of the pretrial motion for continuance. Tr. 42-43.

on non-statutory mitigation factors that had been noted in passing by the doctors at Whitfield, but which they had not investigated or made specific findings on how these things had affected Mr. Pitchford; nor would they have been expected to do so, since that was not part of the order upon which they acted. [27]

In light of this, the defense, having been denied the time it requested to complete a full forensic mental re-evaluation in light of the information in the Whitfield report and time to complete investigation that would permit this to happen, nonetheless went forward and retained the expert to do as much of the reevaluation as he could on the areas identified but not evaluated by Whitfield. When he was unavailable, there was no one who could present the testimony he did. Tr. 722-23; Supp. Tr. 30-31, 33-34. [28]

A defendant has the right to present expert testimony in support of his case. He is not limited to using the same experts as are available to the State if he wishes to address a subject matter the other experts cannot offer the testimony supportive of his theory of defense.

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[27] The report from Whitfield also identified certain areas of "non-statutory mitigation" that were more likely to be relevant, including a "history of head injuries," the relationship between Mr. Pitchford and his deceased father, and reported substance abuse and violence issues with the stepfather who had replaced him. R. 1025. Supp. Tr. 33. No further evaluation or expert opinion was, however, offered regarding why or how any of these reported factors affected Mr. Pitchford or related to his life history. R. 177-78. Dr. Bailey on the other hand had been retained specifically to follow through with these things. Supp. Tr. 30-31, 33-34

[28] On February 8, the trial court announced it would be proceeding with the penalty phase the next day. The record in open court on February 9 established that Dr. Bailey remained unavailable and was the only mental health expert that the defendant wished to call. Tr. 722-23. The trial judge recalled an off-record conversation earlier that day in which the defense had said that it were not going to call Dr. Bailey, Tr. 43. Defense counsel had no recollection of discussing the matter off record at all other than the night before, but reiterated that he did not call Dr. Bailey or pursue anything further regarding him on February 9 because of his belief that the decision of the trial court the evening before not to delay the penalty phase was a final decision that he would have to work around, and the "tunnel vision" of preparing the witnesses he did have. Tr. 31.

Richardson v. State, 767 So.2d 195, 199 (Miss. 2000) (finding that defendant is entitled to have testing done where there forensic testing by the defense "could significantly aid the defense.") *See also Harrison v. State*, 635 So.2d 894, 900-02 (Miss. 1994) (reversing because defense not accorded right to obtain expert odontologist or pathologist to meet testimony by prosecution's experts in those fields; fact that state's experts testimony was adverse to the defense sufficient to require allowing such assistance); *Polk v. State*, 612 So.2d 381, 393-94 (Miss.1992) (right to obtain independent analysis of DNA results implicating the defendant in the crime). Where time to obtain and present this evidence is required, it must be accorded to the defendant. *Jenkins v. State*, 607 So.2d 1171, 1178 (Miss. 1992) (citing *Acevedo v. State*, 467 So.2d 220, 224 (Miss. 1985) and *West v. State*, 553 So.2d 8 (Miss. 1989) and reversing for failure to grant a continuance where defense counsel announced that "he was not prepared to meet the expert testimony that would be presented by these witnesses").

It is not optional for the defense to develop and, where the evidence is useful, present this sort of mitigation testimony in a capital case where in the informed strategic judgment of the defense it would be useful to do so, as was done in the instant case by retaining Dr. Bailey. *See Wiggins*, 539 U.S. at 523-25; *Ross*, 954 So.2d at 1006. Hence, the trial court's decision not to accommodate the availability of Dr. Bailey, he only expert witness who could present the necessary evidence was plain error that must be corrected by this Court. *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II*) (citing heightened scrutiny standard and reversing conviction for numerous culpability phase errors, including some reviewed under plain error standard).

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

Prosecutorial misconduct violates a criminal Defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to United States Constitution and Article 3, §§ 14, 26, and 28 of the Mississippi Constitution, *Berger v. United States*, 295 U.S. 78 (1935). Where it prejudices the outcome of the case, it requires reversal of any conviction obtained. *See Brown v. State*, 986 So.2d 270 (Miss. 2008); *State v. Flowers*, 842 So. 2d 531, 538 (Miss. 2003) ("*Flowers II*"); *State v. Flowers*, 773 So. 2d 309, 317 (Miss. 2000) ("*Flowers I*"); *Griffin v. State*, 557 So.2d 542, 552-53 (Miss. 1990); *Hickson v. State*, 472 So.2d 379, 384 (Miss. 1985).

Secure in his belief that "[w]e have dealt with the Court long enough that we pretty well anticipate what the Court is going to let us do," Tr. 56, the prosecution obtained the conviction and condemnation to death of Terry Pitchford by doing a great many things that the Constitution of the United States, and this Court, do not in fact or law permit him to do.

In the instant case, these included knowingly violating the rules of evidence to present inadmissible or misleading evidence for the purpose of enflaming the jury, and making improper appeals to the jury at both phases of the trial. *See e.g. Flowers I*, 773 So 2d at 326; *Brown* 986 So.2d at 276-77 (agreeing that when such arguments are made, it can become the responsibility of the trial judge to step in and remedy it him or herself even without an objection from the defense) (citing *Gray v. State*, 487 So.2d 1304, 1312 (Miss.1986); *Griffin v. State*, 292 So.2d 159, 163 (Miss.1974)).

To the extent that there were not contemporaneous objections, the offenses were brought to the trial court's attention by way of Motion for New Trial R. 1249-52, 1261-63; Supp. R. 2 1251 (A) and (B), 1263 (A), (B), (C), which preserves at least the argument errors for review. *Ahmad*

v. State, 603 So. 2d 843, 847 (Miss. 1992). Moreover, the conduct was harmful enough that plain error review is warranted here. *Flowers I*, 773 So 2d at 326, *Mickell v. State*, 735 So. 2d 1031, 1035 (Miss. 1999).

Prosecutorial Misconduct –Culpability Phase

Taking full advantage of the fact that defense counsel were still playing catch-up in preparation due to the denial of the continuance, the prosecution engaged in several kinds of misconduct while examining witnesses in the guilt phase. It used egregious leading or near leading of its own witnesses; such objections to this practice as were interposed were overruled or ignored by the trial court. Tr. 379, 390-92, 415-18, 453, 473, 530, 565. It led its experts in order to elicit opinions that would not otherwise have been obtained, and some of which were improper. *See, e.g.*, Tr. 415-17, 400-01, 411 (Dr. Hayne); 543 (CSI Claire Nethery). It coached its informant and co-participant witnesses not only with such questions but also by feeding them additional information to bolster their shaky credibility, *See, e.g.* Tr. 530, 522-25, 531 (co-participant Quincy Bullins); 564-65, 567 (informant Dantron Mitchell); 430, 447-48 (informant James Hathcock), 453-54 (co-participant DeMarcusWestmoreland). It did similar things with other witnesses who departed in any way from what was obviously the scripted version of events the prosecutor wanted to argue to the jury. *See, e.g.* 376, 378-79, 390-92; 473.

It moved from merely leading into the realm of having the prosecutor being, effectively, the person offering the testimony, during its examination of the officers who took statements from the defendant. Tr. 502-510; 570-576. Faced as it was with six different statements from a tearful, frightened defendant, who at no time, even when inculpating himself, ever offered any support for the State's theory that he had fired the fatal shots, the prosecutor did not content himself with letting the officers recount what was said by the defendant. Instead, he interjected his summary of what the

statements said, including things which had not actually been said in the statement as if they had been. *See. e.g.* Tr. 502, 505, 507-08, 509, 571, 573.

The arguments by the State to the jury rested in large part on facts not in evidence, or on inferences and implications too attenuated from what facts were in evidence to be proper. This is reversible error when those statements are prejudicial, and can be reviewed as a matter of plain error. *Flowers I*, 773 So.2d at 329-30. *See also Randall v. State*, 806 So.2d 185, 212-14 (Miss.2001) (reversing and remanding for new trial in death penalty appeal partly because the prosecutor attempted to infer guilt from the sudden absence of gunpowder residue when absence of gunpowder residue was not in evidence); *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000) (reversing conviction); *West v. State*, 485 So.2d 681, 689-90 (1985) (reversing and remanding for new trial in death penalty appeal partly because the prosecutor inappropriately implied in closing argument the defendant had threatened teenaged witnesses); *Augustine v. State*, 201 Miss. 277, 28 So.2d 243, 244-47 (1946) (reversing and remanding for new trial partly because the prosecutor made references to facts not on the record, including, but not limited to, references to a gun used to commit the crime when there was no evidence of a gun on the record).

The most egregious misconduct occurred in the final closing, where there were two separate uses of facts not in evidence to persuade the jury that Pitchford fired the fatal shots. First, attempting to bolster the shaky credibility of Quincy Bullins, who claimed that he had attempted a robbery a week earlier at the behest of Mr. Pitchford with 22 pistol furnished by him, the prosecutor argued that the detective in charge of the investigation had testified that Mr. Bullins had voluntarily turned himself in the morning of the murder in order to admit his participation in the earlier attempt. Tr.648. In fact, the officer stated only that he had "talked to" Quincy Bullins that morning in company with the two men who had prevented him from completing his own robbery, expressly

without suggesting how he came to interview him, but suggesting, if anything, that Bullins' attendance was affirmatively involuntary. Tr. 482, 512. This argument clearly overstepped any right to argue inferences and was well into the territory of extra-record, and likely non-existent, facts. [29]

The prosecutor further improperly argued as follows:

> [In] two different statements [Pitchford] admitted that him and Eric went in the store. They robbed Mr. Britt, and they killed him. They both shot him. It doesn't matter which one shot with which gun. That hasn't got anything to do with this case. *I think because it was his 22. he probably had it but that doesn't matter*. All we have got to prove is that they went in that store together to rob it and they killed him.

Tr. 649. This argument is improper for several reasons. First, it contains a statement unsupported by the evidence, at least as that evidence was otherwise being argued. The assertion that Mr. Pitchford "probably" had the 22 that fired the lethal shot has absolutely no evidentiary basis as long as the State is also asserting that there were two people involved in the shooting, as its argument to this jury, and its indictment of a second person for this crime, clearly establish. The only evidence concerning who had what gun under that scenario is Pitchford's statement that the co-indictee in that crime had it Tr. 573. [30]

Second, the argument does not even purport to be based on evidence, but is based on the

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[29] Quincy's testimony establishes without contradiction that that far from "owning up" voluntarily to police that he had tried to rob the store the previous week, Quincy was "reluctant" to admit his involvement. Tr. 528. He went to the police only after two people who saw him en route to rob the store the week before and thwarted the earlier attempt forced him to do so by going there themselves to tell what they had seen. Tr. 525, 627. These men identified only Quincy as a robber. Tr. 583-88. Far from coming forward as a repentant wrongdoer trying to come clean, Quincy came forward only because he was implicated by third parties, and successfully prevented his own arrest for the November 7 murder by claiming Pitchford was the force behind the October attempt, not himself.

[30] The only evidence from which an inference could be drawn that Pitchford personally wielded the 22 was a statement from informant Dantron Mitchell that at one point Pitchford told him he did it alone. That, however, is not the theory being argued here by the State. Tr. 565-66

prosecutor's personal opinion which, in this instance has the effect of being an improper "vouching" for otherwise exceedingly incredible snitch witnesses. *Griffin v. State*, 557 So. 2d 542, 552 (Miss. 1990). This not only affected the verdict on guilt, it was laying the groundwork for similar arguments at the penalty phase, though they are based on equally factually uncertain grounds. There, the Eighth Amendment comes into play, as does "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he [or she] had no opportunity to deny or explain.'" *Skipper v. South Carolina*, 476 U.S. 1, 7 n. 1 (1986).

The State also stepped outside the bounds of the evidence when it argued, in its opening closing argument, that "the gun that you saw . . . . that *was* Mr. Britt's gun . . . . And Officer Conley found *that* gun in Terry Pitchford's car the same day of the murder." Tr. 628. This was simply unsupported by the evidence. The firearms expert testified that some of the shells found on the floor of the store were fired from the gun found in Pitchford's car, which could have been fired at any time during the decedent's ownership of the gun, but that the pellets and wad found on the decedent's person were only "consistent with" a gun of that caliber loaded with shot pellets. Tr. 552, 560-61

The prejudice of each these fact arguments is self-evident. The only gun connected with Mr. Pitchford is the 38, and the prosecutor's opening argument exaggerates that connection. The statements in the final closing exaggerate the defendants connection to the fatal bullets that came from the .22. There was no forensic connection to defendant for that gun. Without the improper argument by the prosecutor here the case for intent would be much weaker. To permit argument of this as a fact has "the natural and probable effect of the improper argument [and] create[d] unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So. 2d 659, 661 (Miss.2001) (citing *Ormond v. State*, 599 So. 2d 951, 961

(Miss.1992)). Together, they are incurably prejudicial. *Forrest v. State*, 335 So. 2d 900, 903 (Miss. 1976) (reversing for cumulative effect of otherwise individually harmless misconduct by prosecution in closing argument).

The prosecutor coupled these arguments without factual support with inherently inflammatory and impermissible exhortations to the jury, speculating, over defendant's improperly overruled objection, that merely because of the time the body was discovered, "we could have had two more dead people" and offering his opinion that Mr. Pitchford was "as close to a habitual liar as I have ever seen" Tr. 649. The first clearly appeals, with no evidentiary support, to jurors to find Mr. Pitchford guilty on the basis of harm to people against whom the purported crime was not committed, including by extension themselves. It is therefore an improper attempt to incite prejudice and fear *Sheppard v. State*, 777 So. 2d at 661. It also does much the same harm that a "send a message" or "protect the community" argument does, and is equally improper. *Brown v. State*, 986 So.2d at 275. *See also West*, 485 So.2d at 689-90. [31]

The "habitual liar" argument is not only an improper personal opinion on veracity, *Griffin*, 557 So. 2d at 552, it also improperly treats the prior crimes evidence as going to general character of the defendant, and did so only after the State had successfully had language instructing the jury about how to consider evidence of bad character removed from the instructions on the grounds that there was no evidence of that sort in the case. Tr. 608-10. Also, to the extent this argument comments on purported unexplained inconsistencies in the statements given by Pitchford, it is also an indirect comment on Mr. Pitchford's failure to testify, and violates

[31] To the extent that this argument remained in the jury's mind at sentencing, it also is an appeal to the jury to find the aggravating factor of creating risk of harm to many people, Miss. Code Ann. § 99-19-101(5)(c), on which it had not been instructed, and which the evidence in the instant matter clearly did not support their considering. *Simmons v. State*, 805 So.2d 452 (Miss. 2001).

the Fifth Amendment. *See West*, 485 So. 2d at 627-88. *See also Emery v. State*, 869 So.2d 405 (Miss. 2004) (reversing where, although defendant testified, prosecution made several comments during examination and in closing regarding his failure to give a statement after being Mirandized.). These improper arguments, individually and certainly when looked at collectively, require reversal here. *Forrest v. State*, 335 So. 2d 900, 903 (Miss. 1976).

