2006-DP-0815-SCT t

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.

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Hon. Dale Harkey
Trial Judge
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Attorney for Joseph Goff

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VIII. GOFF'S EXECUTION BY LETHAL INJECTION, UNDER THE CURRENT MISSISSIPPI PROTOCOL, WOULD VIOLATE THE FIRST AND EIGHTH

STATEMENT OF THE CASE

Joseph Goff was indicted for capital murder, defined as killing while engaged in the commission of the crime of robbery, and second degree arson by a George County Grand Jury. C.P. 6, R.E. 23. The offenses were said to have occurred on August 27, 2004, at the Rocky Creek Inn located in George County. C.P. 6.

Goff was represented in the trial court by Mobile Alabama attorneys T. Jefferson Deen, admitted *pro hac vice*, C.P. 28, and T. Scott McNally. The attorneys had been retained by Goff's mother. T. 197. Goff and counsel had a tumultuous relationship culminating in Goff dismissing counsel on the first day of trial and proceeding as his own lawyer, with Deen and McNally as stand-by counsel. T. 253-54.

Goff was convicted on both counts and sentenced to death and ten years respectively. C.P. 274-78. Deen filed a Motion was New Trial and a Motion to Withdraw as Attorney of Record. C.P. 288. The Motion for New Trial was denied, C.P. 305. There is no Order entered on the Motion to Withdraw but the Office of Capital Defense Counsel was appointed to perfect and file this appeal. C.P. 304.

Statement of Facts

Joseph Goff was arrested August 28, 2004, traveling on Interstate 20 near Vicksburg. He was driving his vehicle at a moderate rate of speed in a prudent manner when he was stopped by Patrolman Jason Ginn. T. 27. Goff filed a pre-trial motion to suppress evidence resulting from this illegal seizure of his person. C.P. 103. A hearing was held on this motion on April 7, 2005. T. 23.

Ginn testified that the reason he stopped Goff was the temporary tag appeared torn. T. 27. He further stated that the issuing state was not visible and the tag appeared altered. T. 29. The tag turned out to be expired by about a week. T. 30.

Ginn claimed the condition of the tag and Goff's comment that he was "on a spiritual experience" were the reasons for the detention. T. 32. Ginn claimed that Goff consented to a search of the car. T. 39. During the search Ginn became "suspicious" of drug activity when he found a large amount of cash in the car. T. 37.

Goff explained the cash was given him by his mother and after a computer check Ginn discovered Goff's driver's license was valid and there were no warrants outstanding for Goff. T. 38. At this point Ginn had ended his search without discovering any incriminating evidence, T. 42, and had no reasonable basis to continue detaining Goff.

Ginn testified that he never advised Goff he could refuse to consent to a search, T. 62, and that had Goff refused consent he would not have been free to leave. T. 61, 64. Goff testimony was consistent with this in that he stated that he did not feel free to leave, T. 105, and that he asked if he had a choice concerning the search and Ginn stated "not really." T. 113.

In January 2005, defense counsel filed a Motion for a Competency Evaluation. C.P. 51, R.E. 24. Counsel specifically questioned Goff's competency and asserted that his investigation disclosed both a history of mental illness and bizarre behavior. Defense counsel had personally known Goff for many years. T. 155.

The Motion was not called up until April 7, 2005. T. 151. Defense counsel advised the court of "difficulty" dealing with his client, T. 155, including problems communicating and numerous "firings" of counsel by Goff. T. 159. The trial court advised counsel to quickly locate a mental health expert, explicitly reminding him of the May 2, 2005, trial date. T. 162.

When the case reconvened on April 25, 2005, defense counsel waived the competency issue and the trial court declined to *sua sponte* order an evaluation. T. 190-91. At that point no mental health professional had evaluated Goff. T. 200, Ex. C-1 (first contact was April 27, 2005).

Trial began on May 2, 2005, and Goff made a series of motions beginning with a motion for continuance. T. 218. During the discussions of Goff's motions the court sought to determine if Goff wanted to discharge his counsel. T. 220. Goff did request to proceed with self-representation and a continuance to prepare. T. 233. The court denied Goff's requests for continuance, T. 234, and for legal material. T. 243.

After noting that Goff was seemingly unable to follow court guidelines, T. 234, the trial court proceeded to determine if Goff was competent to represent himself. T. 234. The court asked for the report from the psychologist retained by defense counsel, T. 235, but it was not yet available. T. 235.

The court proceeded to *voir dire* Goff and established he had never been to trial; he had no courtroom experience; had only attained a GED; but that Goff believed if given legal material he could catch on faster than the average layman. T. 236-42. Goff professed the belief that he was "smarter than the average person." T. 242. The evaluation report was presented later and indicates only average intellectual ability. Ex. C-1 at page 6.

When directly asked if he understood the rights he was potentially waiving if he proceeded with self-representation Goff candidly replied "certain portions of it." T. 247. The court then began questioning defense counsel. Counsel contradicted earlier comments by asserting they did not have trouble communicating. T. 249.

The court then found a valid waiver but again asked for the report. T. 250. The written report was not available but counsel attempted to advise the court of the oral report he had received. T. 251. Unfortunately counsel misstated key findings. T. 252. Contrary to counsel's claim that there was no finding of Bipolar Disorder the written report indicates a diagnosis of "Bipolar Disorder, with occasional psychotic features." Ex. C-1 at page 10.

Dr. Van Rosen testified at sentencing not only to this diagnosis but that Goff "was in the

midst of a bipolar disorder psychotic episode" the night Mrs. Yates was killed. T. 1045. However, based on the erroneous information provided by defense counsel the court again found the waiver valid and ordered counsel to remain as stand-by counsel. T. 253-54.

As the trial proceeded, Goff exhibited bizarre behavior included his request for a mental evaluation of his mother, T. 443; cross examination of a witness in which he elicited prejudicial evidence, T. 474; attempts to re-cross witnesses, T. 489; and referring to himself in the third person during questioning of witnesses, T. 498.

During the testimony of the arresting officer Goff waived a previous objection to the introduction of prior offenses at the culpability phase of the trial with no apparent benefit. T. 509-10. His stated purpose was to play the entire tape of the arrest. When the state tendered the witness Goff did not cross-examine him but instead asked that the lengthy tape be played. T. 552. Defense counsel advised the court he saw no need for the tape, T. 553, and Goff decided he only wanted the last 5 minutes played. T. 555. After viewing the video Goff decided he didn't want it shown, T. 566-67, but by then the prejudicial evidence was before the jury. T. 523.

As the trial progressed on its second day Goff demonstrates more inability to conduct the defense, T. 663-66, leading the court to state "you obviously do not listen." T. 665. Even after this exchange Goff continues with his actions including stipulating to evidence and then objecting. T. 678-80. When the court later returned to this issue, the court noted the difficulty Goff had displayed on this point stating we "all understand... Mr. Goff may not." T. 719.

Similar to his request for a mental evaluation of his mother, during the testimony of a girlfriend Goff asked if "we can just deem her an idiot and send her home? T. 877-78. Prompting the court to respond: "I wouldn't be calling anyone an idiot if I were in your shoes." T. 788. Indeed no competent litigant much less lawyer would have acted in that manner.

As the case came to a close Goff demonstrated difficulty with procedural matters, T. 914,

972. Then, during the state's opening statement at sentencing Goff was whispering irrelevant matters concerning appeal procedures in counsel's ear. T. 981. The matters important to Goff included television and newspaper reports. T. 981.

When the time came to present a sentencing defense, counsel stated Goff was "incompetent as a lawyer to make any decisions at this point"; that he was making no sense and concerned about extraneous things. T. 996-97. When the case proceeded with counsel taking the lead, Mrs. Leslie Goff, Goff's mother, testified about his bizarre, ritualistic behavior. T. 1026. She was followed by Dr. Van Rosen.

Dr. Van Rosen detailed the uncooperative behavior by Goff and the rush he was under in performing the evaluation. T. 1031. Van Rosen testified to Goff's belief of a "very, very high IQ" but that he was actually in the average range. T. 1035. Goff was clearly trying to mask or cover-up his mental health problems. T. 1036. Goff did not want to be seen has being mentally ill. T. 1041-42.

There is no debate about the fact that Brandy Yates was brutally murdered in her hotel room at the Rocky Creek Inn. See Exhibits S-3; S-12; S-13; S-14; S-15; S-16; S-29; S-32; S-34; S-36; S-38; S-39. There is no debate about the fact that Joseph Goff took everything he had touched from that room. T. 764. However, as tragic and brutal as the killing was, none of the evidence in this case supports a finding of capital murder. That is, there is no evidence whatsoever to support a charge of robbery.

Pearl Boulware, the front desk clerk on duty when Yates checked in, testified that Yates entered the office, completed the registration form and provided her driver's license. T. 469-72. The license was found in the wallet. Ex. S-53, T. 692.

