IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-DP-01489SCT

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed person have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications, or recusal:

Lisa Jo Chamberlin	Defendant
Roger Lee Gillett	Co-Defendant
Jon Mark Weathers, Esq.	Forrest County District Attorney
Ben L. Saucier, Esq.	Assistant District Attorney
Michael Adelman, Esq.	Attorney for Lisa Jo Chamberlin
Gay Polk Payton, Esq.	Attorney for Lisa Jo Chamberlin

Jonathan Farris, Esq. Attorney for Roger Lee Gillett

James Lappan, Esq. Attorney for Roger Lee Gillett

MICHAEL ADELMAN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-EP-01489SCT

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

STATEMENT OF ISSUES

1. Whether the trial court erred in denying Appellant's Motion to Suppress Statements;

2. Whether the trial court erred in denying Appellant's Motion to Suppress Evidence;

3. Whether the trial court erred in denying Appellant's *Batson* challenge;

4. Whether the trial court erred in allowing the introduction of numerous gruesome photographs of Decedents;

5. Whether the trial court erred in denying Sentencing Instructions Nos. D-3 and D-10; and

6. Whether the trial court erred in denying Appellant's Petition of Payment of Travel and Related Expenses for Mitigation Witnesses.

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VERSUS	**CAUSE NO. 04-715CR**
STATE OF MISSISSIPPI	**APPELLEE**

BRIEF OF APPELLANT

STATEMENT OF THE CASE

i. Proceedings.

On or about September 30, 2004, Appellant Lisa Jo Chamberlin and Roger Lee Gillett were indicted on two (2) counts of Capital Murder for the killing and murder of Linda Heintzelman during the commission of a Robbery and the killing and murder of Vernon Hulett during the commission of a Robbery. (CP. 18-19). On or about September 30, 2005, the trial court entered its Order granting Appellant's Motion for Severance (CP. 89-90). Appellant Chamberlin also filed a Motion for Change of Venue (CP. 40-47; 86-88). The trial court granted Appellant's Motion for a Change of Venue and her case was separately tried before a jury drawn from a Warren County, Mississippi Special Venire (CP. 210).

On or about July 25, 2006, the trial court entered its order denying Defendant's Motion in Limine which, in effect, denied Appellant's Motion to Suppress Statements (CP. 174-176;

237-243).

Prior to trial, the trial court denied Appellant's Petition for Payment of Travel and Related Expenses for Loma Wagoner and Veronica Scheuning, potential Sentencing Phase witnesses (CP. 256-257; 412-418).

Trial commenced on July 31, 2006 and the jury found Appellant guilty of two (2) counts of Capital Murder on August 4, 2006 (T. 164; 867). Shortly thereafter, the court commenced the Sentencing Phase and on August 4, 2006, Appellant was sentenced to death in both Counts I and II of the Indictment (T. 996).

Subsequent to trial, Appellant filed Motion for Stay of Execution Date (CP. 351-352) and Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for a New Trial (CP. 353-356). On August 25, 2006, the trial court entered its Order Granting Stay of Execution Date (CP. 387) and Order Denying Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for a New Trial (CP. 388). Appellant filed a timely Notice of Appeal on August 28, 2006 (CP. 389) and the matter is now pending before the Mississippi Supreme Court.

ii. Facts.

Lisa Jo Chamberlin was arrested in Russell, Kansas on March 29, 2004 (T. 619). She was interrogated by Officer Matt Lyon of the Kansas Bureau of Investigations (KBI), beginning at approximate 5:13 p.m. that same day (T. 20; Exh. S-58). At approximately 5:14 p.m., Ms. Chamberlin stated: "I can't tell you anything until I talk to a lawyer" (Exh. S-58). Officer Lyon continued to attempt to change Ms. Chamberlin's mind and at approximately 5:18 p.m., he read Ms. Chamberlin her *Miranda* rights (Ex. S-58), after which she unequivocally invoked her right

to remain silent (Ex. S-58). Apparently, Officer Lyon was unhappy with Ms. Chamberlin's decision and continued to cajole and attempt to trick Ms. Chamberlin into changing her mind (Ex. S-58; T. 640-642).

Officer Lyon, an experienced special agent, well aware of Ms. Chamberlin's right to remain silent, attempted to coerce her into changing her mind by stating that her Co-Defendant, Roger Gillett had blamed "everything" on Ms. Chamberlin (Ex. S-58; T. 640-641). During his cross-examination at trial, Officer Lyon admitted that this statement was untrue (T.640) and that he had lied to Ms. Chamberlin for the sole purpose of getting her to talk (T. 641).

The following morning, March 30, 2004, Agent Lyon along with Special Agent Delbert Hawel initiated a second interrogation of Ms. Chamberlin (T. 654-658). Special Agent Kelly Raulston was also present for this interrogation (T. 684-696). This interrogation was not videotaped or recorded (T. 684), and Ms. Chamberlin did not sign a statement.

During the afternoon of March 30, 2004, Ms. Chamberlin was again interrogated and the videotape of this interrogation is Exhibit S-60. Ms. Chamberlin was highly emotional, rambling and disconnected during this interrogation (Ex. S-60). Her statements often made little sense (Ex. S-60). Approximately thirty (30) minutes into the interrogation, Ms. Chamberlin stated that she could not continue. Ex. S-60.

After the interrogation on March 30, 2004, Ms. Chamberlin took law enforcement officers to a dump site located in Russell, Kansas (T. 521-522). Seven black garbage bags filled with items of evidence were recovered from the dump site. (T521-522).

The following morning Ms. Chamberlin was again interrogated (Ex. S-59). During the

pre-trial motion hearing, Special Agent Hawel testified that Ms. Chamberlin through a jailer requested to speak with law enforcement officers (T. 91-92). However, the jailer to whom Ms. Chamberlin allegedly made this request did not testify at the pretrial motion hearing (T. 56-163). Agent Hawel was very clear that Ms. Chamberlin did not initiate either of the interrogations that took place on March 30, 2004 (T. 91).

Max Barrett, the Under Sheriff or Chief Deputy of Russell County, Kansas, who did not testify at the pre-trial motion hearing, testified at trial (T. 508-546). From his testimony, it appears that he was the deputy to whom Ms. Chamberlin expressed her desire to speak with one of the KBI agents (T. 533-534). But, Under Sheriff Barrett testified that this conversation occurred either on March 29th or March 30th, NOT on March 31, 2004 (T. 533-534). Exhibit 59 is the videotape of Ms. Chamberlin's interrogation on March 31, 2004.