Prosecutorial Misconduct – Penalty Phase

At the penalty phase, not only did the seeds planted by the misconduct at the guilt phase bear fruit, independent misconduct occurred as well. In examining witnesses the State persistently violated the long established rule, reiterated in *Flowers I*, 773 So 2d at 330-31 that "[a] prosecutor is prohibited from 'insinuating criminal conduct which is unsupported by any proof." *Smith v. State*, 457 So.2d 327, 334 (Miss.1984) (citing *Stewart v. State*, 263 So.2d 754 (Miss.1972); *Tobias v. State*, 472 So.2d 398, 400 (Miss.1985)).

Without giving the required advance notice for the introduction of prior bad act evidence required by Miss. R. Evid. 404(b), and without offering any testimony to support its factual accuracy, the State queried Defendant's mother and sister (the latter over defendant's objection, Tr. 709-10) about specific incidents of misconduct by the defendant as a child and youth, including a two purported expulsions from middle school in 7th or 8th grade. Tr. 709-10; 718-19. It did not, however, offer any testimony of its own to establish that this misconduct happened. [32] This was clearly inadmissible and prejudicial evidence used improperly by the prosecutor, and, as with similar efforts in *Flowers* I, requires reversal here.

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[32] Neither witness opened the door to these questions. Each had testified about Pitchford's distress at the death of his father and the fact that he did not do well in school afterwards. Mrs. Jackson, the mother, testified only that the Defendant had received no ameliorative counseling for his grief. Ms. Dorsey, the sister, testified only that she picked him up from elementary school 3 or 4 times after his father's death and he had gotten in trouble there.

In a similar vein, Dominique Hogan, the mother of the defendant's 22 month old son DeTerrius, testified at the penalty phase concerning the Defendant's relationship with their child. She was not asked anything about how Defendant treated her or the nature of their personal relationship other than as a predicate to their being co-parents of the child. Tr. 685-87. Nonetheless, the State asked her if she and the defendant had been doing "a lot of fighting," Tr. 688 and whether "ya'll were going with other people at that time." The defendant objected to on grounds of relevance and of the absence of factual basis, and as improper character impeachment of the witness. The court permitted the questions. Tr. 689-92. The only basis cited for asking the questions was alleged interviews of Mr. Pitchford by doctors at the State Hospital and by the defense expert, Dr. Bailey. Tr. 690. *Flowers I* requires more than a mere basis to ask the question. It requires admissible testimony to establish the truth of the implications. 773 So 2d at 330-31.

In the instant matter, there could be no such testimony. Mr. Pitchford could not, of course, be called by the state to testify at all. The doctors, whose evaluations were clearly being done for testimonial purposes, would be testifying only to hearsay if they were called. Although these statements are arguably admissible hearsay in other contexts, admitting this against Mr. Pitchford would violate his Sixth Amendment rights. *Crawford v. Washington*, 541 U.S. 36 (2004) (overruling precedent that permitted reliable hearsay admissible under established hearsay exceptions to come in despite the Confrontation Clause) *Davis v. Washington*, 547 U.S. 813 (2006) (defining investigative statements taken in anticipation of use in prosecution to be "testimonial" and therefore subject to exclusion under *Crawford*). In any event, the State made no effort to call these witnesses, though at least the doctors from the State Hospital were present and available to testify. Tr. 722-23.

The other objectionable question from the prosecution came during Mr. Evans' cross-examination of Mr. Pitchford's sister Veronica:

> Q. Now, you said it was hard on him because his daddy only had about a month before he died.
> A. Yeah. Yes. Yes.
> Q. Okay. At least he did have a month, didn't he?
> A. Yes, he did.
> Q. *That is better than somebody just being murdered and their family not-*
> MR. CARTER: Your Honor, that is absolutely improper question and he knows it.
> THE COURT: I'll overrule the objection.
>
> ***
>
> 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 (emphasis supplied). This Court has repeatedly made it clear that such inflammatory questions are improper.

> Prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Hiter v. State*, 660 So.2d 961, 966 (Miss.1995). The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created. *Ormond v. State*, 599 So.2d 951, 961 (Miss.1992).

Sheppard, 777 So. 2d at 661-62. *See also Ross v. State*, 954 So.2d 968, 1001 (Miss.2007) Verdicts obtained with this kind of argument cannot stand. *Fuselier v. State*, 468 So.2d 45, 53 (Miss.1985).

There can be no doubt in the instant case that these questions had an inflammatory effect. An outburst from the audience ensued as soon as the question was asked and the objection to it made, and the trial court's tepid admonition to the audience afterwards served only to underscore the prejudicial nature of the inquiry. Tr. 711-12. *See West*, 485 So. 2d at 688 (noting that remedial efforts can often "call attention to and enlarge" prejudicial or inflammatory

prosecutorial behavior).

In its closing at the penalty phase, the State was equally egregious. The only two aggravating circumstances the jury was instructed to consider were that the death occurred in the course of a robbery for pecuniary gain and that the crime was committed to avoid arrest or facilitate escape. R. 2006. Nonetheless the State argued in its final closing as if the jury were also to consider the "heinous atrocious and cruel" aggravator, Miss. Code Ann. § 99-19-101(5)(h), by claiming that

> Y'all saw the autopsy photographs. There is not much of a place that you could touch on his body that didn't have some gunshot wound to it. Brutal. This is the ultimate crime. This is the type of crime that the death penalty is for. This is the type of person the death penalty is for, somebody that could commit a crime like that. [33]

Tr. 804. Even where this aggravator is permitted to be considered, a very specific limiting instruction is required if its use is to pass Eighth Amendment muster. *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Knox v. State*, 805 So.2d 527, 533 (Miss.2002). Here, the state through its misconduct incited the jury consider this aggravator not only without such an instruction, but also without sufficient evidence to support its being given in the first place. *West v. State*, 725 So.2d 872 (Miss. 1998), *Taylor v. State*, 672 So.2d 1246 (Miss. 1996).

The State also, over the objection of the defendant and its erroneous denial by the court,

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[33] Admission of even gruesome autopsy photographs is permitted as long as the photos are probative of a fact properly in issue.. Their admission is reviewed on appeal for abuse of discretion. However, there is a concomitant responsibility for the State not to use the photos so admitted for any improper purpose. *See Manix v. State*, 895 So.2d 167, 178 (Miss. 2005) ("[W]e have often allowed gruesome photos, including photos after autopsies, *with warnings to the prosecution and the trial court to guard against excess. Walker v. State*, 740 So.2d 873, 880-88 (Miss.1999); *Manning v. State*, 735 So.2d 323, 342 (Miss.1999); *Jordan v. State*, 728 So.2d 1088, 1093 (Miss.1998)"). In the case *sub judice* the defendant objected to enlarged and numerous autopsy photos being introduced, both by way of pretrial motion and at trial. Tr. 62, 406-07. The trial court ruled them probative to the testimony of the pathologist, Tr. 407-08, and to the firearms expert Tr. 553-4. Though this may not have been an abuse of discretion standing alone, the excessive and improper use to which they ended up being put in this improper and inflammatory evidence is not within that scope, so this abuse of these documents retroactively renders their admission improper.

Tr. 799, made improper "in the box" arguments to condemned by this Court in *Stringer v. State*, 500 So.2d 928, 938-39 (Miss. 1986). Citing the jurors representations in voir dire that they could consider the death penalty as the reason they were on the jury, the State argued 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. It followed that with " [i]t 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. Your job is to go through the instructions and give him the appropriate sentence for what he did.*" Tr. 804. (emphasis supplied). By these arguments, the jury was improperly told by the prosecutor that it was in the box to give Mr. Pitchford the death penalty. This was done in the final closing, where no response was possible. Thus, even had the defendant wished to take the risk of attempting to rebut this by counter-argument he could not have done so. *See West.* 485 So. 2d at 688. The sentence that ensued must be reversed.

In addition, in support of the jury making the statutory *Enmund mens rea* finding, the prosecution's opening closing expressly alluded to the improper arguments of Mr. Evans at the guilt phase. With that support, it repeated its arguments, unsupported by any firearms evidence at all, or by any other evidence consistent with the State's theory of the case being argued, that the Defendant was wielding the 22 caliber gun which discharged the fatal bullets, but also argued that the use of force by the companion meant that Mr. Pitchford killed, intended to kill, attempted to kill or contemplated that lethal force would be used. Tr. 773-4. [34]

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[34] Mr. Hill (discussing the statutory *Enmund* findings required by the verdict form): "The first one is that the defendant actually killed Ruben Britt. Remember, Mr. Britt was shot with what? He was shot with at 22 caliber pistol. What kind of pistol did Defendant Have? He had a 22 caliber pistol. Was it an automatic? Yes it was. Did it leave traces? Yes it did. . . . So did the defendant actually kill him? Those 22 rounds actually killed him. And that was the defendant's gun. I submit to you that it is what the proof shows, that it was the defendant's gun that killed him." Tr. 773

Overall, the State's cumulative conduct in this trial was an exercise by the prosecuting attorneys in skirting their ethical "obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Ms. R. Prof. Conduct 3.8 (comment).[35] These instances of prosecutorial misconduct, alone and/or in conjunction with one another, violated Pitchford's rights under state law, *Jenkins v. State*, 607 So.2d 1171, 1184 (Miss. 1992); *Griffin v. State*, 557 So.2d 542, 552-53 (Miss. 1990), and deprived him of a fundamentally fair trial, *Donnelley v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and a reliable sentencing proceeding in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 3, §§ 14, 26 and 28 of the Mississippi Constitution, *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and thus mandate his convictions and death sentence be vacated.

The trial court's failure to curb the misconduct

The trial court's handling of the State's misconduct was part and parcel of a troubling pattern of judicial partiality. A look at the prosecutorial misconduct that it permitted here in the context of the cumulative record, all of its rulings, and its differential treatment of the defendant and the State, leads to the unfortunate conclusion that it 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

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[35] Unlike other advocates, it has long been recognized that a prosecutor has a "duty to . conduct himself with due regard to the proprieties of his office." *Adams v. State*, 30 So.2d 583, 597 (Miss. 1947); *accord*, *Jenkins v. State*, 136 So.2d 580, 582 (Miss. 1962); A.B.A. Standards, *The Prosecution Function*, Section 3-1.1(d). *See also* Ms. Conduct Rule 3.8 (comment) (assigning prosecutors the role of "minister of justice" and commending the ABA Standards as "the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense"). Prosecutorial zealousness must be directed towards his minister of justice duties, not simply towards trying to win cases. *Id. See, e.g. In re Jordan*, 913 So.2d 775, 781 (La. 2005) (discussing this obligation and concluding in case involving failure to turn over *Brady* materials that Louisiana's Rule 3.8 had been violated.)

seeing that justice, due process, or the equal protection of the law were accorded the defendant. *Dodson v. Singing River Hosp. System*, 839 So.2d 530 (Miss. 2003). [36]

Although there is a presumption "that a judge, sworn to administer impartial justice is qualified and unbiased" that presumption may be overcome by evidence that creates a "reasonable doubt" about the validity of the presumption. *Turner v. State*, 573 So.2d 657, 678 (Miss.1990). Though rulings by the trial court rarely, in and of themselves, form the basis of a finding of bias or impartiality, *Liteky v. United States*, 510 U.S. 540, 555 (1994), when determining whether bias has been shown "this Court must consider the trial *in its entirety and examine every ruling* to determine if those rulings were prejudicial to the moving party. *Hathcock v. Southern Farm Bureau Cas. Ins. Co.*, 912 So.2d 844, 849 (Miss. 2005) (emphasis in original) (*citing Jones v. State*, 841 So.2d 115, 135 (Miss.2003); *Hunter v. State*, 684 So.2d 625, 630-31 (Miss.1996)). The standard of review is whether the trial court's ruling on the suggestion of its own bias (here, its denial of the motion for new trial) constitutes "manifest abuse of discretion." *Farmer v. State*, 770 So. 2d 953, 956 (Miss). *See also Dodson*, 839 So.2d at 533-34 (once reasonable doubt as to the presumption of impartiality is shown, the bias or prejudice of the judge him or herself need not be shown beyond a reasonable doubt.)

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[36] Ordinarily, questions of judcial bias come to this Court by way pretrial recusal motion. Here, the full extent of the impartiality and its effect on the defendant's ability to get a fair trial was cumulative over the course of the trial. A midtrial motion to recuse and for a mistrial could have precipitated far more drama, confrontation and, ultimately, harm to the orderly administration of justice and prejudice to the defendant than was necessary for resolving the issue in an orderly fashion. *See, e.g. Mingo v. State*, 944 So.2d 18, 31-33 (Miss. 2006). Hence, this issue was preserved for review by way of Defendant's Amended Motion for New Trial Supp. R. 2 1263(B), which gave the trial court exactly the same opportunity to consider the issue, but out of the heat of the moment as a mid-trial recusal motion would have required, *Ruffin v. State*, 481 So.2d 312, 317 (Miss.1985). See *Ahmad* 603 So. 2d at 847 (issue of prosecutorial misconduct at argument properly preserved by motion for new trial). The relief available on a mid-trial motion – recusal and mistrial – is effectively no different than what is available on a new trial motion – vacation of the verdict and a new trial. The latter process has the additional benefit of being able to have the recusal motion considered before any such trial.

The defendant will not rehash here the incidents of error, disparate treatment of the two parties and unwarranted attacks on the credibility and competence of defense counsel that are discussed elsewhere in this Brief. However, in addition to those examples, differential treatment, in particular, was evident in several other respects throughout the trial, as well.

When the State requested breaks, they were granted, when the Defendant requested comparable treatment, they were denied, often with disparaging remarks concerning counsel. See e.g., 584-612; 705. The State was given great leeway in leading its witnesses over the objection of the defendant; the defendant was not. *Compare, e.g.*, Tr. 530 with 699-700. Though the trial court was scrupulous in considering and ruling on every objection made by the state, even to the extent, at times, of improving on the grounds for such objections in granting them, *see. e.g.* Tr. 513, it made no oral rulings at all on many objections made by the defense. It *sub selentio* overruled them, permitting the State to simply proceed with the objected to behavior without even acknowledging the objection, and letting the jury see this dismissive behavior. [37]

In addition to the prosecutorial misconduct discussed, *supra*, the trial court it permitted the state's attorney use inappropriate language towards defense counsel, Tr. 354-55 and even to instruct defense counsel on how things "are done in this district" Tr. 56, 58. When responding to a defense request to voir dire the jury on its racial attitudes relative to a black accused of killing a white the State countered with a disdainful opinion about "some defense counsels" who "always" inject race into the proceedings. Tr. 77-78. The trial court granted the defense request

[37] *See, e.g.*, Tr. 376, 379, 442-43 (ignoring prosecutor's admission of apparent discovery omission despite defense objection to it), 453, 473, 530 (made during the egregious leading by the prosecutor of his own law enforcement witnesses in testifying concerning defendant's statements), 565 (overruling objection to form, not addressing more serious objection that prosecutorial misconduct was occurring during state examination of one of its informant witnesses), 690-92 (overruling objection on no factual basis for question, refusing, despite specific request by defense to be allowed to complete objection, to rule on second ground, that the question was improper character attack).

