IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-EP-01489SCT

LISA JO CHAMBERLIN — *Appellant*

VERSUS — NO. 2006-DP-01489SCT

STATE OF MISSISSIPPI — *Appellee*

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-EP-01489SCT

LISA JO CHAMBERLIN	**APPELLANT**
VERSUS	**CAUSE NO. 04-715CR**
STATE OF MISSISSIPPI	**APPELLEE**

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument since this is a death penalty case.

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IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-EP-01489SCT

LISA JO CHAMBERLIN	**APPELLANT**
VERSUS	**CAUSE NO. 04-715CR**
STATE OF MISSISSIPPI	**APPELLEE**

REPLY BRIEF OF APPELLANT

The Appellant, Lisa Jo Chamberlin, files this Brief in response to the Brief filed by the State in this matter, and in support of her appeal from her conviction and sentence of death imposed her by the Forrest County Circuit Court on August 4, 2006. This Brief contains rebuttal to the arguments presented by the State in its Brief, but does not re-argue every issue in full. To the extent that issues are not re-argued in this Brief, they are not waived, but Lisa Jo Chamberlin relies on the arguments contained in her original Brief in this matter.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS STATEMENTS.

In its Brief, Appellee State of Mississippi contends that "Chamberlin's rights were meticulously observed at all times, pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981),

Miranda v. Arizona, 384 U.S. 436 (1966), *Michigan v. Mosley,* 423 U.S. 96 (1975), and *Agee v. State,* 185 So. 2d 671 (Miss. 1966)." (Brief of Appellee, Page 22). However, the record in this case does not support this contention. In particular, Appellant's rights were violated by agents of the Kansas Bureau of Investigations under both *Miranda* and *Edwards.* Officer Matt Lyon of the KBI admitted on the record during cross examination that he purposefully violated Appellant's Miranda Rights when he interrogated her on March 29, 2005. See T. 640-642.

Contrary to the arguments of the State in its Brief, and certainly contrary to the findings of the Circuit Judge, Appellant's invocation of her right to remain silent was unambiguous. Nevertheless, Officer Lyon admitted that he not only failed to honor Appellant's invocation and continued to interrogate, but that he also lied in order to persuade Ms. Chamberlin to talk. See T. 642. He specifically told Ms. Chamberlin that he had interviewed her co-defendant, Roger Gillett, and that Gillett said that "everything was her fault" (T. 640).

The State's argument, and the finding by the trial court, that the interview on March 29, 2004 only dealt with "five Kansas felony drug charges" (C.P. 237-43) is undermined by Officer Lyon's false statement that Roger had told him that "everything was her fault." (Emphasis supplied.) The language used by Officer Lyon must be taken at its face value. The word "everything" means just that and there is no way to determine after the fact that when Officer Lyon used the word "everything" he was limiting it to the five (5) felony

charges. By injecting the word "everything" into his interrogation, Officer Lyon placed "everything" on the table, including the murders.

Despite these techniques, Ms. Chamberlin remained steadfast and refused to waive her Miranda rights during her initial interview on March 29, 2005.

KBI Agents were undeterred. The following morning, in direct violation of the United States Supreme Court's decision in *Edwards,* KBI Agents initiated a second interrogation of Ms. Chamberlin. This interrogation was initiated entirely by KBI Agents, not Ms. Chamberlin. Additional statements were taken during the afternoon of March 30, 2004 and the following morning on March 31, 2004. Exhibit S-60 is a videotape of one of the interrogations which occurred during the afternoon on March 30, 2004 and Exhibit S-61 is a videotape of the statement which was taken on March 31, 2004.

Under *Edwards*, Appellant's statements on March 30, 2004 and March 31, 2004 should have been excluded. Ms. Chamberlin unequivocally invoked her right to remain silent during the interrogation on March 29, 2004 by KBI Officer Lyon. Under *Edwards,* once a defendant invokes the right to remain silent, he or she is not subject to further interrogation until counsel has been made available to the defendant or the defendant initiates further communications. In this case, KBI Agents simply ignored the requirements of *Edwards.* They initiated interrogation of Ms. Chamberlin on at least two (2), and possibly three (3) occasions subsequent to her invocation of her right to remain silent on March 29, 2004.

Even assuming, *per arguendo*, that Ms. Chamberlin initiated the final statement on March 31, 2004, Exhibit S-61, this statement should also be excluded. It is no less the "fruit of the poisonous tree," than an item of physical evidence which is taken pursuant to either an illegal search and seizure or an illegal confession. The exclusionary prohibition extends to both indirect and direct products of illegal searches and illegal confessions. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S. Ct. 407 (1963). Ms. Chamberlin's statement on March 31, 2004, was at a minimum an indirect result of the impermissible interrogations conducted on March 30, 2004. More likely than not, it was a direct result of those interrogations.