Crime Lab technician Stacy Smith testified at length to her processing of the crime scene, T. 642- 714, witch included a search of Goff's car. T. 677. Smith testified to "soot throughout

the room." T. 647. Sheriff Welford had earlier testified to seeing "body organs thrown about the room. T. 492. Smith provided much more detail on this throughout her early testimony. About three dozen exhibits were introduced through Smith. T. 648-63. As demonstrated through testimony and exhibits, all evidence collected in the motel room had soot and/or bodily fluid on it.

The wallet had no biological evidence on it. T. 709. Nor is there any other evidence the wallet was ever in the motel room thus no evidence Goff removed it. There is not even any evidence that Goff ever touched the wallet. The wallet was never checked for fingerprints. T. 708.

Smith described a scene in the car wherein a shirt is used to cover a pillowcase filled with items. T. 681. Other items were found on the floorboard including a "bloody glove" and "bloody shoes." T. 681; Ex. S-44 – S-48; T. 713, 810. Inside the pillow case was a bloody shirt. T. 683. The pattern of blood on the shirt would be critical in the case. Smith was asked about what appeared to the prosecutor as "droplets of blood" on the back of the shirt but in answering this question she disagreed with his assessment and stated that these were merely "smaller stains." T. 684. In closing argument the prosecutor disregarded this testimony and argued to the jury based on his opinion not his expert witnesses opinion. T. 958-59. Additional items were found in the pillow case that also had biological evidence on them. T. 688-90.

The wallet was not found on the floorboard nor was it found in the pillow case. It was found in the console. T. 692. Items Goff was wearing in the room, glove and shoes, were obviously removed and placed on the floorboard. The shirt and other items taken from the room were all placed together in the pillow case. None of these items were the personal property of Mrs. Yates.

Mrs. Yates was traveling in the vehicle the wallet was found in, it was found in a location

that is a normal storage place for such items thus it can only be reasonably assumed that she is the person who placed the wallet where it was later located. After registering at the motel office she returned to the car. We know this because she was driving. T. 799. Thus we know the wallet went back into the car but there is simply no evidence to support a claim that it was taken into the motel room.

At sentencing Dr. Van Rosen explained that "bipolar disorder is a grave mental disorder" and sufferers can lose touch with reality and become psychotic. T. 1044. Goff has suffered with these disorders for a long time. Goff's mother and Dr. Van Rosen, testified Goff was suffering symptoms of these grave disorders the night Brandy Yates was killed. T. 1026, 1045. Dr. Van Rosen testified that Goff "was in the midst of a bipolar disorder psychotic episode" the night Mrs. Yates was killed. T. 1045. This is further supported Goff's inappropriate "laughter" during questioning by police. T. 90.

SUMMARY OF THE ARGUMENT

Joseph Goff's rights pursuant to the state and federal constitutions were violated when he was illegally detained on the side of the road in Warren County. This constitutional violation resulted in the collection of two critical pieces of evidence later used against him.

Even with this evidence the proof against Goff to prove capital murder is not only insufficient it is non-existent. Goff, however, did not receive a fundamentally fair trial. The court without conducting a proper competency hearing allowed Goff to represent himself. His trial counsel remained active in the case not simply as stand-by counsel but as participating attorney.

Both before and after counsel was "dismissed" he committed numerous acts and omissions that deprived Goff of fundamental constitutional rights. Counsel's actions even contributed to the court's erroneous decision regarding representation. The prosecution took

advantage of the inept defense in committing numerous instances of misconduct.

At the close of the case the court failed to instruct the jury on both Goff's theory of defense and on the law applicable to circumstantial evidence cases. These errors denied Goff a fair and reliable verdict at the culpability phase. Additional errors occurred in sentencing requiring that the sentence of death and the conviction of capital murder be vacated and this matter remanded for a trial on a charge of no more than Murder.

ARGUMENT

Standard of Review

This Court's longstanding practice where the defendant has been convicted of capital murder and sentenced to death, the standard of review this Court applies is different than in other matters. Walker v. State, 913 So.2d 198 (Miss. 2005) at ¶¶ 43-44. Such convictions and sentences must be subjected to "heightened scrutiny." Balfour v. State, 598 So. 2d 731, 739 (Miss.1992) (citing Smith v. State, 499 So. 2d 750, 756 (Miss.1986)). This heightened scrutiny means that the Court will, *inter alia*,

> consider trial errors for the cumulative impact. We apply our plain error rule with less stringency. We relax enforcement of our contemporaneous objection rule. We resolve serious doubts in favor of the accused ... as procedural 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) (internal citations omitted).
>
> Under this method of review, all genuine doubts are to be resolved in favor of the accused because "'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" Id. (quoting *Irving v. State*, 361 So. 2d 1360, 1363 (Miss.1978)). See also Fisher v. State, 481 So. 2d 203, 211 (Miss.1985).

Walker, 913 So.2d at 216, ¶¶ 43-44.

Issues

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

Joseph Goff was arrested August 28, 2004, traveling on Interstate 20 near Vicksburg. He was driving his vehicle at a moderate rate of speed in a prudent manner when he was stopped by Patrolman Jason Ginn. T. 27. Goff filed a pre-trial motion to suppress evidence resulting from this illegal seizure of his person. C.P. 103. A hearing was held on this motion on April 7, 2005. T. 23.

Ginn testified that the reason he stopped Goff was the temporary tag appeared torn. T. 27. He further stated that the issuing state was not visible and the tag appeared altered. T. 29. The tag turned out to be expired by about a week. T. 30.[1]

Ginn claimed the condition of the tag and Goff's comment that he was "on a spiritual experience" were the reasons for the detention. T. 32. Ginn claimed that Goff consented to a search of the car. T. 39. During the search Ginn became "suspicious" of drug activity when he found a large amount of cash in the car. T. 37.

Goff explained the cash was given him by his mother and after a computer check Ginn discovered Goff's driver's license was valid and there were no warrants outstanding for Goff. T. 38. At this point Ginn had ended his search without discovering any incriminating evidence, T. 42, and had no reasonable basis to continue detaining Goff.

At one point in the detention Goff asked to retrieve a cigarette however Ginn refused him

[1] Ginn testified that he saw the date on the tag while they were still driving. T. 56. A picture of the tag was admitted through Ginn. Ex. S-7, T. 517. While the tag was perhaps worn and even torn it was not altered. Moreover it seems humanly impossible to have seen the date on the tag while traveling in a moving automobile. The photograph is at close range and viewing the date is not easy. This exaggeration if not fabrication calls into question Ginn's testimony on all material facts.

that liberty. T. 45. Ginn testified that he never advised Goff he could refuse to consent to a search, T. 62, and that had Goff refused consent he would not have been free to leave. T. 61, 64. This testimony is consistent with Goff's testimony that he did not feel free to leave, T. 105, and that he asked if he had a choice concerning the search and Ginn stated "not really." T. 113.

The trial court ruled that the detention by Ginn, "although it gets into somewhat of a gray area, extending to approximately 50 minutes, is not such that is unreasonable under the totality of these circumstances." T. 141. This ruling is clearly erroneous.

Clearly Goff was "seized" within the meaning of the Fourth Amendment to the Constitution of the United States. United States v. Mendenhall, 446 U.S. 544 (1980) (person is seized "[if] a reasonable person would have believed that he was not free to leave." Goff testified he did not feel free to leave and Ginn testified that he was in fact not free to leave.[2]

Part of the "totality of circumstances" relied on by the trial court to hold this detention to be reasonable was the alleged consent by Goff to the search. T. 139. The court discredited Goff's contention that he was advised he had no right to refuse the search. However, credibility is not the issue. Ginn never testified that he advised Goff of his right to refuse and was not recalled as a witness after Goff testified that he was not so advised.

This record clearly indicates the alleged consent to search was invalid.[3] The Mississippi Constitution requires knowledgeable waiver. Longstreet v. State, 592 So.2d 16 (Miss. 1991). This Court held in Penick v. State, 440 So.2d 547 (Miss. 1983), that "the best way to prove defendant had knowledge he did not have to consent is for the officer to have told him."

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[2] See Stansbury v. California, 114 S.Ct. 1526 (1994) (per curiam) (inquiry is "whether there was a formal arrest or restraint on freedom of movement of the degree associated with formal arrest") (emphasis added).

[3] As stated in Florida v. Royer, 460 U.S. 491 501 (1983) (plurality opinion), if consent is given after an illegal search or seizure, the taint of the prior illegality is generally sufficient to invalidate consent. See also Dunaway v. New York, `442 U.S. 209, 219, 99 S.Ct. 2248 (1979) (Miranda warnings did not constitute intervening act between illegal arrest and confession); Henry v. State, 486 So.2d 1213 (Miss. 1986) (same).

The trial court's final conclusion on the reasonableness of the length of detention is likewise erroneous. United States v. Santiago, 310 F.3rd 336 (5th Cir. 2002); United States v. Jones, 234 F.3d 234 (5th Cir. 2000).