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and itself make the requested inquiry during voir dire, Tr. 212. However, it did not caution the State about the impropriety of making veiled comments on counsel opposite's race. It was also sometimes much less tolerant of defense counsel's shortcomings than of those of the State. *See, e.g.* 603-612 (attacks on counsel's diligence, competence discussed in Argument II, *supra*); suggesting, though ultimately having to acknowledge the inaccuracy of the suggestions, that defense counsel was attempting to put on "hired gun" testimony or had failed to contact the court administrator to obtain settings for pretrial motions. Tr. 51-54, 160-65.

Finally, the trial court repeatedly placed getting speedily through the process over the defendant's request for enough time to do its work properly, not only in the denials of continuance and delay when requested but on such small things as insisting that counsel proceed when not prepared and whittling minutes off of requested breaks and arguments for no apparent good reason. ,Tr. 64-65, 614, 762. The trial court's own bias therefore enabled the prosecutorial misconduct, and the prejudice that ensued to defendant as a consequence requires reversal here.

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.

One source of great emotion arises when the victim's family or supporters of them display grief in the courtroom. *See, e.g., Fuselier v. State*, 468 So. 2d 45 (Miss. 1985) (reversing where trial court allowed the victim's daughter to sit within the rail). See also *State v. Bernard*, 608 So. 2d 966, 968 (La. 1992).

By way of pretrial motion, the Defendant sought to control potential exposure of the jury to these kind of unseemly and prejudicial displays of emotion in the courtroom. R. 170-72. The trial judge denied the motion insofar as it restricted where in the audience relative to the prosecution and jury the victim's family could sit, but did concur that any actual displays would

be inappropriate and would not be allowed by the trial court. Tr. 69-71. However, despite this, such displays from the audience occurred during both the guilt and penalty phases of the trial but the trial court took insufficient measures to ameliorate the prejudicial effect on the jury of such displays.

At the guilt phase, the problem occurred during the testimony of informant James Hathcock – a witness whose testimony is legally suspect in the first place. *McVeal v. State*, 551 So. 2d 151, 158 n.2 (Miss. 1989). Defendant renewed the motion to curtail such displays after members of the victim's family sitting in the back of the courtroom were "crying out loud, loud enough for everybody in the courtroom to hear." Tr. 432-33. The trial judge's response was insufficient. Instead of attempting to get the matter under control, it elected to minimize it and even found that the nature of the testimony justified it:

> There have been no outbursts of any kind. I have heard some sniffling going on. And the type testimony that I just heard, I'm not surprised. *The family has a right to be here, and I am not going to order somebody to leave the courtroom.* . . . . I don't think it's been, you know, terrible outbursts or anything like that. It is just, I think, some natural emotional reactions when people are hearing about the brutal murder of their loved one.

Tr. 433-34.

It is, of course exactly when the testimony is at its most inflammatory that the trial court's duty to preserve the jury from anything that accentuates improper emotion is greatest and the court's intervention must be most immediate. Here it prohibited from the start the one thing that might have lowered the temperature in the courtroom – asking the distressed audience members to remove themselves from the courtroom until they could regain their composure. This was error.

Even in a prosecution where the State does not seek death, appeals to passion and preju-

dice and other inflammatory appeals to the jury are totally impermissible. *Viereck v. United States*, 318 U.S. 236, 247-48 (1943); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979). *See also, American Bar Association. Standards Relating to the Prosecution Function*, Section 3-5.8 (c) (1982). The proscription against irrelevant emotionalism applies with even more force in a capital trial. Miss Code Ann. § 99-19-105(3)(a); *Snow v. State*, 800 So.2d 472, 486 (Miss. 2001) (in a death penalty case, when deciding whether outburst by victim's mother was so prejudicial as to warrant mistrial, reviewing court must use heightened scrutiny). *See also Brooks v. Francis*, 716 F.2d 780, 788 (11th Cir. 1983), reh'g granted and vacated, 728 F.2d 1358 (11th Cir. 1984) ("[a] prosecutor may not incite the passions of a jury when a person's life hangs in the balance"); *Tucker v. Zant*, 724 F.2d 882, 888 (11th Cir. 1984) ("[t]he Constitution will not permit arguments on issues extrinsic to the crime or the criminal aimed at inflaming the jury's passions, playing on its fears, or otherwise goading it into an emotional state more receptive to the call for imposition of death");

Before resuming the testimony of Mr. Hathcock the trial court solicited Defendant's proposed solution, short of removing the overly emotional family members from the courtroom until they could regain their composure, should it happen again. The Defense suggested that if the offending audience members could not be removed that the jury be excused and the audience be cautioned by the judge not to engage in this excessively emotional behavior. Tr. 434 The trial court made no ruling on that request, but apparently denied it since, when an outburst occurred again at the penalty phase the tepid admonishment it did issue was issued in front of the jury, rather than in its absence as requested. Tr. 711-12. This atmosphere of emotionalism in the trial deprived the defendant of his right to fundamental fairness protected by the Fourteenth Amendment.

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

By way of pretrial motion, Defendant objected, to the State presenting testimony from any jailhouse snitches or informants, including James Hathcock and Dantron Mitchell. R. 990-92, Tr. 83. The trial court, without making particular fact findings concerning the relevancy or probative value of the testimony weighed against any possible prejudice, denied the motion. Tr. 84. On the basis of this ruling, Mr. Hathcock and Mr. Mitchell testified at trial concerning a purported in-jail confessions that Mr. Pitchford had made to them. Tr. 426-48, 562-568.

Though each informant denied that any promises were made to him by the district attorney, each did testify to circumstances that suggested he hoped for and/or had received positive consideration with respect to charges of his own. Mr. Hathcock admitted that shortly after he told the authorities about the purported information he was released from jail, and a few months later, and before he testified in court against Mr. Pitchford, the charges which had put him in jail in the first place were dropped. Tr. 446-47. Mr. Mitchell admitted that though he had spoken with Mr. Pitchford eight months earlier, he only came forward with the information he did when police came to him within the past month, that by that time he had been awaiting trial on marijuana possession charges and had been in jail for 10 months, and that he had only decided to testify in this case after consulting with his attorney in the marijuana case. Tr. 566-67.

This Court has recognized that, too often, there is

> an unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement who [are] running a training ground for snitches over at the county jail, and the prosecutors who are taking what appears to be the easy route, rather than really putting their cases together with solid evidence.

McNeal v. State, 551 So. 2d 151, 158 n.2 (Miss. 1989). For this reason, this Court has long held

that the testimony of an informant should be received and considered with caution, as polluted and suspicious. *Dedeaux v. State*, 87 So. 664, 665 (Miss. 1921) (citing *Wilson v. State*, 71 Miss. 880, 16 So. 304 (1894), and that if the jury is not instructed accordingly, a conviction tainted with that testimony must, for that reason alone, be reversed. *Moore v. State*, 787 So. 2d 1282 (Miss. 2001).

The evidence from these witnesses was so unprobative and so prejudicial that Miss. R. Evid. 403 requires its exclusion. If prejudicial testimony is erroneously admitted under state law, that also violates the defendant's constitutional right to due process. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). Though the trial court's ruling on this point is reviewed for abuse of discretion, *Ross v. State*, 954 So.2d 968, 992-92 (Miss. 2007), this court requires that the trial court, at the very least make an on the record weighing of the probative vs. the prejudicial value of the evidence and exclude it if the balance tips against probity. *Jenkins v. State* 507 So.2d 89, 93 (Miss. 1987).

In the case of Mr. Mitchell, he was clearly a reluctant and unforthcoming witness whose testimony who had to be led through it even when being directly examined Tr. 563-67. On a crucial point, however, he was entirely inconsistent with the forensic evidence on which the state was basing its theory of the case (and its charges against co-defendant Eric Bullins) that there were at least two people involved in the robbery, one of whom fired a fatal shot from a 22 pistol and one of whom fired non-fatal shots from a 38 loaded with rat shot. Tr. 400-40. Mr. Mitchell's testimony, however, was the inherently incredible statement that Pitchford changed his story and said had done it by himself. Tr. 565-66. Moreover, there was testimony from Mr. Mitchell that, until the prosecutor led him away from it, called into question whether any of this information came from Mr. Pitchford, and put it in the mouth of Eric Bullins, who did not testify at the trial.

Thus, its probative value was miniscule, and it may have been inadmissible hearsay, and a possible violation of the confrontation clause, as well, in any event.

On the other hand, its prejudicial value was enormous. Mr. Mitchell's testimony about Mr. Pitchford's changed versions might have made the jury that much more receptive to the otherwise improper jury argument that Pitchford was an "habitual liar." At the penalty phase, in support of the death sentence, the State argued, Tr. 772, 804-06, and the jury expressly found that Mr. Pitchford had personally killed, Tr. 811-12, R. 1234-35. Pitchford's statements to police, however, made the actual killer his companion. Mitchell is the only person who says differently. Where the State argues from evidence that should never have been admitted in the first place, that in and of itself is a basis for reversal, even in the absence of a contemporaneous objection. *Flowers II*, 843 So. 2d at 855. It was clear that the jury was struggling with this finding at the penalty phase. It specifically asked during the deliberation to see Mr. Pitchford's statements, in which Mr. Pitchford, even when he acknowledged participation in the events, had always placed possession of the 22 that fired the fatal shot in the hands of his co-defendant, and had offered the explanation that the co-defendant shot only after seeing the decedent with a gun of his own Tr. 505, 508, 571-72.

Mr. Hathcock's testimony is equally unprobative. He, too, appeared to be relying on information obtained from persons other than Mr. Pitchford in his testimony, and had already received a substantial benefit in the form of having been released from jail immediately after providing the information, and then having his criminal charges dropped. Tr. 431-32; 446-47. It, was far more prejudicial than probative because in the course of it he also, despite having been expressly directed not to do so, offered completely inadmissible testimony accusing Mr. Pitchford of being a drug dealer. Tr. 439. Though the trial court gave a cautionary instruction,

the defense was still faced with having to unring a bell that would never have tolled for the jury had Mr. Hathcock been, as he should have been, precluded from taking the stand at all. Because the trial court permitted Mr. Mitchell and Mr. Hathcock to testify it without making the requisite weighing, and because the evidence was inherently unreliable but exceedingly prejudicial, this court should reverse the conviction obtained as a result. *See, e.g. Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987).

Even if the Court determines that it was not error to permit the witnesses to testify under Miss. R. Evid. 403, it was clearly error for the trial court to refuse to give the cautionary instruction requested by the Defendant that made reference to the benefit received by Informant Hathcock. Tr. 596, 607-08. R. 1133. Instead, the court gave only the most minimal instruction lumping accomplices and informants together, S-5, R. 1122, and entirely ignoring the evidence before it that at least one informant had received a benefit. Tr. 446-57. Failure to give the requested instruction where it has been furnished in a capital case is enough, by itself, to require reversal if there is any evidence at all that the informant received a benefit in exchange for the testimony. *Moore*, 787 So. 2d at 1287 (no formal deal offered, but informant was released shortly after providing the information and charges were nolle prossed six months later).

In addition, pertinently to both of these witnesses – and the accomplices – reliability, the district attorney, when asked to "reveal the deal" with the informant witness, acknowledged that though he had made no express deal, "I think anybody with common sense would understand that some of these other defendants, their attorneys hope the Court may take that into consideration when they sentence them." Tr. 82. Mr. Mitchell's testimony makes it clear he fell into that category. He waited until what was apparently the eve of his own trial, when he had counsel to advise him about ways that he might hope for leniency from the state or the Court, to

come forward with information he had been sitting on for eight months. Tr. 566-67. Given these facts, this error alone requires reversal of the conviction and remand for a new trial before a properly instructed jury. *Moore*, 787 So. 2d at 1287.[38]

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

"The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Parks v. State*, 930 So.2d 383, 386 (Miss.2006) (citing *Tate v. State*, 912 So.2d 919, 932) (Miss.2005)). A trial court's decision on granting a mistrial is reviewed for abuse of discretion, though in a case where death is sought, it is, like all other decisions, subject to heightened scrutiny review.

During his testimony, informant Hathcock testified that "Well, he [Mr. Pitchford] was selling me dope." Tr. 439. This was clearly inadmissible prior bad acts testimony under the 404(b) and the due process clause of the United States Constitution. *Palmer v. State*, 939 So.2d 792, 795 (Miss.2006) ("proof of a crime distinct from that alleged in an indictment is not admissible against an accused."). Defendant immediately, out of the presence of the jury, moved for a mistrial, citing the fact that the prosecution had told him that the witness was under instructions not to mention his claim in that regard under any circumstances. Tr. 439-40. The trial court agreed that the testimony was improper, but denied the mistrial. Tr. 440-41. Instead when the jury returned to the courtroom, it reminded them of the testimony, told them not to

[38] Because there is clear evidence in the instant case that the DA knew both snitches would be hoping for a benefit, and one in fact received one, and because the defendant timely requested the proper instruction, this case falls within the scope of *Moore*, and is completely inapposite to the situation in *Manning v. State*, 735 So.2d 323, 335 (Miss.1999). As this Court has found, the unreliability of a snitch does not necessarily arise out of an overt promise, but also from the hope of benefit Certainly where, as here, the hope is both acknowledged by the DA as a factor, and has been fulfilled with respect to one of the informants, at the very least the jury must be instructed about not only the unreliability of the testimony, but that exchange that was paid for it.

consider it, and polled the jury to get affirmative responses to that instruction. Tr. 443-44. This, in all likelihood merely served to underscore the testimony and its prejudicial effect. *See West v. State*, 485 So.2d 681, 688(1985).

Even by itself, this was exceedingly prejudicial information to come before the jury, and the State had, apparently not instructed its witness as it represented to the defense that it had, and the testimony had come out as a result. In addition, this witnesses testimony had already provoked one incident of intrusive emotionalism in the trial, so the level of prejudice associated with this witness was already high. Tr. 432-34. Under these circumstances, with this amount of harm, the prejudice was such that a mistrial should have been granted.

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.

Shortly after the death of Mr. Britt at his store, the police obtained a description of a vehicle that had been seen near the store that morning and information that Terry Pitchford owned a vehicle of that description. Tr. 94-97,493. Several law enforcement officers went to the home Mr. Pitchford shared with his mother, Shirley Jackson, and found a vehicle resembling that description that was co-owned by the two of them. Both Mr. Pitchford and Ms. Jackson were present when, without obtaining a warrant, and with the consent of only Ms. Jackson, police searched that vehicle and recovered a 38 revolver loaded with rat shot. Tr. 493-95. This revolver was introduced into evidence at Mr. Pitchford's trial after it was identified as being a gun owned by Mr. Britt and kept at his store, but which was missing after he was found dead. Tr. 349, 468-70; Ex. 32. It was the only piece of physical evidence that connected Mr. Pitchford to the crime scene, and was relied on heavily by the State as a way to bolster otherwise suspect informant and accomplice testimony in obtaining the conviction and death sentence. The State's reliance on this

evidence was so heavy that, notwithstanding the fact that the pathology evidence actually did not support the statement, the prosecutor in opening told the jury that the seized weapon was "one of the guns [Mr. Britt] was killed with." Tr. 341-42; 628-30.

The Defendant filed for suppression of this evidence by way of pretrial motion. R. 1021-22. After an evidentiary hearing, that motion was denied. Tr. 94-119, R.E. Tab 5. The admission of this evidence and argument was erroneous as a matter of law, and highly prejudicial, and Mr. Pitchford's conviction must be reversed as a consequence. *Wong Sun v. United States*, 371 U.S. 471, 485-86, (1963); *Robinson v. State* 136 Miss. 850, 101 So. 706 (Miss. 1924).