The State of Mississippi has failed to rebut Appellant's argument that the trial court erred in denying her Motion to Suppress Statements. Based on the record, and based on the actions of KBI agents, in violation of Appellant's rights under both *Miranda* and *Edwards,* each statement subsequent to her statement on March 29, 2004 should have been suppressed.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE

The evidence in question, specifically States Exhibits 2, 3, 4, 5 and 35-44 should have been suppressed. In responding to Appellant's initial argument on this issue, the State chooses to simply argue that the Court did not err in refusing to exclude these exhibits because the statements made by Ms. Chamberlin were "all knowingly, intelligently and voluntarily made to law enforcement..." (Brief of Appellee, Pages 21-22).

However, as noted *supra*, the record does not support the State's contention that the

statements in question were knowingly, intelligently and voluntarily made to law enforcement. In fact, the record supports the opposite conclusion, i.e., that these statements should have been suppressed, that they were taken in direct violation of the requirements of both *Miranda* and *Edwards,* and, therefore, the physical evidence taken as a result of these statements, should have also been suppressed. See *Wong Sun v. United States, supra.*

III. THE TRIAL COURT ERRED IN DENYING APPELLANT'S *BATSON* CHALLENGE.

Once again, in its response to Appellant's argument, the State ignores the record in this case. As noted in Appellant's opening Brief, before even allowing Appellant to respond to the State's alleged race neutral reasons for its strikes, the Circuit Judge denied Appellant's Motion by first indicating that Defendant had not made out a *prima facie* case of discrimination and then finding that the reasons expressed by the State were race neutral (T. 405). Appellant did attempt to put on the record a response to the State's proffered reasons to show that they were pretextual (T. 405-407). However, at that point, counsel for Appellant was put in the awkward position of having to respond to the reasons proffered by the State after the Judge had already ruled against Appellant.

Appellant is entitled to a new trial based on the incorrect ruling by the trial judge that Appellant had not made out a prima face of discrimination. (T. 405). Appellant had pointed to the fact that the State exercised 7 out of its 12 peremptory strikes to eliminate African American jurors and that this pattern constituted a prima facie case of discrimination (T. 399). The State was allowed to give allegedly race neutral reasons for its strikes, but, the

trial court ruled in favor of the State before Appellant was given an adequate opportunity to respond to the reasons proffered by the State. On this basis alone, Appellant's conviction and death sentence should be set aside and she should be entitled to a new trial.

Further, as argued in Appellant's opening Brief, based on the strike of Thomas Sturgis, an African American male, Appellant's *Batson* challenge should be upheld. Mr. Sturgis was an administrator at Alcorn State University. In his questionnaire he stated that he generally favors the death penalty. He also stated that he could be open-minded and has the ability to assimilate information and reach conclusions and opinions based on that information. As noted in Appellant's opening Brief, Mr. Sturgis would have been an ideal juror and the only basis for striking Mr. Sturgis is that he appeared to be a strong African American male. See *McGee v. State,* 953 So.2d 211, 216 (Miss. 2007) (one incident of purposeful discrimination is sufficient to prove a discriminatory purpose).

In this case, the trial court erred by first failing to find that Defendant had established a prima facie case of discrimination and second by failing to find that one or more of the allegedly race neutral reasons given by the State for striking African American jurors was pretextual. This Honorable Court should reverse Appellant's conviction and sentence and remand this case for a new trial with instructions to the trial court to scrupulously follow the mandate of *Batson v. Kentucky,* 476 U.S. 79 (1986).

IV. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF NUMEROUS GRUESOME PHOTOGRAPHS OF DECEDENTS.

Counsel for Lisa Jo Chamberlin repeatedly objected to the admission into evidence

of gruesome and prejudicial photographs. See Exhibits S-48; S-49; S-66 through S-73; S-76; S-80; S-81. The only purpose of these photographs was to inflame the juror. The photographs in question are astonishingly gruesome and any minimal probative value is greatly outweighed by their inflammatory and prejudicial effect. In her opening Brief, Appellant relied on the exclusion of photographs in *McNeal v. State,* 551 So.2d 151 (Miss. 1989). As argued, the photographs in this case cannot conceivably be any less gruesome than the photographs in *McNeal.*

Based on the argument set forth in Appellant's opening Brief, Appellant should be granted a new trial because of the introduction of prejudicial and inflammatory photographs.

V. THE TRIAL COURT ERRED IN DENYING SENTENCING INSTRUCTIONS NOS. D-3 AND D-10.

In its Brief, Appellee State of Mississippi attempts to distinguish the United States Supreme Court's decision in *Kansas v. Marsh,* 165 L.Ed. 2d 429, (2006), by arguing that where the mitigating and aggravating circumstances are in equipoise, the Mississippi Statute does not call for a mandatory death penalty finding by the jury. Appellee misreads both the facts and the legal conclusions in *Kansas v. Marsh.*

The Kansas death penalty statute is virtually identical to the Mississippi Death Penalty Statute. Both statutes require that the mitigating factors outweigh the aggravating factors. The equipoise issue is inherent in both statutes. In short, if the statute requires that the mitigating factors outweigh the aggravating factors, then if the two are in equipoise, the Defendant loses.

Appellant understands that the Mississippi Supreme Court has consistently rejected a "mercy instruction" as a requirement in death penalty cases. Appellant submits that with the Supreme Court's decision in *Kansas v. Marsh*, the Mississippi Supreme Court no longer has the option of rejecting a mercy instruction and that a mercy instruction is now required whenever requested by a Defendant in a death penalty case.