Appellant's Motion for Change of Venue was granted by the trial court (CP 210), and she was tried before a jury selected from Warren County, Mississippi (CP 210). The State's case consisted primarily of Ms. Chamberlin's statements, exhibits taken from the crime scene, autopsy photographs of both victims, the testimony of Vernon Hulett's mother, the testimony of Michael Hester and the testimony of numerous law enforcement officers and the Russell County coroner and pathologist, Dr. Donald Pojman.

After the jury convicted Appellant of two (2) counts of capital murder, the court reconvened the jury for the sentencing phase of trial (T. 869). The State moved to incorporate all of its evidence, testimony and exhibits from the guilt phase (T. 871). Appellant presented three witnesses: Ms. Sherry Norris (T. 872-879), Ms. Carla DiBenetto (T. 880-879), and Dr.

Beverly Smallwood, Ph. D. (T. 891-935). The trial court denied Appellant's motion seeking travel and lodging expenses so that Appellant's aunt, Loma Wagoner and childhood best friend, Veronica Scheuning, could testify on her behalf during the sentencing phase (CP 256-258; 410-416). The trial court denied her motion despite the fact that the State of Mississippi paid Twelve Thousand Two Hundred Seventeen Dollars and forty-three cents ($12,217.43) for the travel expenses of nine (9) State witnesses (CP 244-251; 270-276; 357-360; 361-370; 371-375; 377.380).

During the Sentencing Phase, Sherry Norris testified that during early 2005, she spent thirty-one (31) days in the Forrest County Jail for a probation violation (T. 872-873). She testified that she had never been in jail before and was terrified (T. 873). Ms. Norris testified that the person whom came to her aid, who befriended her, was Lisa Jo Chamberlin (T. 873-875). During her incarceration, Ms. Norris also learned of the charges against Appellant (T. 874-875).

Based on her experience with Lisa Jo Chamberlin, and knowing that Ms. Chamberlin had been convicted of two (2) counts of Capital Murder, Ms. Norris, nevertheless, asked the jury to spare Ms. Chamberlin's life (T. 875-876).

Carla DiBenetto also testified that she came to know Ms. Chamber in the Forrest County Jail (T. 881). Ms. DiBenetto was incarcerated for drug court violations (T. 881). She testified that during her incarceration, she became friends with Ms. Chamberlin (T. 882) and that they have kept in touch by phone, letters and visits since Ms. DiBenetto's release (T. 882). She testified that in her opinion, if Ms. Chamberlin were given a life sentence, rather than death, Ms.

Chamberlin could contribute to society (T. 883). She believes Ms. Chamberlin could teach other inmates not only fundamentals, such as reading and math, but also give inmates advice on ow not to follow in Ms. Chamberlin's footsteps (T. 883-884).

Dr. Beverly Smallwood, Ph.D., a clinical psychologist and with advanced training from the American Board of Forensic Psychology, testified on behalf of Ms. Chamberlin (T. 891). The State stipulated and accepted Dr. Smallwood as an expert in psychology (T. 891-892). Dr. Smallwood was appointed by the Court to assist in Ms. Chamberlin's defense (T. 891). She spent between twenty and twenty-five hours interviewing Appellant (T. 892-903). She also administered psychological tests to Ms. Chamberlin and interviewed collateral witnesses (T. 892).

Dr. Smallwood testified that as a child, Ms. Chamberlin was the victim of extensive sexual and physical abuse, both from members of her family and from individuals outside of her family (T. 894-895). As a result of these experiences, Appellant turned to drugs and alcohol at a young age, and eventually became addicted to methamphetamine (T. 899-900). She was married at aged fifteen (15) and has never been divorced from her husband (T. 896).

Ms. Chamberlin is the mother of three children (T. 899): two sons and one daughter (T. 896). Each child has a different father, none of whom is Appellant's husband (T. 896). Ty McClain, the father of one of Ms. Chamberlin's children, was particularly brutal in his treatment of Appellant (T. 897). In addiction, Ms. Chamberlin met her co-Defendant in this case, Roger Gillett, through Ty McClain (T. 897-898).

Ms. Chamberlin's relationship with Mr. Gillett was extremely volatile (T. 898). On one

occasion, he tried to drown her in a pond in Colorado (T. 898).

Ms. Chamberlin's full-scale IQ, based on Dr. Smallwood's testimony, falls in the low average range (T. 899). Dr. Smallwood diagnosed Ms. Chamberlin as suffering from post-traumatic stress disorder and borderline personality disorder (T. 899-900). Dr. Smallwood testified that by the time of the crimes in this case, Lisa Jo Chamberlin was a "psychological mess." (T. 907). Because of her life experiences, particularly the lack of positive role models, Ms. Chamberlin did not have the tools to make good life choices (T 906). While Dr. Smallwood testified that Ms. Chamberlin has certainly lived an irresponsible lifestyle (T. 907), she is not a hardened psychopath without feelings and the ability to care for people (T. 907-909). Like Sherry Norris and Carla DiBenetto, Dr. Smallwood was of the opinion that, if given a life sentence, Ms. Chamberlin could live a productive life and help other inmates (T. 910).

Dr. Smallwood also testified that in her opinion Ms. Chamberlin was under the influence of her diagnosed mental conditions at the time of the crimes committed in this case (T. 911).

Despite the testimony of Ms. Norris, Ms. DiBenetto and Dr. Smallwood, the jury sentenced Ms. Chamberlin to death.