The Fourth Amendment to the United States Constitution requires that, before they can conduct a search of an individual's automobile, police must have both probable cause and a warrant. *Fields v. State*, 382 So. 2d 1098, 1101 (Miss.1980) (reversing conviction and excluding evidence where "there was ample time to obtain a warrant and no probability that the automobile could be removed beyond the reach of the officers"). The need for a warrant can be eliminated by obtaining a valid and informed consent to search from the occupant of the vehicle, or, if the vehicle is unoccupied, by the person who has ownership and control over it. *Moore v. State*, 933 So.2d 910, 916 (Miss. 2006) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973).

Where there are two people who have equal rights of control, ownership or dominion over the premises to be searched, however, and both are present, the consent of only one of the two is insufficient to operate as consent for the other if the non-consenting party affirmatively makes his objection known to the police. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (reversing a conviction based on evidence seized from the defendant's marital home after consent by his wife, who also lived there, and was actually the victim of the crime, because "a physically present occupant's express refusal of a consent to a police search is dispositive as to

him, *regardless of the consent* of a fellow occupant.") (emphasis supplied), *U.S. v. Sims*, 435 F.Supp.2d 542 (S.D. .Miss. 2006) (suppressing search). *See also Chimel v. California*, 395 U.S. 752 (1969); *Preston v. U. S.*, 376 U. S. 364 (1964); *White v. State*, 735 So. 2d 221 (Miss. 1999); *Ferrell v. State*, 649 So. 2d 831, 833 (Miss. 1995); *Powell v. State*, 824 So. 2d 661 (Miss. Ct. App. 2002); *Marshall v. State*, 584 So. 2d 437 (Miss 1991).

In the instant case, the trial court found, and the evidence is undisputed that, there was no warrant obtained to search the vehicle, and that the police relied on a consent to search given them by Shirley Jackson alone in conducting the search. Tr. 101-02. It is also undisputed that the vehicle that was searched was equally co-owned and equally within the control and dominion of Terry Pitchford and Shirley Jackson, and that both were present when the consent to search was sought, Tr. 97-98, 103, 116, 118. Thus, if Mr. Pitchford objected to the search, the search violated the Fourth Amendment as to him and the gun and all testimony and argument relying on it was inadmissible against him. *Randolph*, 547 U.S. at 115.

The evidence regarding Mr. Pitchford shows that, though he at first verbally told an officer that it would be okay to search the car, he expressly withdrew that consent though at least three overt acts – established by testimony of the officer conducting the search, not the defendant or his mother – that clearly and unambiguously established his objection to the search taking place and his withdrawal of any previous consent he had given to making such a search. Tr. 98, 101, 105-06, 13. Though withdrawal of consent is not established by merely passively refusing to cooperate, neither need the withdrawal be done by words explicitly saying "I withdraw my previous consent." In the case of *Moore v. State* this Court held that:

> If the consent occurred while the defendant was being generally cooperative, the consent is more likely to be voluntary; however, if the defendant agreed and then changed his mind, the consent should be suspect.

933 So. 2d 910, 917 (Miss. 2006). Even the federal courts, which employ a less stringent standard to establish voluntary consent, *id.* at 916 n.2, recognize that withdrawal of consent can be established by conduct alone. *See e.g., U.S. v. Fuentes*, 105 F.3d 487, 489 (9th Cir. 1997) (consent withdrawn because suspect shouted "no wait" as officer reached in to grab object in his pants pocket, and tried to push one officer away and pull his arm free from second officer); *U.S. v. Flores. 48 F.3d 467, 468* (10th Cir. 1995) (consent to search trunk of car withdrawn because, after initial consent, defendant slammed trunk door shut).

In Mr. Pitchford's case his conduct clearly and repeatedly established that he had changed his mind after his verbal "okay" and conveyed to police that he did consent to their search of the car and withdrew any previous permission to do so. First, he refused to sign the consent to search form presented to him. Tr. 98. This was regarded by the officer as an indication that he did not have valid consent from Mr. Pitchford and would therefore ordinarily seek a warrant, but did not do so because Mrs. Jackson volunteered to sign one instead. Tr. 106. Second, when Mrs. Jackson was preparing to sign her consent. Mr. Pitchford again indicated his objection by, in the presence of the officer, telling his mother not to let them search the vehicle, either. Tr. 98, 100-01, 496-97. Finally, after his mother still signed the consent, but before the vehicle was searched, Mr. Pitchford actually became so angry in his objections to the search that that he had to be physically restrained, handcuffed, and moved to the other side of the house under guard by two other officers in order that the search take place. Tr. 132.

The fact that Mr. Pitchford after the search was concluded, while under pressure from police to demonstrate his innocence by cooperating with them, said that he had consented to the search does not change the circumstances as they existed, and as the police officer admitted he

perceived them, at the time the decision to search without a warrant was made. Tr. 106. When this Court agreed that the exclusionary rule can be avoided by an officer's good faith but erroneous reliance on facts that if true would have made his search lawful it surely imposed a converse responsibility to obtain a warrant or valid consent on officers who did know that the circumstances required them. *See White v. State*, 842 So.2d 565 (Miss. 2003)

The trial court erroneously found that as a matter of law the consent by Mrs. Jackson alone was sufficient to meet the needs of the Fourth Amendment as to Mr. Pitchford because of her equal ownership of the vehicle, and that "Certainly a co-owner of the property has absolute right to give permission to someone else to search it." Tr. 117, R.E. Tab 5. *Randolph* clearly established that is not what the law says and to the extent the authority the trial court relied on suggested differently, Tr. 118, R.E. Tab 5, it has been overruled by *Randolph*. The trial court's fallback findings that Mr. Pitchford had given his own consent was similarly not supported by either the law or facts, nor is the trial court's conclusory statement that there were exigent circumstances for the search. Tr. 118-19. R.E. Tab 5. [39]

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

For a statement to be admissible against him, the accused must give a knowing and voluntary waiver of both his Fifth Amendment right to remain silent and his Sixth Amendment right of access of counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Saucier v. State*, 562 So.2d 1238, 1244 (Miss. 1990); *Powell v. State*, 540 So.2d 13, 16 (Miss. 1989). The statement must

[39] "Exigent circumstances" require that there be an affirmative showing that the vehicle in question is likely to be removed or interfered with by the suspect pending receipt of a warrant. *Fields v. State*, 382 So. 2d at 1101. The evidence here was that there was no risk of that, since there were other officers present, they had at least sufficient reasonable suspicion to detain Mr. Pitchford—and in fact did so—even before they found the gun, and Mrs. Jackson was being entirely cooperative with them.

also be freely and voluntarily given in compliance with the Fourteenth Amendment. *Jackson v. Denno*, 378 U.S. 368 (1964), *King v. State*, 451 So. 2d 765, 768 (Miss. 1984); *Ladner v. State*, 95 So. 2d 468, 471 (Miss. 1957).

At trial in this matter, the State adduced testimony from two officers concerning a total of six statements given by Mr. Pitchford after his arrest, including summaries of the contents of those statements. Tr. 502-509, 513-16 (Statements 1 through 3 on November 7, 2004, Statement 4, on November 8, all taken by GCSO Detective Greg Conley); 570-77 (an unrecorded statement obtained prior to Statement 4 and Statement 5, both taken on November 8 by D.A. Investigator Robert Jennings.) Defendant objected to the admission of all of this material under the Fifth, Sixth and Fourteenth Amendments by way of pretrial Motion to Suppress on which an evidentiary hearing was held. R. 180-93; 970-76, Tr. 119-159. That motion was expressly renewed at trial with respect to the statements in which Jennings participated. Tr. 568. On both occasions the trial court erroneously ruled the statements admissible. Tr. 154-56,569. R.E. Tab 6.

The State relied heavily on these statements, particularly Statement 5, in obtaining the conviction and, especially, the death sentence of the defendant that is under review here.[40] Tr. 630; 649-51; 768-77; 798-808. The conviction and sentence must be reversed as a consequence.

[40] Mr. Pitchford did not admit participation in the robbery or murder in the first three statements. However, in Statement 2, Mr. Pitchford told Conley that Quincy Bullins had a small caliber pistol and speculated that he might have done it, and admitted that he, Pitchford, owned a pistol that was used in the robbery. Tr. 503-04. Though that admission could as easily refer to the .38 loaded with rat shot, which inflicted no fatal wounds, as to the other pistol, the State obtained its conviction and death sentence by arguing that Mr. Pitchford owned the 22 that inflicted the fatal shot and had therefore wielded it himself during the robbery, and was an habitual liar because of inconsistencies within Statements 1, 2 and 3. Tr. 649. In his statements made to Mr. Jennings alone Mr. Pitchford admitted participation in the robbery with Eric Bullins, but said that Eric had commenced firing in a panic and fired the fatal shots. These things were also significant components of the State's argument at the penalty phase that he deserved a death sentence because he had actually killed, intended to kill or attempted to kill Mr. Britt in the course of robbing him, or contemplated that lethal force would be employed in the robbery. Tr. 773-74. These arguments were also tainted with improper arguments and facts not in evidence but gave some bolstering to those improper arguments. See Argument III, *supra*.

See. e.g. Pannell v. State, --- So.2d ---- (Miss. Ct. App. 2008), No. 2006-KA-01882-COA, ¶ 32, (Miss. Ct. App. September 9, 2008) (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)).

In evaluating a *Miranda* waiver claim, this Court requires trial courts to observe the following procedure to ascertain whether the State has carried its burden of establishing that the defendant *both* understood his rights *and* voluntarily agreed to give them up:

> [T] he trial judge *first* must determine whether the accused has been adequately warned. And, under the totality of circumstances, the court *then* must determine if the accused voluntarily and intelligently waived his privilege against self-incrimination. *Layne v. State*, 542 So.2d 237, 239 (Miss.1989); *Pinkney v. State*, 538 So.2d 329, 342 (Miss.1988); and *Gavin v. State*, 473 So.2d 952, 954 (Miss.1985). *Accord Edwards v. Arizona*, 451 U.S. 477, 486, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 387 (1981).

McCarty v. State, 554 So.2d 909, 911 (Miss.1989) (emphasis added). In determining whether a valid waiver of the rights to silence and counsel has been made, courts must indulge "every reasonable presumption against" waiver and resolve ambiguities against a finding of waiver. *Tague v. Louisiana*, 444 U.S. 469, 470 (1980); *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Abston v. State*, 361 So.2d 1384, 1391 (Miss. 1978).); *Smith v. Illinois*, 469 U.S. 91 (1984).

Where a waiver has been obtained, but the suspect then "indicate[s] a desire" to stop talking, officers must "scrupulously honor" that decision by ceasing questioning for a reasonable time. *See Mosley*, 423 U.S. at 102-103. While, unlike with the invocation of the right to counsel, officers may elect after a reasonable time to resume interrogation, the products of that interrogation are admissible *only if* the defendant knowingly and voluntarily waives his rights *again* with a new and independent *Miranda* warning/waiver given in connection with the resumed questioning. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). *See also Chamberlin v. State*, 989 So.2d 320, 333-34 (Miss. 2008) (citing

Neal v. State, 451 So.2d 743, 755 (Miss.1984) and admitting statement taken in subsequent interrogation after right to silence had been invoked in earlier one, but only because the subsequent interrogator re-administered *Miranda* warnings and obtained a new knowing and voluntary waiver of those rights).

In the case *sub judice*, although the State obtained a written *Miranda* waiver from Mr. Pitchford prior to Statement 1 on November 7, no new written or oral waivers of his Fifth and Sixth Amendment rights were obtained from him in connection with Statements 2, 3, 4 or 5 or the unrecorded statement obtained prior to Statement 4. While the absence of a written waiver is not fatal, there must be at least an oral one. If there is neither, the statement must be suppressed. *Davis v. State*, 320 So.2d 789, 790 (Miss.1975),

Officer Conley testified that before giving Statements 2 and 3 on November 7, Pitchford orally reiterated his understanding of his Fifth and Sixth Amendment rights. However, Conley specifically did not testify that Mr. Pitchford was asked, in addition, whether he desired in either Statement 2 or 3 to waive those rights. Tr. 122. Because the reiteration of the understanding was unaccompanied by an express waiver, the record is insufficient to establish proper waiver of those rights and renders Statements 2 and 3 inadmissible under *Miranda*. *McCarty v. State*, 554 So.2d 909 (Miss.1989) *See also Smith v. Illinois*, 469 U.S. 91 (1984) (ambiguous statements insufficient to establish waiver). [41]

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[41] The record shows that Mr. Pitchford was arrested at his home around midday on November 7. Tr. 131-32, 520. He received his first Miranda warnings at 2:38 p.m. that day from Officer Conley, and executed a written waiver of them at that time. Tr. 119-21, Ex. S-52. Conley took three separate statements (Statements 1 through 3) from Mr. Pitchford on November 7– the first one, initiated by Conley, "slightly after we brought him in," the second, over two hours after the written warning and waiver, at 4:45 p.m. that day, apparently when Mr. Pitchford requested to speak with the officer, and a third one, at the officer's behest, later that evening. Mr. Pitchford was returned to a holding cell between each statement, and had to be affirmatively brought back to Conley's office for each one. Tr. 122, 129-30.

The following morning, November 8, 2004, Mr. Pitchford was brought to Conley's office from the jail for the purpose of having Investigator Jennings give him polygraph examination. Tr. 137. At approximately 9:15 a.m., one of the officers, they disagree about who, went over with Mr. Pitchford, and he apparently signed to acknowledge his understanding of the rights enumerated, the "warning" half of a typed "Warning and Waiver of Rights" form. [42] Both officers agree that Mr. Pitchford did not, however, execute or sign the "Waiver" half of the form at this or any subsequent time. Tr. 123-26, 146-47, Ex. 60.

Conley then left the room so that the polygraph would be administered by Jennings alone, in accordance with how Jennings preferred to operate. Tr. 139. Jennings apparently rehashed Mr. Pitchford's understanding of the rights on top of the form at that time, though without obtaining any waiver of them, oral or written, and moved on to reading Mr. Pitchford the waiver and consent to the polygraph form. Tr. 140. Neither the consent nor the polygraph was ever obtained, however. According to Jennings:

> After advising Terry of his Miranda rights and also reading the waiver and consent form to him, he started crying and he stated that he had been up all night praying. I told him -- I said you realize you said you would take a polygraph. And if you lie to us, we are going to know whether or not you are lying about any of this. He at that point began telling me the chain of events that occurred that -- the day before.