In Santiago the trooper had similar generalized suspicions of drug trafficking based on Santiago's responses to questions, "nervousness", and the like. Like Goff, Santiago was driving under the speed limit. Santiago at 338. Unlike Goff, Santiago was provided a consent to search form that he executed. Id. at 339.

The Fifth Circuit concluded that the stop and initial detention of Santiago were lawful, however once the computer check was concluded the justification for the detention ended. The trooper continued the detention based on suspicion resulting from Santiago's "nervousness and conflicting statements." At this point there was no "reasonable articulable suspicion" of illegal activity. Id. at 342, citing United States v. Valadez, 267 F.3d 395, 396 -99 (5th Cir. 2001) (once reason for stop ended there was no reasonable suspicion "even to run computer check for his criminal history").

The Fifth Circuit went on, even under the more limited protections of the Fourth Amendment vis-a-vis § 23 of the Mississippi Constitution, to hold the consent to search was invalid. Santiago at 343. The Fifth Circuit reached a similar conclusion in Jones, and therein cited to United States v. Dortch,199 F.3d 193 (5th Cir. 1999) (finding no reasonable suspicion notwithstanding defendant's criminal record.). Jones, at 242. As in Santiago the Court in Jones found a Fourth Amendment violation, invalid consent and reversed the district court finding the evidence was "fruit of the poisonous tree" of the Fourth Amendment violation. Jones, at 244.

The same conclusions must be reached in this case. Moreover, evidence at issue here, the wallet (Ex. S-52A, T. 693) and the shirt (Ex. S-49A, T. 685-86), represent the two most critical pieces of evidence introduced against Goff. The former representing the only evidence remotely

supporting a "robbery" and the latter used by the prosecution to rebut Goff's statement, which provided his theory of defense. (See Issues IV and V) This evidence was the direct product of the unreasonable seizure of Goff by Ginn. The remedy for this constitutional violation is reversal of Goff's conviction and remand for trial without this evidence.

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

In January 2005, defense counsel filed a Motion for a Competency Evaluation. C.P. 51, R.E. 24. Counsel specifically questioned Goff's competency and asserted that his investigation disclosed both a history of mental illness and bizarre behavior. Defense counsel had personally known Goff for many years. T. 155.

The Motion was not called up until April 7, 2005. T. 151. An *ex parte* hearing was held on the Motion that day. T. 152-64. During the hearing counsel seemed to abandon his earlier pleading and limited his request to assistance related only to mitigation. T. 161. Counsel explained that his reason for abandoning the evaluation for an insanity defense was based on Goff's insistence. T. 155. While this might be the type decision a competent defendant can make, there had yet to be a determination of competency.

The record indicates that counsel was not attempting to determine if his client was competent but rather trying to insure he was not later found to have rendered ineffective assistance of counsel. T. 156. Counsel then demonstrated at least deficient performance[4] by relying on a representation by the prosecutor that there were no mental health records in the

[4] A claim of ineffective assistance of counsel based on his failure to secure the prior prison files and provide them to his expert cannot be raised at this point because to prove prejudice Goff will have to secure the mental health records and present them to a mental health expert in post-conviction. It must be noted that the mental evaluation report in the record, Ex. C-1, at paragraph 3 on page 4, lists an extensive mental health history. No doubt if this case were to proceed to post-conviction, counsel would do what trial counsel could have done and request subpoenas for all of these records.

prison file[5] rather than getting those records himself. T. 156. Rompilla v. Beard, 545 U.S. 374 (2005).

On the evidence in this record, even without defense counsel's initial motion or positions taken at the hearing, a competency hearing was required. Howard v. State, 697 So.2d 415 (Miss. 1997). Although the court questioned Goff and counsel and had the benefit of an incomplete mental evaluation conducted for the purposes of mitigation, the court never ordered an evaluation for competency nor conducted a hearing on this point.

Defense counsel advised the court of "difficulty" dealing with his client, T. 155, including problems communicating and numerous "firings" of counsel by Goff. T. 159. The trial court advised counsel to quickly locate a mental health expert, explicitly reminding him of the May 2, 2005, trial date. T. 162.

When the case reconvened on April 25, 2005, defense counsel explicitly waived the competency issue and the trial court declined to *sua sponte* order an evaluation. T. 190-91. At that point no mental health professional had evaluated Goff. T. 200, Ex. C-1 (first contact was April 27, 2005). As the record develops from that point it is clear that a competency evaluation was necessary before Goff was allowed to represent himself. Howard, supra.

Trial began on May 2, 2005, and Goff made a series of motions beginning with a motion for continuance. T. 218. During the discussions of Goff's motions the court sought to determine if Goff wanted to discharge his counsel. T. 220. Goff did request to proceed with self-representation and a continuance to prepare. T. 233. The court denied Goff's requests for continuance, T. 234, and for legal material. T. 243.

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[5] Goff is not now alleging the prosecution lied to defense counsel. The Alabama Department of Corrections probably operates as does it's Mississippi counterpart and pursuant to HIPPA maintains separate files for medical, including mental health, records. Whether or not the prosecution mislead defense counsel or defense counsel failed to perform his duties are matters to be investigated and presented to a court via post-conviction proceedings.

After noting that Goff was seemingly unable to follow court guidelines, T. 234, the trial court proceeded to determine if Goff was competent to represent himself. T. 234. The court asked for the report from the psychologist retained by defense counsel, T. 235, but it was not yet available. T. 235.

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When directly asked if he understood the rights he was potentially waiving if he proceeded with self-representation Goff candidly replied "certain portions of it." T. 247. The court then began questioning defense counsel. Counsel contradicted earlier comments by asserting they did not have trouble communicating. T. 249.

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The case then proceeded to jury selection. During the selection process defense counsel raised a valid objection to the removal of a juror clearly leaning towards the defense but Goff

[6] The evaluation report was presented later and indicates only average intellectual ability. Ex. C-1 at page 6.

without apparent rational basis "overruled" the objection. T. 404. Not withstanding this action by Goff the court revisited the waiver of counsel issue after jury selection when the evaluation report was provided and specifically relied on the report and "good" decisions Goff made during jury selection to reaffirm its holding. T. 435.

The courts finding at this point is inexplicable. As quoted by the court, Van Rosen's report indicated that Goff was "competent in most respects to stand trial." T. 435, Ex. C-1 at page 10. Which "respects" of standing trial he was competent in and which he was not is unknown. More problematic is that the issue before the court was not Goff's competency to be tried but his competency to represent himself.

As the trial proceeded the error in the court's determination became even clearer. Examples of Goff's bizarre behavior included his request for a mental evaluation of his mother, T. 443; cross examination of a witness in which he elicited prejudicial evidence, T. 474; attempts to re-cross witnesses, T. 489; and referring to himself in the third person during questioning of witnesses, T. 498.

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As the trial progressed on its second day Goff demonstrates more inability to conduct the defense, T. 663-66, leading the court to state "you obviously do not listen." T. 665. Even after this exchange Goff continues with his actions including stipulating to evidence and then

objecting. T. 678-80. When the court later returned to this issue, the court noted the difficulty Goff had displayed on this point stating we "all understand... Mr. Goff may not." T. 719.

Similar to his request for a mental evaluation of his mother, during the testimony of a girlfriend Goff asked if "we can just deem her an idiot and send her home? T. 877-78. Prompting the court to respond: "I wouldn't be calling anyone an idiot if I were in your shoes." T. 788. Indeed no competent litigant much less lawyer would have acted in that manner.

As the case came to a close Goff demonstrated difficulty with procedural matters, T. 914, 972. Then, during the state's opening statement at sentencing Goff was whispering irrelevant matters concerning appeal procedures in counsel's ear. T. 981. The matters important to Goff included television and newspaper reports. T. 981.

The charade completely fell apart when the time came for the defense to present mitigation. Defense counsel stated Goff was "incompetent as a lawyer to make any decisions at this point"; that he was making no sense and concerned about extraneous things. T. 996-97. When the case proceeded with counsel taking the lead, Mrs. Leslie Goff, Goff's mother, testified about his bizarre, ritualistic behavior. T. 1026. She was followed by Dr. Van Rosen.

Dr. Van Rosen detailed the uncooperative behavior by Goff and the rush he was under in performing the evaluation. T. 1031. Van Rosen testified to Goff's belief of a "very, very high IQ" but that he was actually in the average range. T. 1035. Goff was clearly trying to mask or cover-up his mental health problems. T. 1036. Goff did not want to be seen has being mentally ill. T. 1041-42.

The record in this case is more egregious than the record before this Court in Howard v. State, 697 So.2d 415 (Miss. 1997). Howard exhibited difficulties with his lawyers and family similar to those exhibited by Goff. Id. at 423. Like the case *sub judice* Howard's attorneys questioned his competency included raising the issue a new at the close of the culpability phase.