SUMMARY OF ARGUMENT

Appellant's Motion to Suppress Statements should have been granted by the trial court. Appellant was arrested in Russell, Kansas on March 29, 2004. She was interrogated on that same date by Officer Matt Lyon of the Kansas Bureau of Investigations (KBI) and during this interrogation she unequivocally invoked her right to remain silent. Nevertheless, Officer Lyon continued to cajole and attempt to persuade and trick Ms. Chamberlin into changing her mind

and answering his questions. The following morning, March 30, 3004, law enforcement agents initiated a second interrogation, not initiated by Ms. Chamberlin, despite the fact that Ms. Chamberlin had unequivocally invoked her right to remain silent during the initial interrogation on March 29, 2004. The results of that interrogation as well as a second interrogation on March 30, 2004, which was videotaped (Exhibit S-60) should have been suppressed. The following morning Ms. Chamberlin was again interrogated and although a witness at the Pre-Trial Motion Hearing testified that Ms. Chamberlin through a jailer had requested to speak with law enforcement officers, the person or persons to whom Ms. Chamberlin allegedly made this request did not testify at the Pre-Trial Motion Hearing. Appellant submits that the State of Mississippi failed to meet its burden of proof regarding the interrogations which took place on March 31, 2004, by failing to proffer as witnesses the person or persons to whom Ms. Chamberlin made this request.

Appellant's Motion to Suppress Evidence should have also been granted. Based on this Pre-Trial Motion, during the trial of this cause, Appellant objected to the admission into the evidence of Exhibits S-2, S-3, S-4, S-5 and S-35 through S-44 as "fruit of the poisonous tree." Each of these exhibits came out of the Russell County dump located in Russell County, Kansas where Ms. Chamberlin took law enforcement officers during the evening of March 30, 2004. Seven black plastic bags filled with items of evidence were recovered from the dump. Appellant submits that her agreement to take law enforcement officers to the Russell County dump was a direct result of the impermissible and illegal interrogation of Ms. Chamberlin on March 30, 2004. Thus, this evidence constitutes "fruit of the poisonous tree" and should have been suppressed.

Appellant submits that the trial court erred in denying her *Batson* challenge during the selection of the jury in this case. The trial court erred first by not making a clear determination that Appellant had established a prima facie case of discrimination by showing that the State exercised seven (7) of its twelve (12) peremptory challenges to strike African American jurors off of the regular panel. The State also struck a potential African American juror as an alternate. Had the trial court correctly ruled that the Defendant had established her prima facie case of discrimination, the Court would have been compelled to find that the allegedly race-neutral reasons offered by the State were, in fact, pretext for discrimination. In fact, even if the court were to conclude that the peremptory challenges of the other African American jurors can withstand a *Batson* challenge, the challenge of Mr. Thomas Sturgis cannot. Mr. Sturgis was an administrator at Alcorn State University. His questionnaire actually 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. Appellant would submit that Mr. Sturgis would have been an ideal juror and the only basis for striking Mr. Sturgis was that he appeared to a strong African American male.

Counsel for Lisa Jo Chamberlin repeatedly objected to the admission into evidence of gruesome and prejudicial photographs. See Exhibits S-48; S-49; S-66-73; S-76; S-80; S-81. These objections should have been sustained. The photographs in question were particularly gruesome and served little, if any probative value.

At the Sentencing Hearing, the trial court refused Appellant's Sentencing Instruction D-3 and D-10, which are "mercy" instructions. In the recent decision of the United States Supreme

Court in *Kansas v. Marsh,* 165 L.Ed. 2d 429, 443-444, 450 n. 3 (2006), the United States Supreme Court held that the trial court must give a mercy instruction where the death penalty sentencing statute provides that if the jury finds beyond a reasonable doubt the existence of aggravating circumstances, in order not to impose the death penalty, those circumstances must be outweighed by any mitigating circumstances. That is the structure the Mississippi Death Penalty Sentencing Statute, just as it is the structure of the Kansas Death Penalty Sentencing Statute.

Prior to trial, Appellant filed a Petition for Payment of Travel and Related Expenses. In her Petition, Appellant sought travel expenses and funds for lodging accommodations for Loma Wagoner, who lives in Spokane, Washington, and Veronica Scheuning, who lives in Portland, Oregon. Ms. Wagoner is Appellant's aunt and Ms. Scheuning is Appellant's childhood best friend. The Court was advised that each of these witnesses would be an important witness in the penalty stage of trial, if Appellant was found guilty of Capital Murder.

The court denied Appellant's Petition.

The denial of Appellant's Petition was a violation of Appellant's rights under the Due Process Clause of the Fourteenth Amendment as well as the Eighth Amendment of the United States Constitution.

The trial court's denial of this Petition also constituted a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, given the fact that the court authorized payment of more than Twelve Thousand Dollars ($12,000.00) for the travel expenses of State witnesses in this case.

ARGUMENTS

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

Lisa Jo Chamberlin was arrested in Russell, Kansas on March 29, 2004. Shortly thereafter, at approximately 5:13 p.m., she was interrogated by Officer Matt Lyon of the Kansas Bureau of Investigation (KBI). Exhibit S-58 is the videotape of this interrogation. At approximately 5:14 p.m., within a minute into the interview, Ms. Chamberlin stated: "I won't tell you anything until I talk to a lawyer." At approximately 5:18 p.m., Officer Lyon read Ms. Chamberlin her "*Miranda*" rights, after which she again unequivocally invoked her right to remain silent. Nevertheless, Officer Lyon continued to cajole and attempt to persuade and trick Ms. Chamberlin into changing her mind and answering his questions. He admitted as much during his cross-examination at trial:

> "BY MR. ADELMAN:
> Q. Nevertheless, as I understand, at that point still you continued to discuss the case, and you actually told her that Roger was blaming everything- - that you had spoken with Roger and that Roger was blaming everything on her; didn't you?
>
> A. Yes, sir, I did.
>
> Q. At that point she told you that she did not want to speak any further. She had exercised her right not to speak any further under the Miranda. But you, nevertheless, held out a carrot or a stick in the form that Roger - - that you had interviewed Roger and Roger had told you that everything was her fault, right?
>
> A. That's correct.
>
> Q. Okay. Now, let me ask you this. Had you in fact really interviewed Roger?

A. I had interviewed Roger. That's correct.

Q. Had Roger in fact blamed everything on Lisa Jo?

A. No.

Q. So this was nothing more than a tactic you were using after this defendant had exercised her right under the Miranda?

A. That's correct, sir.

Q. And you had no hesitancy to exercise that tactic and use that tool even though it involved a level of dishonesty, did you?

A. Sure.

Q. Sure what?

A. I had no problem with that.

Q. No problem with that?

A. No, sir.

Q. You're a law enforcement officer, a special agent I believe with the Kansas Bureau of Investigation.

A. Yes, sir.

Q. Well aware of a defendant's rights under Miranda versus Arizona, right?

A. Yes, sir.

Q. And, nevertheless, after this defendant had exercised her right under Miranda, you went ahead and you presented a scenario which was not true?