Tr. 140. The waiver obtained on Nov. 7 was clearly too remote in time to the questioning the next day to be valid, *Mosley*, 423 U.S. at 104; *Tucker*, 417 U.S. at 450, *Chamberlin*, 989 So.2d at 333-34. Jennings admits he sought no new waiver before either this

[42] Conley claims that the form was Jennings' form and that Conley was "not in the room when it was prepared" Tr. 125. Jennings maintains that it was Mr. Conley is who "re-advised Mr. Pitchford of his rights" and that Conley then left the room and Jennings, using the form, went over the form and checked each right again as Mr. Pitchford reiterated to Jennings his understanding of each one Tr. 138.

statement or the subsequent recorded one designated Statement 5. Tr. 144. The information obtained from Mr. Pitchford during this unrecorded statement was offered into evidence at the trial. Though it exonerated Terry of any contemplation of lethal force, or intent or attempt to kill or actual killing—and suggested that he withdrew from the robbery before it was consummated – it also contained information that was used to make him guilty of the crime in ways that the previous statements had not. Tr. 571. Because there was no valid waiver obtained prior to this unrecorded statement, this was prejudicial *Miranda* error and requires reversal in and of itself. *McCarty v. State*, 554 So.2d at 911-12.

Further, to the extent that the information obtained from this unrecorded statement was used as a springboard for further interrogation in Statement 4, taken by Conley immediately thereafter, and Statement 5, taken by Jennings after Mr. Pitchford refused to continue being interrogated by Conley, those statements, too, are infected with its unconstitutionality. They are both, therefore, inadmissible for that reason alone, even if *per arguendo*, there were subsequent valid warnings or waivers obtained prior to either of those statements. *Missouri v. Seibert*, 542 U.S. 600 (2004). [43]

Statement 4, conducted and recorded Conley commenced at 9:43 a.m. Neither officer completed the written waiver process by having Mr. Pitchford sign the waiver portion of Ex. 60, Tr. 124-26. Conley did ask Pitchford if he understood his rights as previously advised and received an affirmative answer from him to the question "is it your own free will to make a

[43] *Seibert* was raised as in the pretrial suppression motion renewed prior to Jennings' testimony. R. 971, Tr. 568-69. The process with Jennings apparently took approximately a half hour, plenty of time for a pre-waiver interview to taint the subsequent ones. Ex. 60 (warnings given 9:14 a.m. and Conley leaves), (Statement 4 commences when Conley brought back in at 9:43 a.m.). Ex. 60; Tr. 126, 138, 139.

statement." Even assuming that this was sufficient to operate as a valid *Miranda* waiver for Statement 4, and Statement 4 was not obtained in violation of *Seibert* however, Pitchford subsequently revoked that waiver and invoked his Fifth Amendment right to silence by indicating he was unwilling to continue the interview with Mr. Conley. Tr. 140 ("when Officer Conley came back in, Terry quit talking. He didn't want to go back into it"); 151 (saying he did not want to talk to Conley in the statement itself). Statement 4 terminated at that time, and Conley left the room. 141.[44]

Instead of "scrupulously honoring" that invocation, however, Jennings immediately resumed interrogation of Mr. Pitchford with a new recorded statement, designated Statement 5 by the prosecution. He did this, however, without administering a new *Miranda* warning and obtaining a new and independent knowing and voluntary waiver of his rights to counsel and against self incrimination Tr. 139-43; 146-47, 151. He also, at the conclusion of that statement affirmatively reassured Mr. Pitchford that, unlike the interrogation conducted by Conley, the one he had just concluded with Pitchford would remain "just between you and I." Tr. 143, 151, 573. The product of that interrogation was the only "confession" by Mr. Pitchford to having participated in the robbery and was relied on heavily by the State both in its own right and as the platform from which inferences, some of them unsupported by the evidence at all, were

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[44] As this Court has recently noted, invocation of the right to silence does not operate as a hard stop of all interrogation in the way as invocation of the right to counsel does. *Chamberlin*, 989 So.2d at 333-34 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). Thus the clear and unequivocal invocation of the right to counsel required to stop all future contact is not required to find an invocation of the right to silence. *Mosley*, 423 U.S. at 100 ("If the individual indicates *in any manner* . . . that he wishes to remain silent . . . he has shown that he intends to exercise his Fifth Amendment privilege" and the interrogation must cease). However, what is not in doubt is that if the conversation is resumed, a new Miranda warning and a new waiver of the Miranda rights must be obtained. *Id.* at 104; *Tucker*, 417 U.S. at 450, *Chamberlin*, 989 So.2d at 333-34.

launched. Tr. 649, 773-74. See also See Argument III, *supra*. The undisputed failure to re-*mirandize* however, rendered that statement inadmissible. *Mosley*, 423 U.S. at 104; *Tucker*, 417 U.S. at 450 *See also Chamberlin*, 989 So.2d at 333-34. Because of the prejudicial nature of the admissions elicited during it, despite the fact that the statement was exonerative of Terry with respect to having killed or attempted or intended to kill, or having contemplated the use of lethal force, Tr. 571-72 reversal of the conviction here and retrial omitting the use of that information is required. *Chapman v. California*, 386 U.S. 18, 23 (1967).

The failure to obtain a valid waiver of rights, even without more, has been recognized by this Court as rendering the statement involuntary under *Jackson v. Denno*, 378 U.S. 368 (1964) for 14th Amendment purposes. *Abrams v. State*, 606 So.2d 1015 (Miss. 1992) *overruled on other grounds Foster v. State* 961 So.2d 670 (Miss. 2007); *Miller v. State*, 243 So.2d 558, 559 (Miss. 1979); *Johnson v. State*, 89 Miss. 773, 42 So. 606 (1907). However, in addition to this, Mr. Pitchford's statements were also the product of threats, promises, and inducements by the interrogators and exploitive psychological coercion based on these things, which independently rendered them involuntary.[45] *Bram v. United States*, 168 U.S. 532, 543 (1897), *Morgan v. State*, 681 So.2d 82, 86 (Miss. 1996) (citing *Chase v. State*, 645 So.2d 829, 838-39 (Miss.1994); *Layne v. State*, 542 So.2d 237, 240 (Miss.1989)); *Abrams v. State*, 606 So.2d 1015 (Miss. 1992) *overruled on other grounds Foster v. State* 961 So.2d 670 (Miss. 2007); (promises of leniency).

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[45] Involuntariness may be shown not only by physical coercion, *Brown v. Mississippi*, 297 U.S. 278 (1936), but by a variety of other types of coercion. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 398-99 (1978) (inculpatory statements obtained during a hospital interview of wounded suspect after police ignored his request for an attorney held involuntary); *Watts v. Indiana*, 338 U.S. 49, 53-54 (1949) *see also Jurek v. Estelle*, 623 F.2d 929, 937-38 (5th Cir. 1980) (en banc). "A finding of coercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of unconstitutional inquisition." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). *See also Rogers v. Richmond*, 365 U.S. 534, 545 (1961); *Harris v. Beto*, 367 F.2d 567, 568 (5th Cir. 1966) (coercion of a confession can result from psychological as well as physical pressure.)

Voluntariness turns solely on the circumstances surrounding the confession and not the probable trustworthiness of the statement. *See Rogers v. Richmond*, 365 U.S. 534, 540-44 (1961); *Denno*, 378 U.S. at 376-77, 383-86. In Mississippi, the prosecution must prove voluntariness beyond a reasonable doubt. *Brown v. State*, 781 So. 2d 925, 927 (Miss. Ct. App. 2001). Involuntary statements cannot be used for impeachment or any other purpose by the prosecution at trial. *New Jersey v. Portash*, 440 U.S. 450, 459 (1977); *Mincey v. Arizona*, 434 U.S. at 1398 ("any criminal trial use against a defendant of his involuntary statement is a denial of due process of law") (emphasis in original).

In the course of the interrogation by Conley on November 7, Conley made several demonstrably false representations to Pitchford: 1) that the police had recovered the cash register and safe from the store; 2) That they had the gun, it had been tested and that the bullets matched; and 3) that Eric Bullins had told them Terry had done it and that Terry had the safe that the police recovered. Tr. 134. While by themselves, misrepresentations that elicit statements do not render the statement involuntary, they became the preconditions to the threats, promises and inducements the next day that were the components of the improper psychological coercion employed by Jennings to obtain the unrecorded statement and Statement 5.

These efforts began when, having unsuccessfully found a "good cop" foil in any of the other officers present during the November 7 interrogations, Tr. 132-33, he brought in the DA's investigator, Mr. Jennings, to do this, as well as to put pressure on Mr. Pitchford by threatening to give him a polygraph, and misrepresenting the reliability of the outcome of that examination, and to tell Terry that anything Terry said to him was just between the two of them. Tr. 137, 143-44, 151, 573. Again, though these things alone were probably not sufficient to make the statements to Jennings involuntary under the Fourteenth Amendment, together they, and what

had transpired the day before became "the perfect storm" of unconstitutional psychological coercion. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Jurek v. Estelle*, 623 F.2d 929, 937-38 (5th Cir. 1980) (en banc).

This storm was the product of the techniques used by Conley and Jennings that successfully made Pitchford believe that, while what he said to Conley would become part of the record, nothing he said to Jennings would be used against him. Tr. 144, 151, 573. The statements were given only at times that the "bad cop" was removed from the process, the second time – which elicited Statement 5 – specifically when Terry invoked his rights and declined to talk any more. Tr. 126, 138-141, 151. They also came only after Jennings elected not to give the polygraph (relieving the "threat" implicit in the misrepresentation about the infallibility of the polygraph). Tr. 142, 144 Finally, and perhaps most importantly, these statements came because Jennings never made Terry waive his constitutional rights on the form Jennings was using to warn him, and left the part of the form he was going over with him blank. He also disassociated himself with any of the waivers of rights given earlier to Conley by doing this separate process, and ensuring the absence of Conley during the statements. Ex. 60 *Abrams*, 606 So.2d 1015 (failure to properly obtain waiver renders statement involuntary). This requires reversal.

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

Under the Mississippi Rules of Evidence 404(b) and the due process clause of the United States Constitution, "proof of a crime distinct from that alleged in an indictment is not admissible against an accused." *Palmer v. State*, 939 So.2d 792, 795 (Miss.2006), *Tobias v. State*, 472 So.2d 398, 400 (Miss.1985) (citing *Mason v. State*, 429 So.2d 569 (Miss.1983); *Tucker v. State*, 403

So.2d 1274 (Miss.1981); *Allison v. State*, 274 So.2d 678 (Miss.1973)). *See also Donald v. State*, 472 So.2d 370, 372 (Miss.1985) (well-settled rule in Mississippi that proof of crime distinct from that alleged in indictment is not admissible against accused); *Hughes v. State*, 470 So.2d 1046, 1048-49 (Miss. 1985) (fundamental fairness demands that defendant retain his liberty unless proven guilty beyond reasonable doubt on indicted offense and that offense alone and proof of other crime is inadmissible). Where evidence in violation of these principles is admitted, it is reversible error. *Snelson v. State*, 704 So.2d 452 (Miss.1997); *West v. State*, 463 So.2d 1048 (Miss.1985) (both reversing murder convictions);. *Stringer v. State*, 500 So.2d 928 (Miss.1986)(affirming capital murder conviction but reversing sentence due to inflammatory effect on jury at sentencing).

In the instant case, Terry Pitchford was indicted in two separate indictments. The first, and the one that the trial *sub judice* was held on, was the crime of capital murder of Rubin Britt in the course of an armed robbery on November 7, 2004. R. 10. In that crime, Mr. Pitchford's alleged co-perpetrator was Eric Bullins. The second indictment was a joint indictment of Terry Pitchford, Quincy Bullins, and DeMarcus Westmoreland for Conspiracy to Commit A Crime arising out of an thwarted attempt by Westmoreland and Quincy Bullins to rob the store in late October, 2004. [46] According to Westmoreland and Quincy Bullins, Mr. Pitchford was a co-conspirator in that offense, instructing the other two on how to do it and providing Bullins with a 22 pistol to commit it. However, both Westmoreland and Quincy Bullins denied having anything

[46] Eric Bullins, was indicted for capital murder a separate indictment from Terry Pitchford for allegedly participating in the same crime. R. 26. In September 2006, after Mr. Pitchford's conviction and death sentence, Eric Bullins pled guilty to Manslaughter on that indictment. He is presently serving his 20 year sentence for that offense and another 20 years for various drug offenses not connected to the November 7, 2004 incident. MDOC Inmate Locator http://www.mdoc.state.ms.us/InmateDetails.asp?PassedId=113929 Neither of the co-defendants in the second indictment is presently in MDOC custody.

to do with the subsequent robbery. Tr. 449-65; 522-31.

The state did not attempt to use a multi-count indictment claiming that the two charged crimes were part of the same transaction, nor did it seek to have the two separate charges against Mr. Pitchford tried in a consolidated proceeding. Instead, again reprising a discredited tactic about which it has been warned twice by this Court, it tried Mr. Pitchford on one crime, but introduced evidence about the other crime in order to enflame the jury and bolster otherwise inconclusive proof, particularly proof that would make the crime seem worse when the jury came to deliberate sentence. *State v. Flowers*, 773 So. 2d 309 , 322-25 (Miss. 2000) ("*Flowers I*"); *State v. Flowers*, 842 So. 2d 531, 543-50 (Miss. 2003) ("*Flowers II*") (reversing in both decisions because of State's introduction of evidence and arguments concerning deaths of three people in the same incident, but for whom defendant was not being tried at the time) It was error here, as it was in the *Flowers* cases, for the trial court to permit him to do this.

Defendant objected by way of pretrial motion to the admission of this and any other "bad act" evidence. R. 42-45, Tr. 54-56. The prosecution disclosed that it was going to offer testimony concerning the conspiracy involving the earlier thwarted robbery attempt by Quincy Bullins and Westmoreland. Reserving ruling at that time, the trial court overruled the objection just prior to the commencement of trial. Tr. 337-38. The state discussed the events involved in the charged conspiracy in its opening statement, Tr. 340 and offered the testimony of Westmoreland and Quincy Bullins concerning it in its case in chief Tr. 449-65; 522-31. Defendant was forced by the improper admission of this testimony to call rebuttal witness to some of the testimony given by Quincy Bullins. Tr. 582-89. The evidence concerning the purported conspiracy – for which Mr. Pitchford was not on trial at the time – was also a recurrent subject in the closings by both prosecutors, particularly in attempting to tie Mr. Pitchford to the .22 that had fired the fatal shots

at the November 7 robbery. Tr. 629-30, 631, 647-48.

Defendant does not gainsay the principle that other crimes may be admissible under Rule 404(b) to show intent, preparation, plan or knowledge, or where they are necessary to tell the complete story so as not to confuse the jury. *Palmer*, 939 So.2d at 795; *Ballenger v. State*, 667 So.2d 1242, 1257 (Miss.1995). However "even where evidence of other crimes is admissible under M.R.E. 404(b), it cannot be admitted unless it also passes muster under M.R.E. 403. That is, the risk of undue prejudice must not substantially outweigh its probative value." *Ballenger*, 667 So.2d at 1257.

In its guilt phase closing, the State expressly admits that the evidence about the overt acts in connection with the earlier conspiracy was not necessary for the jury to understand the story of what happened on November 7, arguing that the evidence pertaining only to that day "separately would be more than plenty for a conviction." Tr. 648. Hence, the probative value of the testimony from Westmorland and Bullins is relatively slight when it comes to convicting Mr. Pitchford of the only crime for which he was being tried, at least at the guilt phase of the proceedings. *See Flowers I*, 773 So. 2d at 325.