Id. at 423. Although the Howard Court discounted the opinion of the state hospital, Id. at 422, the trial judge in Howard at least had that opinion which found Howard competent in all respects. In this case no mental health professional ever opined that Goff was competent to be tried much less competent to represent himself.

Comparing the facts of Howard with those now before this Court it can only be concluded that the "court below could not have known whether [Goff] was capable of knowingly and intelligently waiving the right to counsel, as a competency hearing should have been ordered before or during the proceedings. The failure to do so, under these circumstances, constitutes error."

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

Goff was indicted for killing while engaged in the commission of the crime of robbery, i.e., capital murder. C.P. 6, R.E. 23. At the close of the state's case, the defense moved for a directed verdict on the capital murder charge which was denied. T. 813-24. The defense renewed its motion at the close of the case which was denied. T. 889.These rulings were erroneous.

In the case *sub judice*, even reviewing the evidence most favorable to the verdict, it cannot be said with the requisite degree of certainty that a reasonable juror could conclude beyond a reasonable doubt that Goff committed the crime of capital murder.

"[B]efore a conviction of any crime may stand, there must be in the record evidence sufficient to establish each element of the crime. [citations omitted]" Fisher v. State, 481 So.2d 203, 211; In Re Winship, 397 U.S. 358 (1970). For there to be a valid capital murder conviction under Miss. Code § 97-3-19(2)(e) there must be "evidence legally sufficient to support a conviction of both the murder and the underlying felony had either been charged alone." Fisher v. State at 212 (citing Moore v. State, 344 So. 2d 731 (Miss. 1977)).

The lack evidence to support a conviction on the underlying felony requires reversal under state law and the Fourteenth Amendment to the United States Constitution. Jackson v. Virginia, 443 U.S. 307 (1979) (Fourteenth Amendment's right to due process guarantees that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof"); McQueen v. State, 423 So.2d 800, 804 (Miss. 1982) (Due Process Clause forbids conviction based upon insufficient evidence). Where the evidence is insufficient to sustain a conviction, a directed verdict and/or a motion for a new trial should be granted. See Nelson v. State, 361 So.2d 500, 503 (Miss. 1978); Brown v. State, 556 So.2d 338, 339-40 (Miss. 1990).

There is no debate about the fact that Brandy Yates was brutally murdered in her hotel room at the Rocky Creek Inn. See Exhibits S-3; S-12; S-13; S-14; S-15; S-16; S-29; S-32; S-34; S-36; S-38; S-39. There is no debate about the fact that Joseph Goff took everything he had touched from that room. T. 764. However, as tragic and brutal as the killing was, none of the evidence in this case supports a finding of capital murder. That is, there is no evidence whatsoever to support a charge of robbery.[7]

The State's theory of robbery is based entirely on Mrs. Yates wallet being found in the console of Goff's car. T. 457, 691-92. Pearl Boulware, the front desk clerk on duty when Yates checked in, testified that Yates entered the office, completed the registration form and provided her driver's license. T. 469-72. The license was found in the wallet. Ex. S-53, T. 692.

Crime Lab technician Stacy Smith testified at length to her processing of the crime scene, T. 642- 714, witch included a search of Goff's car. T. 677. Smith testified to "soot throughout the room." T. 647. Sheriff Welford had earlier testified to seeing "body organs thrown about the room. T. 492. Smith provided much more detail on this throughout her early testimony. About

[7] In limiting this argument to sufficiency of the evidence of robbery Goff is not conceding his guilt of murder. He has steadfastly maintained his innocence of the charge of killing Mrs. Yates and maintains that position today. For reasons set forth throughout this brief Goff maintains he is entitled to a new trial limited to the charge of murder.

three dozen exhibits were introduced through Smith. T. 648-63. As demonstrated through testimony and exhibits, all evidence collected in the motel room had soot and/or bodily fluid on it.

The wallet had no biological evidence on it. T. 709. Nor is there any other evidence the wallet was ever in the motel room thus no evidence Goff removed it. There is not even any evidence that Goff ever touched the wallet. For reasons only the prosecution knows the wallet was never checked for fingerprints. T. 708.

Mrs. Yates was traveling in the vehicle the wallet was found in, it was found in a location that is a normal storage place for such items thus it can only be reasonably assumed that she is the person who placed the wallet where it was later located. After registering at the motel office she returned to the car. We know this because she was driving. T. 799. Thus we know the wallet went back into the car but there is simply no evidence to support a claim that it was taken into the motel room.

Smith's testimony concerning the processing of the car further negates the theory of robbery. Smith describes a scene wherein a shirt is used to cover a pillowcase filled with items. T. 681. Other items were found on the floorboard including a "bloody glove" and "bloody shoes." T. 681; Ex. S-44 – S-48; T. 713, 810. Inside the pillow case was a bloody shirt. T. 683. Additional items were found in the pillow case that also had biological evidence on them. T. 688-90.

The wallet was not found on the floorboard nor was it found in the pillow case. It was found in the console. T. 692. Items Goff was wearing in the room, glove and shoes, were obviously removed and placed on the floorboard. The shirt and other items taken from the room were all placed together in the pillow case. None of these items were the personal property of Mrs. Yates.

In Young v. Zant, 506 F.Supp. 274 (M.D.Ga. 1980) *aff'd. sub nom* Young v. Kemp, 677 F.2d 792 (11th Cir. 1982) (insufficiency of the evidence finding barred retrial under double jeopardy clause), the defendant became involved in a heated argument with his banker about some outstanding loans and eventually killed the banker. The defendant then took the banker's billfold. The District Court found the evidence insufficient to support the jury's finding beyond a reasonable doubt of the aggravating circumstance that the murder was committed in the course of a robbery. "The only relevant evidence presented at trial indicated that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows struck, i.e., after the murder had been committed. Based on the evidence presented at trial, that petitioner prior to the commission of the murder had any intent to rob the victim is only speculation." Young, 506 F.Supp. at 280-81 (citations omitted).

In the case *sub judice* the trial court, the jury and ultimately this Court must do far more than speculate. There is simply no evidence that the wallet was ever in the motel room and reasonable evidence to the contrary. There is no evidence that Goff ever touched the wallet much less took it from Mrs. Yates person or presence. There is no evidence Goff was even aware the wallet was in his car when he drove off from the motel.

This lack of sufficient evidence to support the underlying felony required the granting of a directed verdict on the capital murder charge, see Fisher v. State, 481 So.2d 203, 212 (Miss. 1985), and compels this Court to hold the evidence insufficient to prove capital murder. Cf. Jackson v. Virginia, 443 U.S. 307 (1979). Goff's conviction of capital murder must be reversed and this cause remanded for a new trial on a charge of no more than murder.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL[8]

The Sixth Amendment to the United States Constitution guarantees the right to *effective* assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984). A conviction and sentence cannot stand where counsel's ineffective assistance rendered the trial unfair and its result unreliable. See Johns v. State, 926 So.2d 188, 195 (Miss. 2006). To establish ineffectiveness, a petitioner must show that (i) counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and (ii) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 687, 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. Id. at 694.

As shown by the compelling evidence described herein, defense counsel's representation of Goff was grossly deficient. Goff was denied his Sixth Amendment right to competent counsel at all stages of his case. Because of this constitutional infringement and the prejudice that resulted, this Court must grant a new trial.

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

Defense counsel filed a Motion for a Competency Evaluation. C.P. 51, R.E. 24. Counsel specifically questioned Goff's competency and asserted that his investigation disclosed both a

[8] In addition to the claims set forth in this section and elsewhere in this brief, there are numerous other potential claims of ineffective assistance of counsel that cannot be raised in this appeal because they are not "fully apparent from the record." MRAP Rule 22 (b). These potential claims include a comment on appellate review allegedly made by the trial court. Goff attempted to correct the record to reflect this by filing a Rule 10 (b) Motion however the lower court and this Court refused to allow a hearing on this correction. Order, October 4, 2006; Motion for Remand filed September 27, 2006. Also included as potential claims include the matters that lead to discharge of counsel: denial of continuance to litigate authenticity of tape, T. 226, 228-29 and locate witnesses, T. 258; failure to request medical records of decedent, T.232. These claims require access to the tape for testing and the records to determine prejudice to Goff. Consistent with due process Goff must be allowed to present the evidence in support of prejudice. Branch v. State, 882 So.2d 36 (Miss. 2004). Accordingly, Goff reserves these claims and those identified elsewhere in this brief, for post-conviction review if that is necessary. Havard v. State, 928 So.2d 771 (Miss. 2006).

history of mental illness and bizarre behavior. Defense counsel had personally known Goff for many years. T. 155. He later secured funding from the court to retain a psychologist to evaluate Goff but this was not done until less than a week before trial. T. 162, 200.