A. That's correct." T. 640-642

The following morning, agents of the KBI again approached Ms. Chamberlin and

initiated a second interrogation. This interrogation was initiated entirely by the agents of the KBI, NOT Ms. Chamberlin. Unfortunately, there is no record of that interrogation. It was not videotaped or recorded, and Ms. Chamberlin did not sign a statement. KBI Agents, Delbert Hawel and Kelly Raulston, as well as Special Agent Lyon were present for this interrogation (T.654; 684). At trial, both Agents Hawel and Raulston gave summaries of Ms. Chamberlin's interrogation on the morning of March 30, 2004 (T. 659-663; 686-696). Agent Raulston read from his report (Exhibit S-64).

During the afternoon of March 30, 2004, Ms Chamberlin was again interrogated and the videotape of this interrogation is Exhibit S-60. As the court will note, Ms. Chamberlin's statements at this time were highly emotional, rambling, disconnected and often made little sense. Approximately thirty (30) minutes into the interrogation, Ms. Chamberlin stated that she could not continue. Appellant submits that at this point, she again invoked her right to remain silent. *Holland v. State,* 587 So. 2d 848, 855 (Miss. 1991).

The following morning Ms. Chamberlin was again interrogated. During the pretrial motion hearing, Officer Hawel testified that Ms. Chamberlin through a jailer requested to speak with law enforcement officers. But, the person or persons to whom Ms. Chamberlin allegedly made this request did not testify at the pretrial motion hearing.

Officer Hawel was very clear that Ms. Chamberlin did not initiate either of the interviews which took place on March 30, 2004 (i.e., the second and third interrogations). His testimony at the pretrial hearing was as follows:

> "Q. [BY MR. SAUCIER] But were you also advised by a deputy that she wanted to talk to you?

MR. ADELMAN: Objection to the leading question, Your Honor.

THE COURT: Don't lead your witness.

A. Not for the third interview. For the fourth.

Q. No, I'm not talking about the fourth." [T. 91]

Max Barrett, the Under Sheriff or Chief Deputy of Russell County, Kansas, testified at trial. From his testimony, it appears that he was the deputy to whom Ms. Chamberlin expressed her desire to speak with one of the KBI agents:

"Q. [BY MR. SAUCIER] All right. Was there any other time that you came into contact with Lisa Chamberlin?

A. I came into contact with her. She wanted to talk to someone and she asked to speak to one of the KBI agents. They weren't there, so she asked to speak to me.

Q. Did you transfer that information to them that she want to talk with you?

A. Yes.

Q. And that was on the 30th so far as you can recall?

A. It was late the 29th or early the 30th." (T 533-T 534)

Again, it is important to note that Under Sheriff Barrett did not testify at the pretrial motion hearing. Furthermore, as the Court will note, his trial testimony actually contradicts Agent Hawel's testimony on an important key point. Agent Hawel was very clear in his testimony that Ms. Chamberlin did not initiate either of the interrogations on March 30, 2004 (i.e., the second and third interrogations). Under Sheriff Barrett's recollection as to the date on

which Ms. Chamberlin allegedly made her request differs from the recollection of Agent Hawel. Under Sheriff Barrett testified that the request came either late on the 29th or early on 30th of March, 2004.

Exhibit S-61 is a videotape of the statement which Ms. Chamberlin gave to law enforcement officers early during the afternoon of March 31, 2004.

The United States Supreme Court's decision in *Edwards v. Arizona,* 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880 (1981) requires that Appellant's statements should have been excluded by the trial court. In *Edwards*, the Supreme Court held that once a Defendant invokes his right to remain silent under *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), he or she is not subject to further interrogation until counsel has been made available to the Defendant or the Defendant himself initiates further communication. See also *Holland v. State, supra.*

The State's failure to proffer Under Sheriff Barrett as witness at the pretrial motion hearing should have been fatal to the State's case on Appellant's Motion to Suppress. The trial court erred in finding otherwise. This witness was the linchpin in the State's case. Without this witness the State could not overcome *Edwards.* See also *Agee v. State,* 185 So.2d 671, 673 (Miss. 1966), in which the Mississippi Supreme Court held that where a Defendant testifies that a confession was not voluntary, the State must produce all of the witnesses present at the alleged confession. While this case turns on the requirements on *Edwards* rather than an allegation of coercion, the logic of *Agee* applies. The fact that this witness may have testified at trial is irrelevant. The trial court is required under *Agee* and its progeny to make a determination at the

conclusion of the hearing on a Defendant's Motion to Suppress as to whether or not the statement or statements in question were voluntary or not. That is the time of decision. See *Wilson v. State,* 937 So. 2d 357, 361-362 (Miss. 2006); *Mays v. State,* 925 So. 2d 130, 133-134 (Miss. App. 2005); *Glasper v. State,* 914 So.2d 708, 720-721, (Miss. 2005). The court cannot simply play fast and loose and make a decision in favor of the State anticipating that the State's default will be cured at trial.

Further, even with Under Sheriff Barrett's testimony, there is not a clear record that Ms. Chamberlin initiated the interrogation on March 30, 2004. If, in fact, Officer Barrett's recollection is correct and she spoke to him on March 29th or March 30th, then she again invoked her right to remain silent at the conclusion of her second (videotaped) statement on March 30, 2004, and did not again initiate contact immediately prior to the March 31, 2004, statement. This is why it should have been essential for Mr. Barrett to testify at the pretrial motion hearing and why his failure to testify at that hearing should have been grounds for granting Appellant's Motion to Suppress under both *Edwards* and *Agee.*

Finally, the State's theory, adopted by the trial court in its Order Denying Defendant's Motion in Limine (sic), that *Edwards* does not apply because Appellant's initial and subsequent interrogations concerned different crimes is undercut by the requirement in *Michigan v. Mosley,* 423 U.S. 96, 46 L.Ed.2d 313, 96 S.Ct. 321 (1975), that law enforcement officers scrupulously follow the *Miranda* principles. *Mosley* is the primary United States Supreme Court case relied upon by the State and the Trial Court regarding this issue. In *Mosley* the Supreme Court stated as follows:

> "We therefore conclude that the admissibly of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' *Mosley*, 423 U.S. at 104

Here, Officer Lyons admitted that he did not "scrupulously" follow the principles of *Miranda* and seemed at trial almost defiant about this fact.