The possibility of unfair prejudice is extremely high, especially since the prosecutor also expressly argues it as evidence of Mr. Pitchford's character, for which it is clearly inadmissible. *See* M.R.E 404(b) ("Evidence of other crimes, wrongs, or acts *is not admissible to prove the character of a person* in order to show that he acted in conformity therewith). Similarly, even if some parts of what Bullins and Westmoreland testified to might have been relevant to intent, preparation or plan, most of it was inflammatory and irrelevant to those things. Where, as here, there is potentially admissible smidgens of proof mixed into a sea of inflammatory and inadmissible evidence, however, the conviction cannot stand. *Flowers I* 773 So. 2d at 322-25

(holding that even where evidence is part of chain of events, must also be necessary to tell the story; where it is not both, it is not admissible).

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

Miss. R. Evid. 702 permits an individual who is "qualified as an expert by knowledge, skill, experience, training, or education" to offer expert testimony, including expert opinions

> if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

See also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 35 (Miss. 2003). If evidence is admitted against a criminal defendant in violation of this rule and is unduly prejudicial to him, its admission is also a violation of his rights under the Due Process Clause. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

Dr. Steven Hayne was tendered under Rule 702 and accepted by the Court in the instant prosecution as "an expert in forensic pathology." Tr. 398. His expert testimony was heavily relied upon by the State both in obtaining its conviction of Mr. Pitchford and in securing a death sentence from the jury thereafter, both in its own right and as a means of bolstering otherwise suspect and unreliable testimony from informant or co-defendant witnesses, which, in turn was the only direct evidence that Mr. Pitchford had personally killed or intended to kill the victim in the instant matter. *See. e.g.*, Tr. 629-30, 649, 773-4, 804-05.

Hence, if it were improperly admitted it would be unduly prejudicial to him and violative of the Due Process Clause as well as Rule 702. *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) (holding that opinion offered by Dr. Hayne outside his expertise was inadmissible and

required reversal of the defendant's conviction). [47] In the instant matter, there are three reasons requiring reversal on this basis because the testimony of Dr. Hayne was admitted in violation of Rule 702 and the due process clause.

First, even assuming *per arguendo* that Dr. Hayne should have been qualified as an expert in the first place, many of the opinions he did offer—and which were relied upon heavily by the State in obtaining the conviction, were outside the scope of his expertise, and therefore improperly admitted. *Edmonds*, 955 So.2d at 792-93. In particular, in addition to testimony within the general expertise of forensic pathology, [48] Dr. Hayne, over the objection of the defense, was permitted to give what purported to be expert opinions regarding the caliber of the weapons with which each of the injuries were inflicted, and the number of times each weapon was discharged. With respect to the "shot pellets" and "wadding" he associated with certain

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[47] The court reversed, holding that

> [w]e have no alternative but to find that [the defendant's] substantial rights were affected by Dr. Hayne's conclusory and improper testimony. Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain area than the average person. See M.R.E. 702. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. *See generally Simmons v. State*, 722 So.2d 666, 673 (Miss.1998); see also *United States v. Benson*, 941 F.2d 598, 604 (7th Cir.1991) (an expert's "stamp of approval" on a particular witness's testimony [or theory of the case] may unduly influence the jury).

Edmonds, 955 So.2d at 792. *See also Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1242 (Miss. 2007).

[48] The testimony within his expertise included his autopsy findings that Mr. Britt had five injuries consistent with wounds made by small caliber projectiles and died as the result of bleeding to death from three of those wounds. Tr. 414. He also authenticated "projectiles" and "projectile fragments" that he associated with several of these wounds. Tr. 416-17. Additionally, he offered his opinion that Mr. Britt's body showed non lethal wounds to the chest, abdomen, left thigh and right arm from "shot pellets" Tr. 400-01 and identified some "shot pellets" and "wadding" that were recovered by him during the autopsy as being associated with those wounds and authenticated those items as well. Tr. 400-01, 414.

non-lethal injuries from one of the weapons, his opinion was specifically solicited about whether the non-fatal wounds suffered were "not inconsistent" with having been shot by a 38 caliber weapon loaded with rat shot that had been shot from one to four times." Tr. 404, 415-16. This testimony is similar to that which was condemned in *Edmonds* and is likewise outside his area of expertise. Its admission also similarly irreparably prejudiced the defendant and requires reversal here.[49]

The state made devastating use of this clearly improper testimony and inferences from it. In seeking a conviction at the guilt phase, the prosecution argued that "you heard Dr. Hayne testify that he was shot five times with a 22, three of which were lethal wounds" Tr. 629-30 and that the jury should "look at where the wounds are. Whoever was shooting with that 38 meant to kill him with that 38." Tr. 649. At the penalty phase, Dr. Hayne was again invoked as an expert whose testimony established, contrary to the defendant's statement that he was not firing the fatal shots and the shooting was done in a panic by his companion, made death the "only" appropriate punishment. "They didn't shoot him one time . . . They shot five – more than five times." "They were up close on him at some point . . .They were close enough that shot in that 38 sprayed his whole body . . . thigh to shoulder." "They didn't just shoot him, they made sure he

[49] Defendant first objected to leading nature of the question propounded, and was overruled. Tr. 415-16. Once the doctor's testimony proceeded to its conclusion that the only fatal wounds were from a different gun, it became evident that any findings regarding the number of times the 38 was discharged was not related to his findings as a pathologist. At that point, the defense expressly articulated the outside the expertise objection. Tr. 417-18. The objection was therefore a timely contemporaneous objection. *Sumner v. State*, 316 So. 2d 926 (Miss. 1975). Even if it were not technically contemporaneous, however, it did not prejudice the proponent of the testimony, since it was made while the witness was still on the stand and subject to further examination by both parties. It was certainly made in time to allowed the court to "correct the error with proper instructions to the jury." *Jackson v. State*, 885 So.2d 723, 729(Miss. Ct. App. 2004) (quoting *Baker v. State*, 327 So.2d 288, 292 (Miss.1976). Moreover, in this capital case, even if it was not an abuse of discretion for the trial court to rely on the contemporaneous objection rule, in light of the explicit and highly prejudicial use this very testimony was put to by the state in obtaining the death penalty, Tr. 804, this should be reviewed as a matter of plain error. *Porter v. State*, 732 So.2d 899, 902-05 (Miss.1999) *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991)

was dead" Tr. 773-74. In the States final closing, Mr. Evans specifically invokes the testimony he elicited from Dr. Hayne, and only from him "They went in there and continued to shoot him *up to 9 times*" compare Tr. 804 with Tr. 415 ("you are finding that he was shot anywhere from six to nine times"). Only a new trial can cure the prejudice this error caused the defendant. *Edmonds*, 955 So.2d at 792-93

Second, the State failed to show that Dr. Hayne is "qualified as an expert by knowledge, skill, experience, training, or education" because, the doctor substantially misrepresented, perhaps even perjured himself, regarding, some of his material experience and credentials as a forensic pathologist. This would require exclusion of all of Dr. Hayne's testimony.

In particular, Dr. Hayne claimed to be "*The* state pathologist for the Department of Public Safety Medical Examiner's office." Tr. 396. This was facially untrue. Mississippi has no office of "State Pathologist for the Department of Public Safety Medical Examiners office." The Mississippi Code does establish the office State Medical Examiner, to be appointed and supervised by the Commissioner of Public Safety but at the time of the autopsy and Dr. Hayne's testimony, that office was vacant and was thus not held by Dr. Hayne. Miss. Code Ann. § 41-61-55. Moreover, the statute requires that the occupant of that office be a licensed physician who is also "certified in forensic pathology by the American Board of Pathology." *Id. See also* § 41-61-53(h) (distinguishing expressly between "the State" Medical Examiner, who must hold that credential, and "county medical examiners" who need only be licensed physicians appointed by counties to perform autopsies on a case by case basis, and which is the capacity in which Dr. Hayne performed the autopsy in this case). Dr. Hayne does not have this credential and was therefore not only not "the state" anything, he was not even eligible to serve in the only state office for which a forensic pathologist is the appropriate occupant. *Edmonds*, 955 So. 2d at 802

(Diaz, P.J., specially concurring) (expressing "serious concerns over Dr. Hayne's qualifications to provide expert testimony" at all as a consequence of that lack of credential).

Even if the lack of the credential itself does not facially disqualify Dr. Hayne from being recognized as an expert in forensic psychology, for him to have obtained recognition as such in the trial court by making material misrepresentations relevant to his credentials renders that recognition of expertise invalid and requires a new trial *See, e.g. State v. Ruybal*, 408 A.2d 1284 (Me. 1979), *People v. Cornille*, 448 N.E.2d 857 (Ill. 1983). *See also Pearson v. State*, 428 So.2d 1361, 1353 (Miss. 1983) (use of false evidence or perjured testimony).[50]

Second, even if this perjury did not prevent meeting the threshold qualifications as a forensic pathologist, his own testimony concerning his qualifications established that the methods he employed were not in conformity with the accepted methods of the profession, and his opinions were therefore not "the product of reliable principles and methods." *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 60 (Miss. 2004) (holding that "if a particular expert's methods ignore or conflict with the techniques and practices generally accepted within the field, that expert's opinion should not be considered valid or competent for admission in court.").

Dr. Hayne testified in this matter that he does 1500 to 1600 autopsies annually. Tr. 418. The National Association of Medical Examiners (NAME) is perhaps the largest professional

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[50] "To be sure, where it may be established that a conviction has been obtained through the use of false evidence or perjured testimony, the accused's rights secured by the due process clause of the Fourteenth Amendment of the Constitution of the United States are implicated. *Mooney v. Holohan*, 294 U.S. 103, (1935). And this is so without regard to whether the prosecution has wilfully procured the perjured testimony. Where such false evidence has in fact contributed to the conviction, the accused is entitled to relief therefrom. *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150, (1972)." 423 So. 2d at 1353. (parallel citations omitted).

association in the profession of forensic pathology, sets limits on the number of autopsies a forensic pathologist can conduct in a year and still meet the quality assurance standards of the profession. After 250 autopsies a year, a pathologist is deemed under those standards to be deficient, and after 325 is subject to sanction. NAME Inspection & Accreditation Policies and Procedure Manual, Sept. 2003 at 2.[51] Dr. Hayne, by his own admission, was performing between four and over six times the number of autopsies the standards of the profession dictate at the time he performed the autopsy on Mr. Britt. It is clear that his methods "ignore or conflict with the techniques and practices generally accepted within the field" of forensic pathology and the conviction based on them should not be allowed to stand.

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

In addition to the failure to grant Defendants Instructions D-9, R.1132 and D-10, R. 1133 as proper cautionary instructions concerning informant testimony, discussed in Argument V, *supra*, the trial court erred in granting several other instructions, as well. Because the denial of these instructions affected his ability to be fairly tried in a matter where the death penalty was a possible punishment, these denials also violated the Eighth and Fourteenth Amendments to the U.S. Constitution.

The trial court's most prejudicial error came in failing to instruct the jury on the lesser offense of non-capital murder. *Fairchild v. State*, 459 So.2d 793 (Miss. 1984). D-30, R. 1148. Tr. 604. Failure to give this instruction amounted to granting a peremptory instruction to the

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[51] These are not arbitrary numbers but are directly correlated to competent professional practice. Vincent DiMaio, the author of *Forensic Pathology*, the profession's guiding textbook, explained to the Wall Street Journal that "[a]fter 250 [forensic] autopsies, you start making small mistakes. At 300, you're going to get mental and physical strains on your body. Over 350, and you're talking about major fatigue and major mistakes." Radley Balko, *CSI: Mississippi*, WALL ST. J., Oct. 6, 2007, at A20.

state on the defendant's having committed armed robbery. *See Jenkins v. State*, 607 So. 2d 1171, 1179 (Miss. 1992) (finding that improper accomplice instruction likely served as peremptory instruction on guilt). The trial court based its denial solely on the conclusory statement that "there's not one bit of evidence that would support the giving of this instruction." Tr. 604. This was simply wrong. The testimony of the co-conspirators in the earlier robbery attempt concerning Mr. Pitchford's decision to get someone else to help him do it, Tr. 454, combined with Mr. Pitchford's statements to Inv. Jennings that he intended to rob, but withdrew from the store without attempting to take anything by force – and thereby the robbery -- when his co-defendant started shooting, Tr. 575, could make him guilty as an accomplice to simple felony murder – killing in the course of a non-capitalizing other felony – conspiracy. Miss. Code Ann. § 97-3-19(c). The only item associated with the store found in his possession was the 38 pistol, but there is also testimony from Officer Conley that Mr. Pitchford said he acquired that pistol from another source before the robbery occurred. Tr. 502. Hence, there was evidence to support the giving of the simple murder instruction. In determining whether or not to grant an instruction, the trial court may not weigh the evidence or make credibility determinations concerning it. If any evidence exists which supports giving an instruction, it must be given. *Ruffin v. State*, 444 So.2d 839, 840 (Miss.1984).

In combination with Instructions 2, 3, and 4 (State's proposed instructions S-1, S-2A, and S-3 granted over the objection of the defendant, Tr. 591-93), R. 1118-19, which instruct the jury on the elements of capital murder and armed robbery and in accomplice liability but improperly fail to give any guidance to the jury on what to do if it fails to find any of the requisite elements beyond a reasonable doubt, the denial of the lesser included non-capital murder instruction

rendered the jury instructions at the culpability phase fatally flawed and requires reversal. *Lester v. State*, 744 So. 2d 757, 759-60 (Miss. 1999).

It was also error when, after initially granting it, the trial court refused the proposed defense c instruction D-18, R. 1131 in favor of a hastily drafted instruction S-5, given as Instruction 6, R. 1122. Tr. 597-99, 613 which included the accomplices and informants in the same instruction. D-18 was a cautionary instruction dealing only with the co-participant/accomplice testimony from Quincy Bullins and DeMarcus Westmoreland, who were testifying about a different crime than the one being considered by the jury (error in and of itself, see Arg. IX, *supra*) solely for the purpose of establishing motive or planning, and not with the informant testimony from James Hathcock and Dantron Mitchell, who were testifying to purported admissions by defendant to them about the crime that the jury was considering (also independent error, see Arg. V, *supra*). Denying the separate instruction had the effect of confusing the jury regarding the evidence and permitting it to confound two very different kinds of evidence into one, and requires reversal. *See, e.g., Brazile v. State*, 514 So.2d 325, 326 (Miss. 1987) (reversing conviction "because of the inaccurate and confusing nature of" an aiding and abetting instruction).

Finally, it was error to deny defendant's requested instruction D-34, R 1151. *Sandstrom v. Montana*, 442 US 510 (1979) requires that where the state is relying on inferences and presumptions arising out of even non-circumstantial evidence, the Fourteenth Amendment requires that the jury not be permitted to make more than one leap from what is proven beyond a reasonable doubt to what is inferred. In the instant matter the State was relying on inference for a key element of defendant's guilt of capital murder–that his ownership of the gun that fired the fatal shot made him at least an accomplice, if not the actual perpetrator, of the death in the course

of an armed robbery which he had planned. Tr. 649. It sought and obtained its accomplice instruction, at least in part on the basis of this inference. Instruction 4 (S-3), R. 1120.[52]

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

At the penalty phase of a capital trial, it has long been established that the Eighth Amendment to the United States Constitution gives a very broad scope to a criminal defendant facing the death penalty in presenting evidence in mitigation of punishment. A sentencing jury must be permitted to "consider[] . . . [any] evidence [that] the sentencer could reasonably find . . . warrants a sentence less than death." *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990).

