IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-DP-01218

WILLIAM WILSON — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF APPELLANT

APPEALED FROM LEE COUNTY CIRCUIT COURT

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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. Thomas Gardner (Trial Judge)
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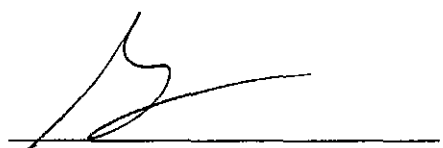

Attorney for William Wilson

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2. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPROPERLY CROSS EXAMINING MITIGATION WITNESSES AND THEREBY DEPRIVED WILSON OF A FUNDAMENTALLY FAIR SENTENCING AND MANDATES HIS DEATH SENTENCE BE VACATED.

3. THE ADMISSION OF TESTIMONY BY DR. STEVEN HAYNE UNDERMINES THE RELIABILITY OF THE DEATH SENTENCE IMPOSED IN THIS CASE AND PRESENTS QUESTIONS OF IMPROPER EXPERT TESTIMONY AND INEFFECTIVE ASSISTANCE OF COUNSEL.

4. THE INTRODUCTION OF IMPROPER VICTIM IMPACT TESTIMONY VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, ARTICLE 3, SECTIONS 14, 26, AND 28 OF THE MISSISSIPPI CONSTITUTION.

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

STATEMENT OF THE CASE

William Wilson was indicted for capital murder, defined as killing while engaged in the commission of felonious child abuse, and felonious child abuse by a Lee County Grand Jury. C.P. 5-6; R.E. 9-10. The offenses were said to have occurred on April 29, 2005, and January 19, 2005, in Lee County. C.P. 5.

Wilson was represented in the trial court by court appointed attorneys Will Bristow and James Johnstone. Wilson entered a guilty plea to both counts on May 24, 2007. T. 217. Wilson proceeded to sentencing before the court without a jury on both counts. The court sentenced Wilson to twenty years on Count II and sentenced Wilson to death on Count I. C.P. 151-54; R.E. 11-14. Bristow filed a Motion was New Trial, C.P. 165-66; R.E. 16-17, which was denied, C.P. 170; R.E. 18.

After perfecting the appeal Bristow filed a Motion to Withdraw and Substitute the Office of Capital Defense Counsel which was granted by this Court on February 27, 2008. This appeal is limited to issues related to the death sentence. Miss. Code § 99-19-105; Booker v. State, 699 So.2d 132, 33-34, 36-37; ¶¶ 3 and 20-22 (Miss. 1997).

Statement of Facts

After over a year of discord between Wilson and his lawyers as well as the lawyers and the prosecution, Wilson and the prosecution reached a plea agreement in this matter. Wilson agreed to plead guilty to the charges in the indictment and the prosecution agreed to forgo seeking the death penalty. Both sides signed a written agreement. (State's Exhibit 3 from 3/5/07). On March 5, 2007, Wilson appeared before Judge Gardner to formally enter his plea. T. 178.

At the end of the plea colloquy, after the prosecution had made its offer of proof, Wilson had entered his pleas of guilty agreeing with each and every element presented by the

prosecution and after the court was satisfied that the pleas were knowingly, voluntarily and intelligently made, the court asked Wilson if he was satisfied with the services of his lawyers.

At this point the court already knew the answer to the question. In a letter to Judge Gardner stamp filed by the circuit clerk on March 5, 2007, Wilson advised the court that he was not satisfied with his attorneys because they were not communicating with him. C.P. 125-27. As expected Wilson advised the court he was not "totally satisfied" with his lawyers. T. 204. The court then abruptly ended the proceeding refusing to accept the pleas of guilty and sent Wilson back to the jail. T. 205.

The communication issues mentioned in the first letter were set forth in greater detail in a second letter to the trial court from Wilson dated May 15, 2007. C.P. 167-69. The attorney's request for compensation prove that between March 5, 2007 and May 15, 2007, Johnstone never communicated with Wilson, C.P. 162, and Bristow wrote one letter and saw Wilson for no more than thirty minutes while the special venire was pulled. C.P. 159.

Less than 10 days after sending the second letter to the court, Wilson stood before the court and said he was satisfied with counsel. T. 208. The trial court then accepted the pleas. T. 217.

The case then proceeded to sentencing before the trail court. The defense called three witnesses in mitigation. Jan Stembridge, Wilson's former teacher, T. 319; Josh Estes, Wilson's friend, T. 328, and Nancy McGee, Wilson's mother T. 337. The prosecutor cross examined each of these witness extensively about alleged drug abuse by Wilson and Stembridge about an alleged assault on the victim's mother. T. 327. Ms. Stembridge had no knowledge of drug history or assaults yet the prosecutor went into detail with allegations. T. 324-26, 327. Estes had limited knowledge of Wilson smoking marijuana (a fact already in evidence) but no knowledge of any other drug abuse. T. 332. The prosecutor used similar tactics in cross-examining

Wilson's mother. T. 356.