Based on the United States Supreme Court analysis in the primary case relied upon by the State and Trial Court regarding this particular issue, Ms. Chamberlin's statements should have been suppressed.

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

Prior to trial, Appellant filed a Motion to Suppress Evidence (CP. 172-173). This Motion was based on rulings by the United States Supreme Court which prohibit the "fruit of the poisonous tree" from being admitted into evidence. *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S. Ct. 407 (1963); *Brown v. Illinois,* 422 U.S. 590, 45 L.Ed. 2d 416, 95 S. Ct. 2254 (1975).

Based on Appellant's pretrial motion, during the trial of this cause, Appellant objected to the admission into evidence of Exhibits S-2, S-3, S-4, S-5 and S-35 through S-44. See T-524 through T-534. As the Court will note, each of these exhibits came out of the Russell County dump located in Russell County, Kansas. Max Barrett, the Under Sheriff of Russell County, Kansas, testified that Chamberlin took law enforcement officers to the dump where seven (7) black plastic bags filled with items of evidence were recovered (T. 521-522). He also testified that this event occurred before Ms. Chamberlin stated that she wanted to speak with law

enforcement agents (T. 540-541). Mr. Barrett specifically testified that his conversation with Appellant took place "later" during the evening after Ms. Chamberlin and law enforcement had returned from the dump site (T. 540). This would have been the evening of March 30, 2004.

Even assuming, *per arguendo,* that Ms. Chamberlin's statements on March 31, 2004 were admissible, those on March 30th were not. The statements taken on March 30, 2004 were a direct violation of the United States Supreme Court's mandate in *Edwards v. Arizona, supra due* to the fact that the officers, not Ms. Chamberlin, initiated further interrogation after she had invoked her right to remain silent on March 29, 2004. The "search" of the dump site, led by Ms. Chamberlin, was the direct result of the officers' unlawful action when they initiated the further interrogation on the morning of March 30, 2004.

The exclusionary prohibition against "fruit of the poisonous tree" evidence applies to both Fourth and Fifth Amendment violations, even when a defendant is properly advised of his *Miranda* rights. See *Brown v. Illinois,* 422 U.S. at 603-604; see also *Glasper v. State,* 914 So. 2d 708, 720-722 (Miss. 2005); *United States v. Jensen,* 462 F.3d 399 (5th Cir. 2006); *United States v. Portillo-Aguirre,* 311 F. 3d 647 (5th Cir. 2003).

The exhibits recovered from the dump include decedent Vernon Hulett's uniform clothes (Exhibits S-2 through S-4), a pillow (Exhibit S-5), a picture of that same pillow (Exhibit S-35), a woman's purse (Exhibit S-36), a coin purse (Exhibit S-37), a cigarette case (Exhibit S-38), keys, camera and photos (Exhibits S-39), a wallet, remains of decedent Vernon Hulett's drivers' license and paperwork (Exhibit S-40), a Mississippi Accident Report form (Exhibit S-41), a direct deposit card (Exhibit S-42), a Hattiesburg, Mississippi telephone directory (Exhibit S-43)

and the cardboard center from a roll of duct tape (Exhibit S-44).

Appellant submits that all the evidence taken from the dump constituted "fruit of the poisonous tree." Appellant Chamberlin would not have taken law enforcement officers to the dump had she not given her statements on March 30, 2004. In turn, as argued *supra,* those statements should have been suppressed by the trial court.

The admission of these exhibits into evidence was a critical component of the State's case and Appellant's ultimate conviction. These exhibits link Appellant to Hattiesburg, Mississippi as well as to decedents Vernon Hulett and Linda Heintzelman. The State cannot show, nor should this Court find, that the admission of these exhibits was harmless beyond a reasonable doubt. See *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S. Ct. 824 (1967). The trial court's denial of Appellant's Motion to Suppress Evidence and the admission of these exhibits constitute reversible error.

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

Five of the State's first six (6) peremptory challenges were lodged against African American jurors: Juror No. 5, Emma Roberts (T-385); Juror No. 38, Geralline Gray Wilkerson (T 385); Juror No. 81, Brittany Mary Burks (T 389); Juror No. 92, a black female (T 402); and Juror No. 104, Thomas Charles Sturgis (T 390). The State also struck Juror No. 106, David Bernard Minor, and Juror No. 117, Gloria J. Broome, making a total of seven out of twelve peremptory strikes on the regular panel (T 390). Two African Americans were selected to served on the trial jury (T 399).

In support of Appellant's motion to set aside the State's peremptory strikes of Black

jurors, under *Batson v. Kentucky*, 476 U.S. 79 (1986), 90 L.Ed. 2d 69, 106 S. Ct. 1712 (1986), Appellant pointed to the fact that the State's exercise of seven out twelve peremptory strikes to strike African American jurors constituted a prima facie case of discrimination (T 399).

The State then attempted to give race neutral reasons for its strikes and primarily relied upon answers in the jury questionnaires which the potential jurors had completed prior to jury selection (T 398-399; 401-404).

Before even allowing Appellant to respond to the State's alleged race neutral reasons for its strikes, the Court 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). It seems clear from the record that regardless of the alleged race neutral reasons given by the State, the Court essentially denied Appellant's *Batson* motion before Appellant was given the opportunity to respond to the State's proffered reasons for its strikes. The only reasonable conclusion is that the Court found that Defendant, despite the fact that the State had exercised seven of its twelve peremptory challenges to strike Black jurors, had not met her burden of proof.

Regardless, Appellant pursued the issue and attempted to put on the record why the State's proffered reasons were pretextual. (T 405-407).

In this regard, counsel for Appellant pointed out that Juror No. 4, Thomas Sturgis, an African American male, was an administrator at Alcorn State University. In his questionnaire, he stated that he generally favors the death penalty. He also stated as a comment in response to Question No. 56:

> "I am fair and open-minded and I have the ability to assimilate information and reach - - or form a conclusion or an opinion." (T 406)

Regarding Juror No. 106, David Minor, an African American male, the State had proffered as a basis for its strike that Mr. Minor has a nephew with the Highway Patrol. Counsel for Appellant pointed out that the State accepted other jurors with law enforcement connections. Also, Mr. Minor had no opinion on the death penalty and had worked for the Vicksburg Fire Department for twenty-eight (28) years.