Further, in a recent decision, the United States Supreme Court has reiterated that it "speak[s] in the most expansive terms" when it describes the scope of evidence a capital defendant may introduce in mitigation. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (holding that mitigating evidence is relevant even if it has no nexus with the crime committed and reiterating that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"). It expressly sets the threshold for relevance for admissible evidence in a defendant's mitigation case at a very low level and holds specifically "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death." *Tennard*, at 285. *See also Boyde v. California*, 494 U.S. 370, 377-378 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586, (1978)); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Payne v. Tennessee*, 501 U.S. 808, 822, (1991).

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[52] The lack of this instruction at the guilt phase also infected the penalty phase, where the State spring boarded off of the guilt finding obtained with it to argue that the defendant met the statutory *mens rea* factors for imposition of a death penalty, as well. Tr. 772-74.

The trial court erroneously prevented the Defendant from adducing mitigation evidence allowed by the Constitution and the jury was thus unable to make a decision regarding sentence in conformity with the Eighth Amendment. The sentence in this matter must be vacated as a result. *Tennard*, 542 U.S. 274.

Citing *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), the State objected to the Defendant seeking information from Dominique Hogan, the mother of Terry's two year old son, about the effect Terry's death would have on the child. The trial court sustained the objection and pursuant to that ruling, the Defendant did not seek to inquire about the impact Terry's death would have on any other family member witness, either. Tr. 687-88. [53] This was constitutional error under the broad scope of *Tennard* and requires vacating the death sentence here.

Notwithstanding some language in *Wilcher*, apparently foreclosing testimony from family members about their own feelings and how they relate to the defendant, this Court has, consistently with the trend in the Supreme Court that has culminated in *Tennard*, subsequently recognized that denying the right to offer such testimony is, in fact, erroneous. *Simmons v. State* 805 So. 2d 452, 498 (Miss. 2001).

In the instant case, the defendant, already reduced by the failure of the trial court to permit time to complete the mitigation investigation, and to accommodate the conflicting schedule of the mental health professional who could "knit up" the mitigation case, to a mitigation case dependent solely on the testimony of a few teachers and close family members,

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[53] *Sua sponte*, though it was not argued by either counsel, the trial court also sustained the objection on the grounds that the witnesses response would be "speculative." Tr. 688. Clearly, if otherwise admissible, the lay opinion of a mother about the possible effects of absence of the father on a two year old – especially in light of the fact that the father had been incarcerated since the child's infancy and the mother had been observing the effect the highly restricted access had had, is within the scope of admissible lay opinion under Miss. R. Evid. 701. *See McGowen v. State*, 859 So.2d 320, 344-45 (Miss. 2003).

was restricted by the court from offering significant evidence in support of mitigating his sentence, evidence that "the sentencer could reasonably find [] warrants a sentence less than death." *Tennard*, 542 U.S. at 284 (citing *McKoy*, 494 U.S. at 441). This was error that requires that the death sentence imposed on Mr. Pitchford be vacated.

Although the trial court agreed that information about Mr. Pitchford's present relationship with his child was relevant mitigation, it thwarted the defendant's attempt to illustrate that for the jury by way of videotape. Tr. 97-91. Such evidence is legally well within appropriate mitigation, and the means of presenting it is also reasonable. *See, e.g. State v. Fautenberry*, 650 N.E.2d 878, 885 (Ohio, 1995) (noting that trial court had permitted actual videotaped testimony from family member mitigation witnesses), *Collier v. Johnson*, 2001 WL 498095 (N.D.Tex., No. CIV. A. 798CV008R, May 9, 2001) (acknowledging that video footage of defendant with his children that appointed attorney assisting a defendant representing himself *pro se* wanted to introduce could have been powerful mitigation evidence).

Under both federal constitutional law and Mississippi law, it has long been established that in a death penalty case "the jury must have before it as much information as possible when it makes its sentencing decision." *Mackbee v. State*, 575 So.2d 16, 39 (Miss.1990). Hence, the right of a defendant to put on any relevant evidence that he wishes to argue to the jury mitigates his sentence is virtually unlimited. *Jackson v. State*, 684 So.2d 1213, 1238 (Miss.1996), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) *See also Jordan v. State*, 912 So.2d 800, 820 (Miss. 2005) (citing *Jackson*. 684 So.2d at 1238 and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)and stating that they "stand for the proposition that a defendant is entitled to present almost unlimited mitigating evidence.").

Letting a jury observe the object of their sentencing deliberations and his children can be

powerful mitigation evidence, and is generally admissible under the broad scope of non-statutory mitigation evidence the Court must permit under *Jackson*, 684 So. 2d at 1238, *Eddings*, 455 U.S. 104 and their progeny. It was reversible error for the trial court to prevent this evidence from being obtained.

Finally, the trial court erred when it refused to permit Defendant to contextualize the mitigation information about how he reacted to his father's illness and death with information about how the family unit as a whole reacted to it by eliciting his brother's feelings at the time, and his mother's testimony about the nature of the illness or the effect it had on the mother in the context of her ability to parent her sons. Tr. 696, 714-16. The family environment in which the client was reared is of great significance to establishing mitigation, and can include both positive and negative aspects of that environment. *See*, *Wiggins v. Smith*, 539 U.S. at 520-26 (noting importance of family and childhood life in mitigation investigation). There need not be a "nexus" to the crime itself. *Tennard*, 542 U.S. at 280; *See also Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (post-offense adjustment to prison life). By limiting the defendant from discussing the impact of his father's death on his family of origin in general the trial court improperly limited the defendant's ability to paint the picture of that environment, as it contributed to his reaction to his father's death.

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

In addition to the misconduct and improper evidence dealt with elsewhere, the trial court made three additional reversible errors in what it permitted the jury to hear about at the penalty phase. First, it permitted victim impact testimony that went beyond the limited scope permitted by *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("[i]n the event that [victim impact] evidence

is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief"). In particular, members of the victim's family were permitted to give evidence about the decedent beyond that which was "*relevant to the crime charged*" *Randall v. State*, 806 So.2d 185, 225 (Miss. 2001) (emphasis in original). Defendant preserved this objection by way of pretrial motion. R. 60-64; Tr. 57.

Second, in the course of presenting its victim impact evidence, it employed hearsay evidence that violated the defendant's Sixth Amendment right to confrontation of witnesses. *Crawford v. Washington*, 541 U.S. 36 (2004). Over defendant's objection, the trial court permitted the decedent's widow not only to tell about her loss at her husband's death, but to read a letter from her niece, who did not testify, regarding him. Tr. 658-62.

Third, it effectively and inappropriately, and over the defendant's objection gave the State what amounted to an closing argument to the jury at the conclusion of its case in chief at the penalty phase. Tr. 667-70. The State elected not to give an opening statement at the commencement of its penalty case. This operated as a waiver of its right to do so that it did not have any right to have the trial court correct merely because the Defendant elected to make one prior to the commencement of his mitigation evidence. *See McFadden v. Mississippi State Bd. of Medical Licensure*, 735 So.2d 145 (Miss. 1999).

Given the other impediments the defense was under at this point, including the absence of the only witness who could function as an "explainer' of the significance of the family and social information the jury would be hearing, to have to do its own opening only after the State's de facto closing was an abuse of discretion that prejudiced the defendant and denied him his right to present the mitigation case he was entitled to present. *Tennard* 542 U.S. at 284.

XIV. SENTENCING PHASE INSTRUCTION 1 IS DEFICIENT BECAUSE OF THE REFUSAL OF DEFENDANTS REQUESTED SENTENCING PHASE INSTRUCTIONS DS-7, 8, 13, 15, AND MITIGATING FACTOR (H) FROM DS-17 AND BECAUSE OF THE IMPROPER PLACEMENT OF THE VERDICT OPTIONS ON THE PAGE.

Sentencing Instruction 1 directs the jury that if it finds one or more of the aggravating circumstances on which it has been instructed exists beyond a reasonable doubt "then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances" and goes on to instruct the jury that it "may" impose a death sentence if it finds that the mitigators do not outweigh the aggravators. R. 1206. The instruction does not expressly inform the jury that it may give a life sentence *even if* it finds that the mitigating circumstances do not outweigh the aggravators. The defendant therefore requested an instruction doing so DS-7, R. 1225. The trial court denied DS-7 on the basis of the State's argument that *Manning v. State*, 765 So.2d 516 (Miss. 2000) and its progeny did not require it. This was error in light of the United States Supreme Court's intervening decision in *Kansas v. Marsh*, 548 U.S. 163, 176 n.3 (2006).

This court has not required the giving of the mercy instruction that the Supreme Court found to be crucial to the constitutionality of the Kansas sentencing scheme. *Chamberlin v. State*, 989 So.2d 320, 342 (Miss. 2008). That conclusion makes the clarification that the mere finding of less weighty mitigation does not require a death sentence all the more important. DS-7 does not "nullify" the weighing process at all, which is the problem *Manning* and *Chamberlin* identify as the reason for not permitting a mercy instruction, it simply clarifies what legal options are available to it once it has done the weighing. The sentencing statute itself specifically permits the jurors to make the finding DS-7 instructs them about, Miss. Code Ann. 99-19-101(2)(d), as do the United States and Mississippi Constitutions. *Graham v. Collins*, 506 U.S. 461, 468

(*relying on Woodson v. North Carolina*, 428 U.S.280, 304-05 (1976)); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). *Pruett v. Thigpen*, 665 F.Supp. 1254, 1277-78 (N.D. Miss. 1986); *Manning v. State*, 726 So. 2d 1152 (Miss. 1998). It was therefore error for the Court to give Sentencing Instruction 1 without also giving DS-7.

This error was compounded when the trial court also declined to include in its listing of non-statutory mitigating circumstances the jury could consider the mitigating circumstance that "Mr. Pitchford had mental health problems as a child that were never treated" as requested in D-17(h), R. 1215, refused as unsupported by evidence at Tr. 731-33. Mississippi permits the proof of mental health infirmities through the use of lay testimony concerning them. *Groseclose v. State*, 440 So.2d 297, 301 (Miss. 1983). In the case *sub judice*, the defendant's mother, brother and sister all testified to significant emotional and behavioral changes in Terry Pitchford at age 10 immediately following his father's death from cancer. His mother also testified to the lack of counseling or other treatment for these things. Tr. 696-97, 708-09, 717-18. This is clearly sufficient evidence to warrant the instruction sought. The trial court however, improperly weighed that testimony, rejecting it in favor of its own conclusion that this testimony was "not an indication that he had mental health problems. It may have been an indication that she spared the rod and spoiled the child." Tr. 731-32. While that is one conclusion that the *jury* might have been free to draw from the testimony, it was not one the judge was permitted to predetermine and deny the instruction that asked the jury to consider the evidence and make up its own mind as to the mitigating import – or lack of it – of this testimony. *Ruffin v. State*, 444 So.2d 839, 840 (Miss.1984).

The trial court also erroneously declined to give Defendant's proposed sentencing instruction, D-13 which cautioned the jury that the aggravating factors on which it was being

instructed in Sentencing Instruction 1 were the only aggravating factors they could consider. R. 1220; refused as cumulative at Tr. 753. Although Sentencing Instruction 1 did advise the jury of only two aggravating factors it could consider, that was insufficient under the United States Constitution to protect the Defendant from having the jury improperly consider other things as aggravating. *See U.S. v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover it magnified the prejudice to the defendant of the State's improper argument inviting it to find the brutality of the crime as a basis for imposing the death penalty even though the State had not sought, and the facts did not justify their finding the crime was aggravated because it was so heinous, atrocious and cruel. Tr. 804. *See* Arg. III, *supra*

It was also error for the trial court to refuse Defendant's proposed sentencing instruction DS-15, R. 1218, refused as cumulative at Tr. 754. Instruction 1 recites several time that the two sentences being considered by the jury are "death" and "life in prison without parole." R. 1205-8, 1213. However, nowhere does that or any other instruction expressly describe what, under the statutory sentencing scheme, the term "without parole" means in terms of other kinds of available release. Without the additional information doing so provided by DS-15, Sentencing Instruction 1 is incomplete and improper, since it leaves the jury free to speculate on whether "without parole" truly does preclude future release. Leaving such opportunity for speculation, when it is possible to be definitive, is reversible error if a proper, more specific instruction is furnished to it. *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006). It is not sufficient that counsel may argue that "without parole" really means what it says. "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and

are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990).

Similarly, the trial court refused an instruction informing the jury that the black letter law of the statute required that a sentence of life in prison without parole be imposed in the event that the jury could not agree upon sentence. Miss Code Ann. §99-19-103. DS-8 R. 1224 denied, even with redaction to statutory language alone, at Tr. 750-51. The jury was instructed that one possible verdict it could return was "We the jury are unable to agree unanimously on punishment." Almost all jurors know that ordinarily, a hung jury means that another trial, before another jury, will be required. In the unique world of capital sentencing procedures, that is not the case. In *Simmons*, the Court relied on similar misapprehensions that were likely in jurors' minds about what a "life" sentence actually meant in terms of eligibility for future release to require that jurors be instructed on that if their sentence would meet the requisites of the Eighth Amendment. 512 U.S. at 169. So, too, here, because out statute particularly requires this counter-intuitive outcome, the jury must be apprised of it if any sentence they render is to pass Eighth Amendment muster.

Finally, Sentencing Instruction 1 placed the instructions about the form of a post-weighing verdict of life imprisonment without parole, or that the jury was unable to unanimously agree on punishment on a separate page from the instructions and form of the verdict for returning a death sentence. R. 1207, 1213. This was condemned in *Jenkins v. State*, 607 So. 2d, 1171, 1180 (Miss. 1992); *Stewart v. State*, 662 So. 2d 552, 564 (Miss. 1995); *Bell v. State*, 725 So. 2d 836, 858 (Miss. 1998). Defendant objected to this instruction for this reason but the trial court declined to have the instruction redone to avoid the problem. Tr. 757-60. Although the actual Verdict Form, R. 1234-35, put all three possible verdicts on the same page of the form, that does not undo the confusion and possible suggestibility to the jury that death is the preferred

verdict that the layout of the instructions they were following gives. Indeed, when the jury first attempted to return its verdict in this matter, the trial court found that the form had not been filled out properly and sent the jury back telling it to "read the instruction again real carefully" and fill in another part of the verdict form. Since it only took them five minutes to do this, it seems evident that it was the second page that had been left blank, since the writing on the first pages about aggravating factors and mens rea was lengthy. Tr. 811-12

In light of these instructional errors the sentence of death imposed on Mr. Pitchford must be reversed and remanded for a new sentencing proceeding before a properly instructed jury. *See Rubenstein*, 941 So.2d at 791.

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

Execution will violate Baze v. Rees

Terry Pitchford has been sentenced to death by lethal injection. This Court has held that challenges to this method of execution can, and must, be brought on direct appeal. *See, e.g., Jordan v. State*, 918 So.2d 636, 661 (Miss. 2005). Hence, this is a timely request for relief

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. U.S. Const. amend. VIII. The Supreme Court's Eighth Amendment jurisprudence establishes that punishments that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society'" violate the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). The Court has also established that the Eighth Amendment prohibits punishment that "involves the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), "involve torture or a lingering death," *In re*

Kemmler, 136 U.S. 437, 447 (1890), or that do not accord with "the dignity of man, which is the basic concept underlying the Eighth Amendment." *Gregg*, 428 U.S. at 173.