On the first day of trial Goff requested to proceed with self-representation. The trial court proceeded to attempt to determine if Goff was competent to represent himself. T. 234. The court asked for the report from the psychologist retained by defense counsel, T. 235, but it was not yet available. T. 235.

The court found a valid waiver but again asked for the report. T. 250. The written report was still not available but counsel attempted to advise the court of the oral report he had received. T. 251. Unfortunately counsel misstated key findings. T. 252. Contrary to counsel's claim that there was no finding of Bipolar Disorder the written report indicates a diagnosis of "Bipolar Disorder, with occasional psychotic features." Ex. C-1 at page 10.

Dr. Van Rosen testified at sentencing not only to this diagnosis but that Goff "was in the midst of a bipolar disorder psychotic episode" the night Mrs. Yates was killed. T. 1045. However, based on the erroneous information provided by defense counsel the court again found the waiver valid and ordered counsel to remain as stand-by counsel. T. 253-54.

Without question a criminal defendant has the right to be proceeded against only if competent and defense counsel has a primary role in assuring this fundamental right is fulfilled. Howard v. State, 697 So.2d 415, 416-24 (Miss. 1997) (*citing* Pate v. Robinson, 388 U.S. 375 (1966). In not having his client evaluated until after the time to assert an insanity defense had passed, URCCC Rule 9.07, and after Goff had waived that defense without even knowing if he had evidence to support the defense and in providing incorrect information to the court on this fundamental right counsel provided ineffective assistance of counsel requiring the reversal of the convictions in this cause. People v. Howard, 392 N.E.2d 775, 778 (Ill.App. 1979) (counsel

ineffective in litigating a competency hearing without sufficient investigation and the lack of investigation compromised the potential insanity defense).

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

Beginning in voir dire defense counsel recognized the potential prejudicial effect of the crime scene photographs in this case and asked potential jurors if these gruesome photos would effect their decision at the culpability phase. T. 369. However, counsel never asked if viewing these photos which depicted a badly burned corpse and body parts spewed about the room, see Exhibits S-3; S-12; S-13; S-14; S-15; S-16; S-29; S-32; S-34; S-36; S-38; S-39, would effect their opinion at sentencing.

Failure to explore this on voir dire was ineffective assistance of counsel. Ross v. State, 954 So.2d 968 (Miss. 2007). This prejudice from this error was heightened in that counsel failed to take any steps to limit the introduction of these photographs or at least the number of photographs. See Manix v. State, 895 So.2d 167 at ¶ 31 (Miss. 2005) (cautioning trial judges to limit photographs).

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

Counsel filed a motion pre-trial seeking to limit the introduction of victim impact or character evidence. C.P. 76. This motion was never called up and when the prosecution began injecting such evidence no contemporaneous objection was made. T. 326. The prosecutions improper injection of victim character and impact evidence continued in its opening statement, again without objection. T. 448.

> Brandy Stewart Yates was 29 years old. She had a husband named James. She had a son eight years old, James IV, and she had a daughter named Sissy. Her mother Carolyn, her father Jack, her syster Crystal, and her brother Jeff loved her dearly and cared for her greatly.
>
> ...
>
> She worked there to help support the family. James worked construction.

T. 448. The prosecution, still in the culpability phase of the trial, then formally introduced improper victim impact and character evidence into the trial through the decedent's husband. T. 568 – 74.

This evidence consisting of details of her children, their relationship and the relationship of the children to their mother was irrelevant, highly prejudicial and had no place in a capital murder trial, especially not the first phase. See Wiley v. State, 484 So. 2d 339, 348 (Miss. 1986); see also Griffin v. State, 557 So. 2d 542, 552-53 (Miss. 1990) (references to decedent and impact of death on family were improper); Clark v. Commonwealth, 833 S.W.2d 793 (Ky. 1991) (emotional evidence designed to create sympathy for the victim and victim's family is not admissible at culpability phase of trial); Eakes v. Moore, 876 So. 2d 975, 985 (Miss. 2004) (error to admit highly prejudicial scenes from a day-in-the-life video depicting decedent's mother); Reed v. State, 99 So.2d 455 (Miss. 1958) (This Court has long "condemned the injection into the trial of a lawsuit, which should be decided on the facts and law, of improper and irrelevant influences and possible prejudices.").

The failure to object to this clearly impermissible and prejudicial evidence cannot be explained by any strategy and constitutes ineffective assistance of counsel. Counsel who fails to object to blatant instances of prosecutorial misconduct fails to satisfy his duty to his client and to the court. See *ABA Guidelines* 10.8 cmt. ("One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial." (citations omitted)).

Inevitably, the result is a flawed process and an untrustworthy result.

D. FAILURE TO OBJECT TO JURY COMPOSITION.

Trial counsel failed to object to the composition of the venire which had a disproportionate number of potential jurors with close ties to law enforcement, including the assistant district attorney who also serves as a pastor of a church in the county. T. 400.[9] The result of counsel's deficient performance lead to Goff's right to a fair trial and an impartial jury, guaranteed to him by the United States Constitution and the Mississippi Constitution, being violated.

The final juror seated (excluding alternates) was juror 9 of panel 4 thus the jury was selected from 44 persons in the venire. C.P. 162-63 (juror 2, panel 3 did not participate). Thirteen of these persons, 29.5%, had close ties to law enforcement. T. 344-45, 360-65, 400 (1-2;1-6; 1-9; 1-11; 2-4; 3-1; 3-4; 3-9; 3-12; 4-1; 4-2; 4-6; 4-7). This number included a uniformed Highway patrol office who was present at the Sheriff's Office when the call came in, T. 285-86, and the 911 operator who took the call. T.406.

After voir dire, the trial judge struck ten potential jurors for cause including four with ties to law enforcement. T. 402-415. Because both sides exercised all 12 peremptory challenges the jury was selected from the first 36 of the 42 potential jurors. T. 418-20. Nine of the 36, 25%, had close ties to law enforcement. T. 345, 360-65 (1-2; 1-9; 3-1; 3-4; 3-9; 4-1; 4-2; 4-6; 4-7). Two of the twelve jurors who served on this case had close family ties not only to law enforcement but to jailors in the very jail Goff was being held in. T. 410, 413, 421(1-9; 4-6).

The makeup of the venire in this case resulted in a "statistical aberration" in violation of

[9] Defense counsel also failed to adequately voir dire jurors on their law enforcement connections. For example counsel accepted jurors 1-9 and 4-6 who's mother and daughter respectfully worked in the jail Goff was being housed in without asking if they had discussed Goff with their loved on. In refusing to strike 1-9 the court noted "without more" the strike is denied. T. 410. Counsel, learning during voir dire of the potential for additional jurors being members of ADA/Pastor Bradley's church, failed to do any follow-up voir dire on that point even after this matter was discussed. T. 400-01. The inadequate voir dire cannot be raised at this time. The record would have to be more fully developed in post-conviction to allow Goff to prove prejudice. Goff reserves the right to raise these claims in post-conviction if that becomes necessary. Havard v. State, 928 So.2d 771 (Miss. 2006).

Mhoon v. State, 464 So.2d 77 (Miss.1985) (12 of the 39 potential jurors, 30%, had close ties to law enforcement). Trial counsel's failure to object to this aberration was ineffective and was a violation of the defendant's right to receive a fair and impartial jury.

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

In voir dire the prosecution sought a promise from the jury that they would be able to convict even in the absence of evidence such as DNA. T. 341. Then in closing argument the prosecution reminded the jury of this promise. "You were asked in voir dire, you all know about CSI. Can you set that aside if it's not needed and return a verdict, and you all said yes. So we ask you to hold to that." T. 924-25. This prosecution tactic of putting jurors in "a box" has long been condemned. Stringer v. State, 500 So.2d 928, 938-39 (Miss. 1986).

Defense counsel failed to object to both the promise seeking question and the argument that put the jurors in "the box."

Moreover the defense failed to object to improper closing argument that became the most damaging "evidence" presented against Goff, the blood on the back of the shirt recovered from his car. Exhibit S-49A. Goff, in his statement to the police admitted in evidence, explained that the blood on the shirt resulted from his laying on the body after he discovered his girlfriend brutally murdered in their hotel room. Exhibit S-70. This formed his theory of defense.

The prosecutor argued that the blood could not have gotten on the shirt this way. T. 958-59. However no witness testified as to how this blood might have gotten on the back of the shirt. There is nothing in this record to support the prosecutor's argument. In fact when crime scene analyst Stacy Smith was asked about what appeared to the prosecutor as "droplets of blood" on the back of the shirt she did not agree with his assessment and stated that these were merely "smaller stains." T. 684.