Counsel for Appellant pointed out that Juror No. 117, Gloria Broome, an African American female, stated she had no opinion as to the death penalty.

Counsel for Appellant also pointed out that the African American alternate juror struck by the State, Juror No. 229, Audrey Brown, (T 397), also stated that she had no opinion regarding the death penalty.

In summary, counsel for Appellant argued that on the basis of their answers to the juror questionnaires, it appeared that Mr. Sturgis, Mr. Minor, Ms. Gloria Broome and Ms. Audrey Brown could be open and fair minded jurors on the question of the death penalty. (T 407).

Finally, counsel for Appellant pointed out to the Court that when the State asked for individual voir dire of those jurors who appeared to be strongly opposed to the death penalty, the State did not individually voir dire No. 38, Geralline Gray Wilkerson, No. 81, Brittany Mary Burkes, No. 92, No. 104, Mr. Sturgis, No. 106, Joyce Elaine May or No. 117, Gloria J. Broome. Nevertheless, in proffering its reasons for striking these jurors, the State consistently took the position that they were striking these jurors because they had exhibited some opposition to the

ability to assimilate information and reach conclusions and opinions based on that information. Appellant would submit that 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.

In *McGee v. State,* _____ So.2d _____ (Miss. 2007), the Mississippi Supreme Court stated unequivocally that one instance of purposeful discrimination is sufficient to prove a discriminatory purpose. *McGee* at ¶ 11. Here, the State's peremptory strike of Thomas Sturgis, standing alone, requires reversal of Ms. Chamberlin's conviction and sentence. See also *Village of Heights v. Metro Hous. Dev. Corp.,* 429 U.S. 266, n. 14, 50 L. Ed. 2d 450, 97 S.Ct. 555 (1977).

In this case, the trial court erred by first failing to clearly 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.*

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 problem with the photographs in this case is similar to the problem with the photographs in *McNeal v. State,* 551 So.2d 151 (Miss. 1989).

In *McNeal*, this Court described the photographs as "some of the most gruesome photographs ever presented to this Court." *McNeal* at 159. The Court went on to find that the trial court had abused its discretion and was in error in allowing the introduction of the photographs into evidence. This Court stated as follows:

> "In arriving at the finding above, we do presume to conclude that every gruesome photograph admitted into evidence constitutes an abuse of discretion; however, when presented with photographs such as the ones in this case, we caution the trial judge to carefully consider all the facts and circumstances surrounding the admission of this particular type of evidence. More specifically, the trial court must consider: (1) whether the proof is absolute or in doubt as to identity of the guilty party, as well as (2) whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury." (*McNeal* at 159)

While counsel for Appellant have not had the opportunity to review the photographs in *McNeal,* they would submit on behalf of Appellant that it would be difficult to imagine more gruesome photographs than the photographs admitted into evidence in this case. Regarding decedent Vernon Hulett, they include photographs of a decapitated body, severed limbs and disfigurement. Regarding decedent Linda Heintzelman, the photographs include numerous injuries which are breathtaking in their gruesomeness.

As this Court held in *McNeal,* the law demands that photographs contain some probative value, and they are not admissible if that prohibitive value is "substantially outweighed by the danger of unfair prejudice." *Gossett v. State,* 660 So.2d 1285, 1292-93 (Miss. 1995).

The photographs admitted in this case have little or no probative value. Questions which might justify the use of photographs in another trial were not at issue in this case. *Corpus delicti*

and the identity of the victims was established by witnesses Caroline Hester and Michael Hester. (T. 443-507). In addition, the State was able to present the testimony of Dr. Donald Pojman (T. 699-752) who as the coroner and pathologist in Russell County, Kansas, performed the autopsies on decedents Hulett and Heintzelman. Dr. Pojman testified as to the cause of death for each decedent.

In *Sudduth v. State,* 562 So. 2d 67-79 (Miss. 1990), this Court stated: "[P]hotographs of the victim should not ordinarily be admitted into evidence where the killing is not contradicted or denied, and the *corpus delicti* and the identity of the deceased have been established." None of the issues identified in *Sudduth* were at issue in this case.

Appellant would submit that the photographs in the case were so gruesome that once convicted of capital murder, Appellant may have had no chance whatsoever of receiving any sentence other than a death sentence. The photographs in this case were inflammatory and could only have aroused the passion and prejudice of the Jury. They should not have been admitted by the trial judge, and their admission constituted harmful and prejudicial error. Their admission compels reversal of Appellant's conviction and sentence of death.

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

At the Sentencing Hearing, the Lower Court refused Defendant's Sentencing Instruction D-3 and D-10, so-called "mercy" instructions.

Proposed Sentencing Instruction D-3 provides as follows:

> "A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree or moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the

> offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case. The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted."

Proposed Sentencing Instruction D-10 provides as follows:

> "If based upon your consideration of the aggravating and mitigating circumstances each and every one of you agrees that death is the appropriate sentence, you must still consider the final step of the penalty phase process. Just as you are the sole judges of the facts, so too are you the sole arbiters of mercy. Regardless of your consideration of aggravating and mitigating circumstances, as the jury, you always have the option to recommend against death. This means that even if you conclude that death is an appropriate sentence based on your consideration of mitigating and aggravating circumstances, you may still show mercy and sentence Ms. Chamberlin to life in prison. As a jury, this option to recommend life must always be considered by each and every one of you before an ultimate and irrevocable sentence may be passed."

Contrary to the decisions of the Mississippi Supreme Court, e.g., *Thorson v. State*, 859 So.2d 185, 108 (Miss. 2004); *Howell v. State*, 860 So.2d 704, 728 (Miss. 2003); *Goodin v. State*, 787 So.2d 639, 657 (Miss. 2001); *Jordan v. State*, 728 So.2d 1088, 1099 (Miss. 1998). *Hanson v. State*, 592 So.2d 114, 150 (Miss. 1991), the recent decision of the United States Supreme Court in *Kansas v. Marsh*, 165 L.Ed.2d 429, 443-444, 450 n.3 (2006), requires that the trial court give a mercy instruction where the death penalty sentencing statute provides that if the jury finds beyond a reasonable doubt the existence of aggravating circumstances, in order not to impose the death penalty, those circumstances must be outweighed by any mitigating circumstances. That is the structure of the Mississippi Death Penalty Sentencing statute, just as it is the structure of the Kansas Death Penalty Sentencing statute. In the opinion written by Justice Clarence Thomas, the United States Supreme Court upheld the Kansas statute because

Kansas juries are permitted to consider any evidence relating to any mitigating circumstance, including mercy.