Appellant urges the Mississippi Supreme Court to reconsider this issue in light of Justice Thomas' opinion in *Marsh.*

Except for the Mississippi Supreme Court's decision in *King v. State,* 960 So. 2d 413 (Miss. 2007), each of the cases cited by Appellee on this issue pre-dates the United States Supreme Court's decision in *Marsh.* Although it appears that *King* was decided after *Kansas v. Marsh,* the Mississippi Supreme Court does not discuss or analyze the impact of Justice Thomas' opinion and decision in *Marsh.* Had the Mississippi Supreme Court done so, it would have concluded that, when requested, a Defendant facing the death penalty in Mississippi is entitled to a "mercy" instruction. Appellant submits that the decisions in *King* and the numerous other pre-*Marsh* cases cited by the State are in direct conflict with *Kansas v. Marsh* and must be now overruled.

The State also cites *Saffle v. Parks,* 494 U.S. 484, 492-95, 100 S.Ct. 1257, 1262-64, 108 L.Ed. 2d 415 (1990). However, there is nothing in *Saffle* which states that a mercy instruction cannot be given. *Saffle* simply unheld an instruction charging the jury that it was to avoid any influence of sympathy. Further, and perhaps most importantly, to the extent

Saffle stands for the proposition that a capital defendant is not entitled to a mercy instruction, it has been overruled *sub silento* by *Kansas v. Marsh*. In *Marsh,* the Supreme Court found that the *Kansas* instruction advising the jury that "mercy can itself be a mitigating factor" is required under the Kansas death penalty statute. As previously noted, the Mississippi and Kansas statutes are virtually identical in terms of procedural structure.

Based on the trial court's failure to grant a "mercy" instruction in this case, at a minimum, Appellant is entitled to a new sentencing trial.

VI. THE TRIAL COURT ERRED IN DENYING APPELLANT'S PETITION FOR PAYMENT OF TRAVEL AND RELATED EXPENSES FOR MITIGATION WITNESSES.

In its Brief, Appellee State of Mississippi, Mississippi's only argument is that on the issue regarding travel expenses for sentencing phase witnesses, Appellant is procedurally barred. The State does not contend that the Court was correct or did not err in denying funds for Loma Wagoner and Veronica Scheuning.

Appellee's procedural argument should be rejected in its entirety. First, it ignores the fact that this is a death case and that this Court has repeatedly stated that it will apply principles of fundamental fairness in reviewing death sentences. See *Puckett v. State*, 737 So. 2d 322, 350 (Miss. 1999); *Williams v. State,* 445 So. 2d 798 (Miss. 1984); *Culberson v. State,* 379 So.2d 499, 506 (Miss. 1980); *Bell v. State,* 360 So.2d 1206, 1215, 1217-1218 (Miss. 1978). Second, as noted by Appellee in its footnote on Page 39, Appellant cured the lack of a ruling from the trial court on this issue by filing a statement pursuant to Mississippi

Rule of Appellate Procedure 10(c). Appellee now argues that Appellant's statement did not comply with the requirements of Rule 10(c) because it was not filed within sixty (60) days of the Notice of Appeal. However, the State waived any objection to Appellant's Rule 10(c) statement when it failed to object to Appellant's statement within the fourteen (14) days required under Rule 10(c). Rule 10(c) specifically provides:

> "If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement."

Further, Appellee's argument that Appellant's statement was somehow inadequate in contradicted by the statement itself.

Appellant filed a request for the State to provide funds for the two (2) witnesses in question. The trial judge refused to do so. As noted by the State, the trial judge failed to enter an Order to this effect. Appellant's Rule 10(c) statement adequately sets forth the facts in question, i.e., that Defendant filed a Petition for Payment Travel and Related Expenses, requesting travel and lodging expenses for two (2) mitigation witnesses; that the trial court failed to provide those expenses; that the trial court did not enter an Order denying Defendant's Petition for Payment of Travel and Related Expenses or make an announcement on the record, that counsel for Ms. Chamberlin were advised by the trial judge that he would not authorize payment for the travel and related expenses of these witnesses. This statement adequately reflects the facts in question and provides a sufficient basis for this court to rule on this issue.

Finally, Appellant would submit that if she is, in fact, procedurally barred under Mississippi law on this issue, then the procedural bar itself is a denial of due process and therefore unconstitutional. The mechanistic application of a procedural rule should not be allowed to defeat the ends of justice. See *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973); see also *Coddington v. State,* 142 P. 3d 437 (Okla. 2006).

CONCLUSION

For the reasons set forth in the above and foregoing Reply Brief as well as Appellant's opening Brief, Appellant Lisa Jo Chamberlin's conviction sentence should be reversed and this case should be remanded for a new trial. Alternatively, and a minimum, Appellant's sentence should be reversed and the case remanded for a new sentencing trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael Adelman, counsel for Defendant, Lisa Jo Chamberlin herein, do hereby certify that I have this day served by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

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