It is clearly prosecutorial misconduct to argue outside the record. See Griffin v. State, 557 So.2d 542, 553 (prosecutor commits reversible error by arguing facts which "lack evidentiary support"); Hosford v. State, 525 So.2d 789, 794 (Miss. 1988) (it is highly improper for a prosecuting attorney to refer to matters incompetent as evidence, or which he does not attempt to prove); Cabello v. State, 471 So.2d 332, 346 (Miss. 1985) (prosecutor prohibited from arguing facts not in evidence). However the defense attorney failed to object.

The failure to object to this improper argument based on the record now before this Court constitutes ineffective assistance of counsel. Matthews v. State, 350 S.C. 272, 565 S.E.2d. 766 (2002); Eure v. State, 764 So.2d 798 (Fla. Dist. Ct. App. 2000) (Counsel ineffective for failing to object to prosecutor's numerous improper statements during closing argument); State v. Storey, 901 S.W.2d 886 (Mo. 1995) (Counsel ineffective for failing to object to state's improper closing argument which argued facts outside the record). There can be no strategic reason for failing to object to such an improper and prejudicial argument. See *ABA Guidelines* 10.8.

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

Counsel requested only one instruction at sentencing. C.P. 230, R.E. 26; T. 1060. This instruction was offered as the "antithesis" of S-10 which dealt with mitigating circumstances. T. 1059. However, what jurors may consider in aggravation is not the "antithesis" of what must be considered in mitigation.

While mitigation must be unlimited, in Mississippi jurors may only consider the statutory aggravating circumstances. Flowers v. State, 733 So.2d 309 (Miss.2000). The instruction advised jurors that the listed aggravating circumstances were not the only aggravating circumstances they could consider. C.P. 230 ("those [listed aggravators] or any other aggravating circumstances exist") (emphasis added). Because the jury was allowed to consider non-statutory aggravating circumstances the sentence in this case cannot be affirmed consistent

with the 8th and 14th Amendments to the Constitution of the United States and §§ 14 and 28 of the Mississippi Constitution. See Humphrey v. State, 759 So. 2d 368, 389 (Miss. 2000) (Banks, J., concurring) (consideration of anything beyond the statutorily enumerated factors would "fly in the face of the uniform death determination that the statutory scheme was designed to achieve"). Because arbitrary factors were presented as a result of counsel's action, counsel was ineffective.

G. MISHANDLING OF STATE WITNESS

During the testimony of pathologist Steven Hayne, defense counsel failed to object to clearly irrelevant and prejudicial testimony concerning the amount of pain suffered by the victim. T. 620. Hayne was testifying at the culpability phase and such evidence had no relevance to the cause and manner of death. During cross-examination counsel went from allowing prejudicial testimony to eliciting prejudicial testimony.

Goff's theory of defense to the killing was that James Yates had abuse his wife in the past and likely tracked her down and again assaulted her resulting in her death. Counsel, apparently having failed to interview Hayne before he testified, see Holland v. State, 587 So.2d 848 (Miss. 1991) (failure to interview pathologist surprising to Court), elicited testimony that there was no evidence of old injuries to Mrs. Yates. T. 627-28. He further elicited graphic details of the ripping organs from the body with no apparent evidentiary value other than to inflame the jury against his client. T. 629.

Having apparently failed to investigate or even interview the witness prior to trial, counsel attempted to investigate during the trial itself. Such a tactic amounts to ineffective assistance of counsel, especially where counsel elicits detrimental information. See Fisher v. Gibson, 282 F.3d 1283, 1296 (10th Cir. 2002) (finding counsel ineffective where he conducted an "investigation" of witnesses at trial, eliciting damaging information).

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

In determining whether to reverse a case for ineffective assistance of counsel, this Court must not only assess the effectiveness of counsel with respect to particular issues, but it must also apply a cumulative prejudice analysis. Kyles v. Whitey, 514 U.S. 419, 436 (1995) (holding that prejudice must be "considered collectively, not item-by-item"); Moore v. Johnson, 194 F.3d 586, 619-20 (5th Cir. 1999) (holding that trial counsel's "cumulative errors" and "deficient performance, including counsel's performance during the guilt phase of Moore's trial, prejudiced the outcome of the punishment phase of Moore's [capital] trial").

Even if the defaults itemized above or set forth elsewhere in this brief, by themselves, is not sufficient to establish ineffectiveness of counsel, when taken cumulatively, especially in a capital matter, they are sufficient to undermine confidence in the verdict and require reversal. Moore v. Johnson, 194 F.3d 586, 619-20 (5th Cir. 1999).

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

The prosecution committed numerous incidences of misconduct, more fully developed below, which violated Goff'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 and compels this Court to reverse this conviction and vacate the sentence of death. Berger v. United States, 295 U.S. 78 (1935); Griffin v. State, 557 So.2d 542, 552-53 (Miss. 1990); Hickson v. State, 472 So.2d 379, 384 (Miss. 1985).

During voir dire the prosecution injected victim character evidence into the case. T. 326. This theme was continued in its opening statement. T. 448. The prosecution, still in the culpability phase of the trial, then formally introduced improper victim impact and character

evidence into the trial through the decedent's husband. T. 568 – 74.

This evidence, consisting of details of her children, their relationship and the relationship of the children to their mother was irrelevant, highly prejudicial and had no place in a capital murder trial, especially not the culpability phase. See Wiley v. State, 484 So. 2d 339, 348 (Miss. 1986); see also Griffin v. State, 557 So. 2d 542, 552-53 (Miss. 1990) (references to decedent and impact of death on family were improper); Clark v. Commonwealth, 833 S.W.2d 793 (Ky. 1991) (emotional evidence designed to create sympathy for the victim and victim's family is not admissible at guilt-or-innocence phase of trial); Eakes v. Moore, 876 So. 2d 975, 985 (Miss. 2004) (error to admit highly prejudicial scenes from a day-in-the-life video depicting decedent's mother); Reed v. State, 99 So.2d 455 (Miss. 1958) (This Court has long "condemned the injection into the trial of a lawsuit, which should be decided on the facts and law, of improper and irrelevant influences and possible prejudices.").

Also in voir dire the prosecution sought a promise from the jury that they would be able to convict even in the absence of evidence such as DNA. T. 341. Then in closing argument the prosecution reminded the jury of this promise. "You were asked in voir dire, you all know about CSI. Can you set that aside if it's not needed and return a verdict, and **you all said yes. So we ask you to hold to that.**" T. 924-25 (emphasis added). This prosecution tactic of putting jurors in "a box" has long been condemned. Stringer v. State, 500 So.2d 928, 938-39 (Miss. 1986).

The prosecution in final closing argument at the culpability phased seized on an innocuous piece of evidence, the blood soaked shirt recovered from Goff's car, Ex. S-50, and turned it into the most damaging evidence against Goff. The prosecutor argued that the only way the blood could have gotten on the back of the shirt was if Goff slashed and beat Mrs. Yates. T. 958-59.

This argument was particularly prejudicial in that it directly negated Goff's theory of defense. Goff, in his statement to the police admitted in evidence, explained that the blood on the shirt resulted from his laying on the body after he discovered his girlfriend brutally murdered in their hotel room. Exhibit S-70.

However no witness testified as to how this blood might have gotten on the back of the shirt. In fact when crime scene analyst Stacy Smith was asked about what appeared to the prosecutor as "droplets of blood" on the back of the shirt she did not agree with his assessment and stated that these were merely "smaller stains." T. 684.

There is no way for this Court to know if this was a "splatter" as described by the prosecutor in closing argument, T. 958-59, or if there is some other explanation consistent with Goff's statement to the police.

The prosecutor's argument was clearly unsupported and to a great extent contradicted by the record in this case. It is clearly prosecutorial misconduct to argue outside the record. See Griffin v. State, 557 So.2d 542, 553 (prosecutor commits reversible error by arguing facts which "lack evidentiary support"); Hosford v. State, 525 So.2d 789, 794 (Miss. 1988) (it is highly improper for a prosecuting attorney to refer to matters incompetent as evidence, or which he does not attempt to prove); Cabello v. State, 471 So.2d 332, 346 (Miss. 1985) (prosecutor prohibited from arguing facts not in evidence).

This is especially true in a capital case since the Eighth Amendment comes into play in addition to "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).

Because this argument, unsupported by the evidence, as well as the victim character evidence and improper voir dire coupled with the closing argument that put the jury in "the box" was so prejudicial it should be considered as plain error on appeal. The plain error doctrine arises from Mississippi Rule of Evidence 103(2)(d), which states: "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." See also 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).

Alternatively the failure to object to this improper argument based on the record now before this Court constitutes ineffective assistance of counsel. Matthews v. State, 350 S.C. 272, 565 S.E.2d. 766 (2002); Eure v. State, 764 So.2d 798 (Fla. Dist. Ct. App. 2000) (Counsel ineffective for failing to object to prosecutor's numerous improper statements during closing argument); State v. Storey, 901 S.W.2d 886 (Mo. 1995) (Counsel ineffective for failing to object to state's improper closing argument which argued facts outside the record). There can be no strategic reason for failing to object to such an improper and prejudicial argument.