Proposed Sentencing Instruction No. D-3 is identical to the mercy instruction which is given to juries in Kansas death penalty cases and which has been approved by the United States Supreme Court in *Kansas v. Marsh*.

As Justice Thomas notes in his Opinion, and as the Kansas jury instruction provides, mercy is itself a mitigating factor. As such, the mercy instruction is required by the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 294, 57 L.Ed.2d 1973 (1978), in which a plurality of the court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis original.)

In upholding the Kansas Death Penalty statute, which like the Mississippi Death Penalty statute requires that the mitigating factors outweigh the aggravating factors, the United States Supreme Court held that the Kansas statute satisfies the constitutional mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*) and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and their progeny, because the Kansas statute rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination.

Certainly, the Mississippi statute rationally narrows the class of death-eligible defendants. However, given the decision in *Kansas v. Marsh*, in order for the Mississippi statute to remain

constitutional, the Mississippi Supreme Court must recognize and require that mercy instructions be given in every death penalty case if requested. As noted, since mercy has been found by the United States Supreme Court to be in and of itself a mitigating factor, in order for a jury to consider any mitigating evidence relevant to its sentencing determination, as required by *Lockett*, a mercy instruction must be given.

In this case, the trial court had the opportunity to give a mercy instruction. Both proposed Sentencing Instruction No. D-3 and proposed Sentencing Instruction No. D-10 provide mercy instructions. As noted, D-3 is modeled after the Kansas instruction approved by the United States Supreme Court in *Kansas v. Marsh*. (T 939-940; 942). Further, during the death penalty sentencing instruction hearing, the trial court was advised and offered a copy of the United States Supreme Court's decision in *Kansas v. Marsh*. Nevertheless, the trial court incorrectly refused both proposed instruction D-3 and D-10. By doing so, the trial court erred and, in fact, allowed the jury to consider the death penalty in circumstances which are unconstitutional.

When requested, mercy instructions must now be given during the sentencing phase of every death penalty case.

Further, the Court's error in refusing proposed Sentencing Instructions No. D-3 and No. D-10 is not subject to a harmless error analysis. This error is a "structural error" affecting the framework within which the trial below proceeded. It was not simply an error in the trial process itself, because by denying a mercy instruction in this case, the trial court rendered the Mississippi Death Penalty statute unconstitutional. See *U.S. v. Gonzalez-Lopez*, 126 S.Ct. 2457 (206); *Arizona v. Fulminante* , 499 U.S. 279, 309-310 (1991).

Appellant acknowledges that constitutional errors are not always "structural defects." Often, even a constitutional error may simply be a "trial error," subject to a harmless error analysis. Structural errors include the denial of counsel, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), the denial of the right of self-representation, see *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n.8 (1984), the denial of the right to public trial, see *Waller v. Georgia*, 467 U.S., 467 U.S. 39, 49, (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see *Sullivan v. Louisiana*, 508 U.S. 275 (1993). In *Gonzalez-Lopez* the United States Supreme Court held that the denial of the application for admission *pro hac vice* by Defendant's attorney constituted a denial of the right to counsel under the Sixth Amendment, and was not subject to harmless-error review. In *Arizona v. Fulminante*, the U.S. Supreme Court rejected the State's harmless error argument regarding a defendant's confession to a prison informant.

Again, in this case, the denial of a mercy instruction constituted a "structural defect," because the trial court by denying the requested instructions rendered the Mississippi death penalty statute unconstitutional. Thus, the jury in this case could not return a verdict of death within a constitutionally accepted framework.

Even assuming, *per arguendo*, that the harmless error standard applies in this case, given the magnitude of the error in this case, the State cannot show that the failure of the trial court to give either proposed Sentencing Instructions No. D-3 or No. D-10 was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Even where the evidence of guilt may be overwhelming, a death sentence does not

automatically follow. The very purpose of the sentencing phase is to allow the jury to consider the aggravating and mitigating circumstances. See *Ring v. Arizona*, 536 U.S. 584 (2002). Under *Ring* only a jury can impose the death penalty. When the Court denies the sentencing jury the full range of mitigating factors – including mercy – such error cannot be found harmless beyond a reasonable doubt. *Lockett v. Ohio, supra*, and *Ring* require otherwise. As the United States Supreme Court acknowledged in *Ring*, "death is different" at 584 U.S. 606.

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

Due Process; Eighth Amendment

Prior to trial, Appellant filed a Petition for Payment of Travel and Related Expenses. In her Petition, Appellant sought travel expenses and funds for lodging accommodations for Loma Wagoner, who lives in Spokane, Washington, and Veronica Scheuning, who lives in Portland, Oregon. Ms. Wagoner is Appellant's aunt, and was responsible for much of her upbringing. Ms. Scheuning is Appellant's childhood best friend. The Court was advised that each of these witnesses would be an important witness in the penalty stage of trial, if Appellant was found guilty of Capital Murder.

The trial Court denied Appellant's Petition, thereby depriving her of due process of law, equal protection of law, and a reliable capital sentencing hearing, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The Court's decision to deny travel and lodging payments for these witnesses flies in the face of the United States Supreme Court's decision in *Lockett v. Ohio, supra;* see also *Eddings*

v. Oklahoma, 45 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In *Lockett*, the United States Supreme Court concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death," 438 U.S. at 604.

The trial Court's ruling on Appellant's Motion seeking funds for these witnesses effectively precluded the sentencer in this case from considering as a mitigating factor the testimony and evidence which would have been presented by these live witnesses.