Affirming Mr. Pitchford's death sentence would violates the Eighth Amendment because Mississippi's method of inflicting death by lethal injection—the only authorized method of execution under Mississippi law— has not yet been determined to pass muster under the Eighth Amendment standards promulgated by the United States Supreme Court in *Baze, et al. v. Rees*, 553 U.S. __, 128 S.Ct. 1520 (2008).

In *Baze*, the plurality opinion authored by the Chief Justice and joined by Justices Kennedy and Alito held that a method of execution that presented a "substantial risk of serious harm" would violate the Eighth Amendment's prohibition against cruel and unusual punishment. 238 S.Ct. at 1531. The plurality opinion explained that conditions of execution that were "sure or very likely" to cause serious illness and needless suffering, and give rise to "sufficiently imminent dangers" of serious harm would meet this standard. *Id.*

The Court in *Baze* went on to look at the fully developed factual record about the practice of lethal injection in the state of Kentucky, and concluded that as it was performed in Kentucky, lethal injection met the requisite standard. In doing so, it relied on specific fact findings that had been made after a full hearing in the lower courts that established both significant safeguards against unnecessary suffering in the doses of drugs administered and well trained personnel who carry out the process. *Id.* at 1533-34. Based on information on file in the United States District Court for the Northern District of Mississippi, it appears that the lethal injection procedure employed in Mississippi may not meet these factual criteria for acceptance. See *Walker, et al. v. Epps, et al.*, No. 4:07-cv-00176 (N.D. Miss, Affidavit of Mark Heath, M.D., filed October 23, 2007).

In the wake of *Baze*, it is necessary that each jurisdiction's lethal injection process undergo a similar careful factual examination before that process as employed in that jurisdiction can be deemed to meet the Eighth Amendment standards promulgated by the Court. This requires at the very least that, upon timely raising the issue, a hearing be conducted doing so before a determination is made. *See, e.g. Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Opinion and Order setting hearing on post-*Baze* challenge to state lethal injection protocols and practice, filed 08/26/2008). Because that has not yet occurred in Mr. Pitchford's case, this Court should either reverse the death penalty altogether or remand this matter for full hearing on the lethal injection issue in the trial court before proceeding with the appeal.

Failure to include aggravating circumstances in indictment

The indictment in this case failed to charge all elements necessary to impose the death penalty under Mississippi law. R. 10. R.E. Tab 3. The indictment did not include a valid statutory aggravating factor nor a mens rea element of Miss. Code § 99-19-101(5) and (7) respectively. This claim is not subject to a procedural bar. *Byrom v. State*, 863 So. 2d 836, 865 (Miss. 2003) ("substantive challenges to the sufficiency of the indictment are not waivable and may be raised for the first time on appeal"). This Court's prior jurisprudence permitting finding such indictments valid is wrongly decided and that error should be corrected here. *Williams v. State*, 445 So. 2d 798, 804 (Miss. 1984).

Under the Due Process Clause of the Fifth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, and the corresponding provision of our state constitution, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-82 (2000). "The right to trial by jury guaranteed by the Sixth

Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." *Ring,* 536 U.S. 584, 122 S.Ct. at 2443.

Under the Mississippi statutory scheme, without a sentencing hearing before a jury as mandated in Miss. Code § 99-19-101, and a finding of the jury of requisite men rea factors and aggravating circumstances beyond a reasonable doubt, the maximum penalty for capital murder is life imprisonment. *See Pham v. State*, 716 So. 2d 1100, 1103-04 (Miss. 1998); *Berry v. State,* 703 So. 2d 269, 284-85 (Miss. 1997); *White v. State*, 532 So. 2d 1207, 1219-20 (Miss. 1988); *Gray v. State*, 351 So. 2d 1342, 1349 (Miss. 1977). *See also Ring*, 122 S.Ct. at 2437 ("Based solely on the jury's verdict finding Ring guilty of first-degree murder, the maximum punishment he could have received was life imprisonment"). This implicates the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, and the corresponding provisions of our state constitution. *Apprendi* at 476; Ring, 536 U.S. 584. Holdings by this Court to the contrary are clearly erroneous in light of the Supreme Court of the United States decision in *Kansas v. Marsh*, 126 S.Ct. 2516 (2006).

In *Marsh* the Kansas Supreme Court had found its capital sentencing scheme unconstitutional and the State sought certiorari. The Supreme Court reversed the state court finding of an 8th Amendment violation, however, on the way to reaching its conclusion the Court compared the Kansas scheme to the Arizona scheme and found them essentially the same. Mississippi's scheme is indistinguishable from *Kansas.* Thus the position that *Ring v. Arizona* has no application to Mississippi's scheme, is incorrect.

The State cannot avoid these constitutional requirements by classifying any factor which operates as an element of a crime as a mere "sentencing factor." The "look" of the statute – that is, the construction of the statute or, perhaps, the legislative denomination of the statute – is not at all dispositive of the question as to whether the item at issue is an element of the offense or a sentencing factor. See *Jones v. United States*, 526 U.S. 227, 232-33 (1999); see also *Ring*, 122 S.Ct. 2428, 2439-40 (noting the dispositive question from *Apprendi* was "one not of form, but of effect"); *Apprendi*, 530 U.S. at 476 (New Jersey's placement of word "enhancer" within the criminal code's sentencing provision did not render the "enhancer" a non-essential element of the offense). Any fact which elevates punishment above the maximum is considered an "element of an aggravated offense." *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 2414 (2002). *See also Blakely v. Washington*, 542 U.S. 296, 24 S.Ct. at 2536 (2004)(Holding that *Apprendi* reflects two longstanding tenets of common-law criminal jurisprudence: the right to a jury trial and "that 'an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason'").

Mississippi requires that "each and every material fact and essential ingredient of the offense must be with precision and certainty set forth." *Burchfield v. State*, 277 So. 2d 623, 625 (Miss. 1973). An indictment which fails to allege the essential elements of an offense would be so defective as to deprive this Court of jurisdiction in violation of due process of law. *Alexander v. McCotter*, 775 F.2d 595, 599 (5th Cir. 1985).

Moreover, in *Rose v. Mitchell*, 443 U.S. 545, 557 n. 7 (1979), the United States Supreme held that if a state elects to prosecute by indictment, that process must comport with the Fourteenth Amendment and that the arbitrary denial of a state right (not even a constitutional

right) violates the Fourteenth Amendment and due process. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks* and holding that "the arbitrary denial ... rises to a violation of the due process clause of the Fourteenth Amendment.")

Dual use of robbery as capitalizer and aggravator

This use, objected to by way of pretrial motion in the instant matter, R. 101-08, 136-40 Tr.62, 65-66 violates the longstanding constitutional precept that a death penalty can be imposed constitutionally only if "the sentencing body's discretion [is] suitably directed and limited" so as to avoid arbitrary and capricious executions. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). See also *Pulley v. Harris*, 465 U.S. 37 (1984) (states must narrow sentencer's consideration of the death penalty to a smaller, more culpable class of death-eligible defendants).

Where state law does not narrow the class of death eligible offenders sufficiently in its definition of capital murder, then an aggravator found at sentencing must be an effective, operative narrower, further restricting the class of offenders beyond those convicted of capital murder. See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *Poland v. Arizona*, 476 U.S. 147, 156 (1986); *Zant v. Stephens*, 462 U.S. 862, 878 (1983); United *States v. McVeigh*, 944 F.Supp. 1478, 1489-90 (D.Colo. 1996) (striking duplicative aggravators as they only serve to skew the weighing process in favor of death). See also *Roper v. Simmons*, 543 U.S. 551, ____ 125 S.Ct. 1183, 1194 (2005) (states must give narrow and precise definition to the aggravating factors that can result in a capital sentence).

This Court has, Defendant understands, heretofore ruled that there is no constitutional violation, despite the failure of the dual use to narrow the sentencer's consideration of the death penalty, *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), *Ross v. State*, 954 So.2d 968 (Miss. 2007). However, for the reasons stated in the foregoing section, Defendant respectfully urges this Court

to revisit this view and find that the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution do, in fact require that this Court revisit those holdings, and that hold the aggravators to a capital crime be distinct from the factor that capitalizes the crime in the first place, just as it has affirmed that aggravators of each other cannot be used together in a single case. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991).

Enmund* And *Tison

Enmund v. Florida, 458 U.S. 782, 798 (1982) and *Tison v. Arizona*, 107 S.Ct. 1676 (1987) require expressly that to be sentenced to death, a person convicted of capital murder must have actually killed, attempted to kill or intended to kill. *White v. State*, 532 So.2d 1207 (Miss.1988). When the jury returned its verdict in this matter, it relied in part upon the provision of our statute that permits imposition of the death penalty on a felony murder even if the only *mens rea* established is that Mr. Pitchford "contemplated that lethal force would be employed" in the undergirding felony. R. 1234. Even if this language is sufficient in some circumstances to meet the requisites of *Enmund* and *Tison*, it does not do so here.

The only evidence that the defendant personally killed, attempted to kill, or intended to kill Mr. Britt on November 7, 2004 is the testimony regarding prior bad acts that was, , improperly admitted, or from informant witnesses, whose testimony was for the reasons stated in also inadmissible. The remaining evidence – Mr. Pitchford's own accounts (also assumed admitted only *per arguendo*, see Arg. VIII) of the events in the only statement in which he admits involvement, supported by the evidence that connects him only to a weapon that fired non-fatally and contained ammunition affirmatively intended to be non-fatal when fired – establishes, at most, that he was armed and was aware that his companion was armed with a .22 for the purpose of the robbery but that the companion's discharge of the .22 was a surprise to

him, and the result of panic. Tr. 503-514, 570-77.

This Court has held expressly held that this is not a sufficient showing to permit the imposition of the death penalty for felony murder:

> The mere possession of a gun when there is no evidence that there was a plan to kill, although sufficient under the felony-murder statute, does not establish that there was a "substantial probability that fatal force will be employed."

Randall v. State, 806 So.2d 185 (Miss. 2001) (quoting *White*). Although Mr. Britt was, tragically, killed in the course of the robbery in which there is evidence that Mr. Pitchford was a willing participant, in the absence of the inadmissible prior bad act and informant evidence there is no showing beyond a reasonable doubt that Mr. Pitchford did more than possess a weapon and fire non-fatal shots, and know his companion possessed a lethal weapon. The death sentence therefore was imposed in violation of *Enmund and Tison* and must be set aside.

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

This Court has repeatedly emphasized that the mandatory appellate review of death sentences must be qualitatively different from the scrutiny used in other type cases. *Irving v. State*, 361 So.2d 1360, 1363 (Miss. 1978). This review goes beyond simply evaluating the defendant's assignments of error. Miss. Code § 99-19-105(3)(c) and (5) require this Court to review the record in the instant case and to compare it with the death sentences imposed in the other capital punishment cases decided by the Court since *Jackson v. State*, 337 So.2d 1242 (Miss. 1976).

For a sentence of death to be affirmed, the Court must conclude "after a review of the cases coming before this Court, and comparing them to the present case, [that] the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other." *Nixon v. State*, 533 So.2d 1078, 1102 (Miss. 1987) (proportionality review takes into consideration

both the crime and the defendant). This type of review provides a measure of confidence that "the penalty is neither wanton, freakish, excessive, nor disproportionate." *Gray v. State*, 472 So.2d 409, 423 (Miss. 1985), and that it is limited as the Eighth Amendment requires to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551 (2005).

The murder of which the defendant was convicted in this case was, however unwarranted for the victim and tragic for his family, simply not within that "narrow category of the most serious crimes" that the Eighth Amendment contemplates punishing with the ultimate penalty. Nor is the defendant, even if the verdict of guilt is not subject to reversal, someone whose "extreme culpability" makes him "the most deserving of execution." *Id.*

Instead, even under the evidence that supports the conviction, the admissible proof shows that Mr. Pitchford was a willing participant in a robbery, but that his co-defendant initiated the fatal conduct in an act of panic when he saw the decedent with a gun and Mr. Pitchford only inflicted separate, non-lethal injuries. Tr. 509-514. This co-defendant has received plea bargain to manslaughter and some drug charges and is serving a total sentence of 40 years, with the possibility of parole and other early release.[54] Hence, while Mr. Pitchford's conduct may fall within the technical parameters of § 93-19-2(e), it simply does not rise to the level where the Eighth Amendment permits the imposition of the ultimate penalty on its perpetrator in light of

[54] In reaching this plea, the factual basis for Mr. Bullins' having committed manslaughter would seem to indicate that in his case, at least, they credited Mr. Pitchford's statement that Bullins did not open fire until Bullins saw Mr. Britt with a gun while the two of them were walking towards the counter, and that Pitchford reacted to that by firing his own 38 loaded with rat shot into the floor. Tr. 572. This would be a clear case of manslaughter by imperfect self-defense. Since Bullins did not testify at trial, we can only infer that he corroborated that aspect of Mr. Pitchford's account. For Mr. Pitchford to get the death penalty for a manslaughter by his co-defendant is clearly disproportionate, as well as being improper under *Enmund*.

the circumstances as a whole.

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

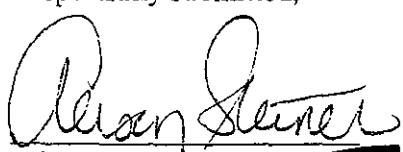
This Court has recently reiterated its longstanding adherence to the cumulative error doctrine, particularly in capital case. *Flowers III*, 947 So. 2d at 940 (Cobb, P. J. concurring) Under this doctrine, even if any one error is not sufficient to require reversal, the cumulative effect of them does mandate such an action. *Walker v. State*, 913 So.2d 198, 216 (Miss. 2005); *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992), *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990) ("if reversal were not mandated by the State's discovery violations, we would reverse this matter based upon the accumulated errors of the prosecution").

As the foregoing litany of errors makes clear, the factual and legal arguments concerning which are incorporated into this assignment of error by reference, this is one of those cases where, even if there are doubts about the harm of any one error in isolation, the cumulative error doctrine requires reversal. *Flowers III*, 947 So. 2d at 940 (Cobb, P.J. concurring), *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990).

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,



Alison Steiner, MB #[redacted]
Ray Charles Carter, MB #[redacted]

Office of Capital Defense Counsel
510 George St., Suite 300
Jackson, MS 39202
601-576-2316

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:

Terry Pitchford
Unit 32 –C
Mississippi State Penitentiary
Parchman, MS 38738

Marvin L. White, Jr., Esq.
Pat McNamara, Esq.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Hon. Joseph H. Loper, Jr., Presiding Judge
P.O. Box 616
Ackerman, MS 39735

Doug Evans, Esq., District Attorney
P.O. Box 1262
Grenada, MS 38902

THIS the 29th day of October, 2008

Alison Steiner MB #[redacted]

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

Name	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	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	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	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	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	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 dependency

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Name	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	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 wt Tramel Tr. 255	Witherspoon Morgan inquiry	philosophy on dp
Ward, Carlos Fitzgerald	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	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 Shane*, 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

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Name	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	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	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	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