These instances of prosecutorial misconduct, alone and/or in conjunction with one another, violated Goff'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, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), and thus mandate his convictions and are death sentence be vacated.

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

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

Based on this evidence Goff submitted Instruction D-16. C.P. 239, R.E. 27, T. 902-03. The instruction can best be described as a "third party guilt" instruction. There can be no question that third party guilt is a valid legal defense. Holmes v. South Carolina, 547 U.S. 319 (2006) (exclusion of evidence offered to show that third party had actually committed the crime charged violated defendant's constitutional right to have "'a meaningful opportunity to present a complete defense.'"

(internal citations omitted). Accordingly Goff had an absolute right to have his jury instructed on this defense.

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

> ¶ 13. Furthermore, every accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal. We have held that "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court. This Court will never permit an accused to be denied this fundamental right." O'Bryant v. State, 530 So.2d 129, 133 (Miss.1988) (citing Ward v. State, 479 So.2d 713 (Miss.1985); Lancaster v. State, 472 So.2d 363 (Miss.1985); Pierce v. State, 289 So.2d 901 (Miss.1974)). This Court recently has stated that "[w]e greatly value the right of a defendant to present his theory of the case and 'where the defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error.' " Phillipson v. State, 943 So.2d 670, 671-72 (Miss.2006) (citing Adams v. State, 772 So.2d 1010, 1016 (Miss.2000)).

Chinn, supra.

In refusing this proposed instruction, the court denied Goff the only opportunity he had for the jury to consider his theory of defense. This refusal was erroneous, denied Goff a fundamentally fair trial and requires his conviction be reversed and death sentence vacated.

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

Goff submitted instruction D-14, C.P. 240, R.E. 28, T. 901. The instruction reads:

> The Court instructs the jury that if there may be a fact or circumstance in this cause susceptible of two interpretations, one favorable and the other unfavorable to the Defendant, and when the jury has considered such fact or circumstance with all other evidence, there is a reasonable doubt as to the correct interpretation, then you, the jury, *must* resolve such doubt in favor of the Defendant, and place upon such fact or circumstance the interpretation most favorable to the Defendant.

The trial court erroneously denied this instruction. C.P. 240, R.E. 28, T. 901-02. This instruction, in a circumstantial evidence case must be granted. Parker v. State, 606 So.2d 1132,

1140-41 (Miss. 1992).

The prosecution conceded that this case was a circumstantial case but argued against the giving of the instruction based on the language "beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence" being found in the elements instruction. T. 901 (Jury Instruction 4, C.P. 212, R.E. 29). The court, in denying the instruction stated "I don't think you're entitled to this and a circumstantial evidence instruction when the burden of proof is used in the elements instruction. D-14 will be refused." T. 902.

Parker is indistinguishable from the case *sub judice*. The prosecutor and ultimately the trial court are clearly wrong, Goff was entitled to the instruction and the denial of the instruction resulted in the jury not being fully and fairly instructed on the law mandating reversal. Parker.

Like Goff, Parker's jury was given "[t]he typical circumstantial evidence instruction ... ("beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence")." Parker at 1140. Parker's complaint was that the trial judge failed to give the requested "two theory" instruction. Id. The instruction requested by Goff and that requested by Parker were almost verbatim:

> The Court instructs the jury that if there may be a fact or circumstance in this cause susceptible of two interpretations, one favorable and the other unfavorable to Michael Parker, when the jury has considered such fact or circumstance with all other evidence, there is a reasonable doubt as to the correct interpretation, then you, the jury, must resolve such doubt in favor of Michael Parker, and place upon such fact or circumstance the interpretation most favorable to Michael Parker.

Parker at 1140.

> In reaching the decision that Parker was entitled to a new trial this Court held:
>
> The very same two-theory instruction was at issue in Henderson v. State, 453 So.2d 708, 710 (Miss.1984). This Court reversed and remanded for a new trial because the trial judge refused the two-theory instruction as well as the typical circumstantial evidence instruction. ("... where the evidence is purely circumstantial, the trial court must grant a 'two-theory' instruction ..."). Id.

Parker at 1140.

Because, as conceded by the prosecution, this was a purely circumstantial case the "two-theory" instruction was required. Because the instruction was refused and "jury was not fully and fairly instructed on this point by any of the instructions given, [Goff's] conviction should be reversed and remanded for failure to give the two-theory instruction." Parker at 1141.

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

Joseph Goff has been sentenced to death by lethal injection. C.P. 274-78, R.E. 31-35. This Court has held that challenges to this method of execution must be brought on direct appeal. See, e.g., Jordan v. State, 918 So.2d 636, 661 (Miss. 2005).

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.

Goff's death sentence violates the Eighth Amendment because Mississippi's method of inflicting death by lethal injection—the only authorized method of execution under Mississippi law—constitutes cruel and unusual punishment. See Morales v. Hickman, 415 F.Supp.2d 1037 (N.D. Cal. 2006).

The United States Supreme Court has granted certiorari to review the constitutionality of execution by lethal injection in a case arising in Kentucky. Baze v. Rees., No. 07-5439, 2007 WL 2075334, *cert. granted,* Sept. 25, 2007. Mississippi's protocols are similar in all material respects to Kentucky's. Berry v. State, 2002-DR-301, 93-DP-59 (Motion to Re-Set Execution Date, filed by State of Mississippi Oct. 1, 2007, at page 7 fn. 2).

If the United States Supreme Court declares lethal injection as practiced unconstitutional in Baze, this Court has no choice but to follow suit and void Goff's death sentence and impose the only alternative punishment being life without parole.

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

The indictment in this case failed to charge all elements necessary to impose the death penalty under Mississippi law. (C.P. 6; R.E. 23). 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").

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 (2000).

A "fact that increases the maximum penalty for a crime" is one that exposes the defendant to a punishment exceeding the maximum he could receive if punished according to the facts reflected in the jury verdict alone. Id. at 482. A sentence of death is different from any

other sentence, Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 2441 (2002); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976), and exceeds a sentence of life imprisonment. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 2440-41 (2002).

"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 as mandated in Miss. Code § 99-19-101, the maximum penalty for capital murder is life imprisonment. See Pham v. State, 716 So. 2d 1100, 1103-04 (Miss. 1998). If a sentencing hearing is conducted and the finder of facts fails to find at least one aggravating factor and a *mens rea* element, pursuant to Miss. Code § 99-19-101 (5) and (7) respectively, the statutory maximum is life. See 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); cf. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 2437 (2002) ("Based solely on the jury's verdict finding Ring guilty of first-degree murder, the maximum punishment he could have received was life imprisonment"); see also State v. Clark, 851 So. 2d 1055, 1085 (La. 2003) (Ring impacts invalid aggravation only where the invalid aggravator is the sole aggravator *or in a state which requires the jury to weigh aggravation against mitigation*) (emphasis added).

Thus, in Mississippi, the finding of an aggravating circumstance and a *mens rea* element increases the penalty over the statutory maximum absent that circumstance, and therefore 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 v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). 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, 536 U.S. 584, 122 S.Ct. 2428, 2439-40 (2002) (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).

This was made clear in Blakely v. Washington, 542 U.S. 296 (2004). Blakely was convicted of a class B felony which carried up to ten years under the state sentencing guidelines. Blakely plead to a class B offense that the guidelines called for sentencing of 53 months. The judge sentenced him to an additional 37 months after finding aggravating factors. The state argued that because the statutory maximum was up to ten years, Apprendi did not apply. Justice

Scalia writing for the majority flatly rejected that argument. Blakely.

Although Blakely, like Apprendi and Ring before it, does not go as far as the indictment question, it clearly sets forth the two foundations of the Rule of Apprendi. Blakely, 124 S.Ct. at 2536 (the Rule 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'").

"It has long been the law of this land that an accused person has a constitutional right to be informed of the nature and material elements of the accusation filed against him. All the authorities are to the effect that an indictment, to be sufficient upon which a conviction may stand, must set forth the constituent elements of a criminal offense. 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).

In Stewart, this Court applied Hicks to the right to a peremptory challenge. The court recognized that although this was merely a state-created right and not even a state constitutional right, "the arbitrary denial ... rises to a violation of the due process clause of the Fourteenth Amendment." Stewart, 662 So. 2d at 557 (citing Hicks v. Oklahoma, 447 U.S. 343, 346 (1980)).

While this Court has held that the indictment in a death penalty case need not include aggravating circumstances, Williams v. State, 445 So. 2d 798, 804 (Miss. 1984), the reasoning in Williams must be reconsidered in light of Apprendi, Ring, Blakely and now Marsh. The similarities between the Arizona and Mississippi schemes and the clear holdings of the United States Supreme Court render Williams constitutionally invalid. Further, the opinion in Williams focused on notice. The post-Apprendi issues are broader and focus on whether the essential roles of the grand and petit juries have been denigrated by permitting the state to avoid charging and/or proving all elements of the offense. This distinguishes Williams, allowing this Court to vacate the death penalty in this case without addressing Williams.