A recent Oklahoma death sentence was set aside and remanded for a new sentencing trial where the trial Court prohibited the playing of a mitigation witness's videotaped examination in its entirety based on strict adherence to the Oklahoma rules of evidence and Oklahoma rules of procedure. See *Coddington v. State*, 142 P.3d 437 (Okla. 2006). The Court of Criminal Appeals of Oklahoma held that such a denial constituted a deprivation of due process of law and a reliable capital sentencing hearing, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Relying on *Chambers v. Mississippi*, 410 U.S. 284, 304 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973), the Oklahoma Court held that the mechanistic application of rules of evidence or rules of procedure should not be allowed to defeat the ends of justice. *Coddington* at 458, ¶ 82.

In *Coddington,* the Court noted that the trial Court had allowed part of the witness' testimony to be read into evidence. In reversing the Defendant's death sentence, the Oklahoma Court stated as follows:

> "While the jury heard this important mitigation testimony, it was wrongly prohibited from seeing this valuable witness. The humanizing effect of live testimony in the form of a mother testifying for her son as mitigation evidence in a capital murder trial cannot seriously be disregarded as irrelevant." (459; ¶ 87)

In *Coddington,* the Court further stated as follows:

> "Hood's videotaped examination showed her demeanor – it showed her distress and sadness she had for her son in a way that the cold reading of a transcript could not portray. The witness' demeanor in this case is exactly the type of evidence that might invoke sympathy for a defendant facing the death penalty." (460; ¶ 90)

Mississippi law is in complete accord with *Lockett* and *Eddings*. In *State v. Tokman, 564* So.2d 1339 (Miss. 1990) the Mississippi Supreme Court stated as follows:

> "It is critical that mitigating evidence be presented at capital sentence proceedings. *Leatherwood v. State*, 473 So.2d 964 (Miss. 1985)." (1342)

Equal Protection

Appellant also submits that the denial of Defendant's Petition for Payment of Travel and Related Expenses for Ms. Wagoner and Ms. Scheuning is a violation of Appellant's right to equal protection under the law under the Fourteenth Amendment of the United States Constitution. In this case, Appellant did not seek the compulsory process of this Court in order for Ms. Wagoner and Ms. Scheuning to testify.[1] Both of these witnesses had agreed to testify

[1] See Section 99-9-33 of the Mississippi Code of 1972, as amended. See also *Diddlemeyer v. State*, 234 So.2d 292 (Miss. 1970); cert. denied, 400 U.S. 917, 27 L.Ed.2d 157, 91 S.Ct. 177 (1970), *Chandler v. State*, 272 So.2d 641 (Miss. 1973); *Woodward v. State*, 726 So.2d 524 (Miss. 1997); cert. denied, 526 U.S. 1041, 143 L.Ed.2d 502, 119 S.Ct. 1338 (1999); *Johnson v. State*, 477 So.2d 196 (Miss. 1985); cert. denied 476 U.S. 1109, 90 L.Ed.2d 366, 106 S.Ct. 1958 (1986).

on behalf of Ms. Chamberlain, should Ms. Chamberlain be convicted of capital murder. The question before the Court was whether the Court would assist Appellant in securing their presence by payment of travel and lodging expenses.

The disparity in treatment in this case could not be clearer. A large number of the State's witnesses were individuals who traveled to the trial from Kansas, including numerous law enforcement officers and the pathologist from Russell County, Kansas. These witnesses included Max Barrett, Kelly Schneider, Roger Butler, Sherri Moore, Scott Ferris, Matthew Lyon, Kelly Rawlston, Delbert Hawel, and Donald Pojman, M.D.. The State of Mississippi paid Twelve Thousand Two Hundred Seventeen Dollars and 43/100 ($12,217.43) for the travel, lodging, meals and incidental expenses of these witnesses. See CP 244-251; 270-276; 357-360; 361-370; 371-375; 377-380. On the other hand, Appellant was denied the ability to secure two (2) important, valuable witnesses who would have testified on her behalf during the penalty phase of her trial. See CP 256-258; 410-416.

In *Batson v. Kentucky,* the United States Supreme Court found that purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. Likewise, the trial Court's denial of funds to secure mitigation witnesses in this case violated Defendant's right to equal protection because it denied her the protection during the penalty phase of her trial that the United States Supreme Court previously secured in *Lockett v. Ohio*, *supra*, and *Eddings v. Oklahoma, supra.* These rights are no less secured by Mississippi law. *State v. Tokman, supra.*

In *Moody v. State*, 716 So.2d 562 (Miss. 1998), the Mississippi Supreme Court held that

an indigent's equal protection rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a fine and there is no determination as to an individual's ability to pay such a fine. In other words, it is a violation of equal protection rights when one class of defendants is treated preferentially for no other reason than another defendant's lack of financial ability. That is precisely the circumstances in this case, where Appellant Chamberlain was precluded from presenting mitigation witnesses because of her lack of financial resources. While this issue was briefly addressed, and Appellant's argument rejected, in *Johnson v. State, supra*, at 215, *Johnson* as well as *Diddlemeyer, Chandler,* and *Woodward* should not be deemed controlling. The premise of these cases, i.e., out of state witnesses cannot be compelled to testify in a Mississippi case is incorrect, given Section 99-9-33, which specifically provides for witnesses from another state to be summoned to testify in Mississippi Courts. Even more important, the reasoning of the Mississippi Supreme Court in *Moody v. State, supra*, applies to the facts of this case, i.e., a criminal defendant should not be penalized regarding a fundamental right, available to other defendants, because of his or her inability to pay.

Further, the Court's error in refusing Appellant funds to secure mitigation witnesses is not subject to a harmless error analysis, see *Arizona v. Fulminante, supra,* and, even assuming, *per arguendo,* that the harmless error standard applies to this issue, the State cannot show that the denial of these funds was harmless beyond a reasonable doubt. See *Chapman v. California, supra*. As noted, *supra*, even where the evidence of guilt may be overwhelming, a death sentence does not automatically follow. As with the mercy instruction discussed *supra*, when

the Court denies the sentencing jury the full range of mitigating factors, such as live mitigation witnesses, that error cannot be found harmless beyond a reasonable doubt. See *Lockett v. Ohio, supra; Ring v. Arizona, supra.*

CONCLUSION

For the reasons set forth in the above and foregoing Brief, Appellant Lisa Jo Chamberlin's conviction and sentence should be reversed and this case should be remanded for a new trial. Alternatively, and at 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 Brief of Appellant to:

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THIS, the 29TH day of MARCH, A.D., 2007.

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