Based on the principles discussed above, the prosecution must include in the indictment any aggravating factors which it intends to prove at the sentencing phase of the trial where those factors are related to the commission of the crime and are not judicially noticed facts. Apprendi, 530 U.S. at 488; see generally Allen v. United States, 536 U.S. 953 (2002) (granting certiorari and vacating the judgment at Allen v. United States, 247 F.3d 741, 759 n. 5 (8th Cir. 2001) and remanding in light of Ring, United States v. Allen, 357 F.3d 745 (8th Cir. 2004) (following remand from United States Supreme Court, 8th Circuit held that the failure to charge the aggravating factors in the indictment invalidated the death sentence).

Because the indictment in this case failed to set forth a statutory aggravating factor or *mens rea* element, the death sentence imposed must be vacated and this case remanded for imposition of a life sentence, the maximum penalty for the offense charged in the indictment. See Berryhill v. State, 703 So.2d 250 (Miss. 1997) (where trial court grants motion to quash capital portion of indictment, case can proceed as non-death penalty case); Willie v. State, 738 So. 2d 217 (Miss. 1999) (where case is reversed for sentencing phase error, state cannot dismiss indictment and proceed on superceding indictment).

X. ERROR IN SUBMITTING CERTAIN AGGRAVATING FACTORS.

The sentencing jury found five aggravating circumstances: prior violent felony; great risk of death to many persons; in the commission of a robbery; avoiding arrest and that the killing was especially heinous atrocious and cruel. C.P. 276, R.E. 33.

Each aggravating circumstance must be proven beyond a reasonable doubt. White v. State, 532 So. 2d 1207 (Miss. 1988). As a matter of federal constitutional law, when there is insufficient evidence to support an aggravating circumstance, the sentencing body may not consider that aggravating circumstance. Jackson v. Virginia, 443 U.S. 307, 314-15 (1979); Wingo v. Blackburn, 786 F.2d 645, 644 (5th Cir. 1986) (*relying on* Jackson, 443 U.S. at 313) ("[t]o satisfy the due process requirement of the Fourteenth Amendment, the evidence as viewed most favorably to the prosecution must warrant the conclusion that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

As presented in Issue III, there was insufficient evidence to support the robbery aggravator. Furthermore there was insufficient evidence to support both the avoiding arrest and great risk of death aggravators. Leatherwood v. State, 435 So. 2d 645, 651 (Miss. 1983); Taylor v. State, 672 So. 2d 1246, 1275 (Miss. 1996); Porter v. State, 732 So. 2d 899, 905-06 (Miss. 1999). Although the prosecution argued the burning of the motel room supported these factors, because Goff was separately convicted and sentenced on the arson, C.P. 275-78; R.E. 32-34, they cannot again be used against him to support aggravating circumstances. Meeks v. State, 604 So. 2d 748, 752 (1992)

Although, as is constitutionally mandated, the jury was provided a limiting instruction on the especially heinous aggravator, C.P. 271, R.E. 30, that instruction itself was unconstitutionally vague. See Leary v. United States, 395 U.S. 6, 31-32 (1969); Boyde v. California, 110 S.Ct. 1190 (1990); Shell v. Mississippi, 111 S.Ct. 313, 314 (Marshall, J., concurring); Bachellar v. Maryland,

397 U.S. 564, 569-71 (1970).

For the forgoing reasons, the sentence of death imposed on Joseph Goff should be vacated.

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

Pursuant to state law, this Court must engage in an independent review of the proportionality of Goff's death sentence. Even if the guilt and penalty phases of the trial are affirmed as to all assignments of error, because of the gravity of Goff's mental disabilities, the sentence should nevertheless be set aside and the case remanded for modification of the sentence to life pursuant to Miss. Code § 99-19-105(b). Given the circumstances and Goff's mental health, "barbarism would attend . . . affirming the death penalty" in this case. Edwards v. State, 441 So.2d 84, 93 (Miss. 1983).

This Court has repeatedly emphasized that appellate review of death sentences must be qualitatively different from the scrutiny used in other type cases. Thoroughness and intensity of review are heightened where the death penalty is involved because that sentence is unique in its severity and irreversibility. 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).

The record is replete with evidence which demonstrates the degree to which Goff is

impaired mentally. In addition to the bizarre trial behavior detailed at Issue II., the record demonstrates that he has been diagnosed with bipolar disorder with psychotic features. T. 1046.

The doctor explained that "bipolar disorder is a grave mental disorder" and sufferers can lose touch with reality and become psychotic. T. 1044. Goff has suffered with these disorders for a long time. Although Goff objected to an insanity defense being presented, at sentencing his mother and Dr. Van Rosen, testified Goff was suffering symptoms of these grave disorders the night Brandy Yates was killed. T. 1026, 1045.

Dr. Van Rosen testified that Goff "was in the midst of a bipolar disorder psychotic episode" the night Mrs. Yates was killed. T. 1045. This is further supported Goff's inappropriate "laughter" during questioning by police. T. 90.

It is a well-established principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer, or the reviewing court on appeal, is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). See also, Penry v. Lynaugh, 109 S.Ct. 2934, 2947 (1989).

Mental disability is particularly relevant to the question of guilt since mental illness has much to do with whether the defendant knew right from wrong or was capable of acting deliberately. It also has ramifications concerning the defendant's moral culpability. Indeed, "emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14, 106 S.Ct. 1669, 1675-1676 (1986). See Penry, 109 S.Ct. at 2949. Especially "critical" to the "determination of culpability required in capital cases is the mental state with which the defendant commits the crime." Tison v. Arizona, 481 U.S. 137, 151, 107 S.Ct. 1676, 1687 (1987). Likewise, the less blameworthy the mental state of a person committing a crime, the less serious the offense, the less severely it ought to be punished. See

Thompson v. Oklahoma, 108 S.Ct. 2687, 2698-2700 (1988); Enmund, 458 U.S. at 798-802; Eddings v. Oklahoma, 455 U.S. 104 (1982).

Following these principles the Supreme Court of the United States has prohibited the execution of people with mental retardation, Atkins v. Virginia, 536 U.S. 304 (2002) and juveniles Roper v. Simmons, 542 U.S. 551 (2005). While those cases involve below-average intellectual functioning and youth, neither present here, Goff's mental impairments also involve deficits in adaptive abilities -- how he relates to other people in daily living and impulse control.

The execution of the mentally ill violates the Eighth Amendment when "it makes no measurable contribution to acceptable goals of pain and suffering" or because it is "grossly out of proportion to the severity of the crime." Penry, 109 S.Ct. 2955, quoting Coker v. Georgia, 433 U.S. at 592, 97 S.Ct. at 2866 (plurality opinion). The Supreme Court noted in Gregg that "[t]he death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders." Gregg v. Georgia, 428 U.S. at 183, 96 S.Ct. at 2929 (joint opinion of Stewart, Powell and Stevens, JJ.).

Mental capacity must be considered when evaluating the proportionality of a death sentence because killing mentally impaired offenders does not measurably further the penal goals of either retribution or deterrence. "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Tison, 481 U.S. at 149. We gauge whether a punishment is disproportionate by comparing "the gravity of the offense," understood to include not only the injury caused, but also the defendant's moral culpability, with "the harshness of the penalty." Penry, 109 S.Ct. at 29599 (Brennan, J., concurring in part and dissenting in part), quoting Solem v. Helm, 463 U.S. 277, 292, 103 S.Ct. 3001, 3010 (1983).

From such a comparison, it is clear that Goff's death sentence is excessive and disproportionate to the penalty imposed in other capital cases. In Edwards v. State, 441 So. 2d 84 (Miss. 1983), a plurality of this Court determined the death penalty to be disproportionate where the defendant was a seriously mentally ill person, with a long history of schizophrenia of a paranoid type. Because of Edwards' severe mental illness, the Court decided, "barbarism would attend our

affirming of the death penalty." 441 So.2d at 93 (plurality opinion of Hawkins, J.).

In light of this discussion and particularly considering the dearth of evidence supporting the finding that this was a killing during the commission of a robbery (Issue III above) the sentence should be reduced to life imprisonment.

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

This Court has a longstanding adherence to the cumulative error doctrine, particularly in capital cases. Ross v. State, 954 So.2d 968 (Miss. 2007). Under this doctrine, even if any one error is not sufficient to require reversal, the cumulative effect of them does mandate such an action. 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 and ineffectiveness of counsel makes clear, this is one of those rare cases where the cumulative error doctrine requires reversal. 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 Joseph Goff respectfully requests this Court reverse the convictions and death sentence.

Respectfully submitted this the 5th day of October, 2007.

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CERTIFICATE OF SERVICE

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This the 5th day of October, 2007.

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