The questioning of Stembridge was particularly egregious and constituted the majority of her cross-examination. T. 324-26. There is no evidence in the record now before this Court to support the prosecutions questions. No witness was called to establish an evidentiary basis for these questions.

During the prosecutions case Dr. Steven Hayne was called to testify in support of the "especially heinous" aggravating circumstance. The death sentence rests heavily on Hayne's testimony, C.P. 152-53, and he was the witness through whom numerous photographs of the deceased child were introduced. T. 294.

The defense filed a motion for funds to hire a pathologist, C.P. 104-05, but did not support this motion with an affidavit of an expert as required by this Court and instructed to do by the trial court. T. 24. Thus defense counsel had no means of challenging Dr. Hayne other than cross-examination. Counsel's attempt at cross examination was virtually incoherent. T. 313-14.

Hayne testified that he was the "Chief State Pathologist for the Department of Public Safety in the State of Mississippi." T. 291. This testimony is not true. There is no such position and Hayne does not meet the qualifications to serve as the State Medical Examiner.

Mr. Bennie Conlee, the victim's grandfather was the final witness called. T. 368. Mr. Conlee was asked what he believed the appropriate punishment would be and he unequivocally asked fro the death penalty. T. 372.

SUMMARY OF THE ARGUMENT

William Wilson appeared before the trial court and entered a knowing, intelligent and voluntary plea to the charge of capital murder. The court arbitrarily refused to accept this plea because Wilson expressed displeasure with the attorneys appointed by the court to represent him.

Wilson's reasons for his lack of total satisfaction were known to the court yet the court neither explored those reasons nor vacated the appointment. As a result of the court's arbitrary action or the ineffective assistance of counsel Wilson lost to opportunity to accept the prosecutions plea bargain offer to not seek the death penalty.

During the sentencing hearing Wilson presented three mitigation witnesses. The prosecution cross-examined each of these witnesses with allegations of extensive drug abuse by Wilson however the prosecution called no witnesses to establish the evidentiary basis for these questions nor is there a basis in the record before this Court.

During the prosecutions case Dr. Steven Hayne was called to present evidence in support of the aggravating factors. The court relied on Hayne's testimony in sentencing Wilson to death. Based on the questions raised in numerous cases and publications concerning Hayne's credibility and the reliability of his practices including at least misleading if not false testimony in this case undermines the reliability and fairness of the death sentence.

Finally the prosecution's eliciting the victim's family's opinion on the appropriate sentence was improper.

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

1. THE TRIAL COURT ABUSED ITS DISCRETION AND ARBITRARILY AND CAPRICIOUSLY REFUSED TO ACCEPT WILSON'S GUILTY PLEA THEREBY PREVENTING WILSON FROM ACCEPTING A PLEA BARGAIN AGREEMENT THAT WOULD HAVE SPARED HIS LIFE OR IN THE ALTERNATIVE WILSON WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL RESULTING IN HIS LOSS OF THE PLEA BARGAIN ALL IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS.

Wilson is now before this Court on direct appeal of his death sentence. He is not appealing and raises no claim here regarding the guilty plea entered on May 24, 2007. In this claim set forth as Issue 1, Wilson argues in the alternative that the trial court erred in refusing to accept Wilson's March 5, 2007, guilty plea or that the reason the March 5 plea was not accepted was a result of ineffective assistance of trial counsel.

These claims or so factual intertwined that presenting them as separate claims is impossible. To conform to Rules of Appellate Procedure Wilson enumerates the claims as Issue 1(a) the trail courts arbitrary and capricious rejection of a plea bargain and 1(b) ineffective assistance of counsel resulting in Wilson's lose of the plea bargain.

If this Court determines that the ineffective assistance claim requires additional factual development consistent with due process Wilson must be allowed to present the evidence in support. Branch v. State, 882 So.2d 36 (Miss. 2004). Accordingly, Wilson reserves this claim for post-conviction review if that is necessary. Havard v. State, 928 So.2d 771 (Miss. 2006).

The prosecution and Wilson reached a plea agreement in this matter. Wilson agreed to plead guilty to the charges in the indictment and the prosecution agreed to forgo seeking the death penalty. Both sides signed a written agreement. (State's Exhibit 3 from 3/5/07). On March 5, 2007, Wilson appeared before Judge Gardner to formally enter his plea. T. 178.

At the end of the plea colloquy, after the prosecution had made its offer of proof, Wilson had entered his pleas of guilty agreeing with each and every element presented by the prosecution and after the court was satisfied that the pleas were knowingly, voluntarily and intelligently made, the court asked Wilson if he was satisfied with the services of his lawyers.

At this point the court already knew the answer to the question. In a letter to Judge Gardner stamp filed by the circuit clerk on March 5, 2007, Wilson advised the court that he was not satisfied with his attorneys because they were not communicating with him. C.P. 125-27. As expected Wilson advised the court he was not "totally satisfied" with his lawyers. T. 204. The court then abruptly ended the proceeding refusing to accept the pleas of guilty and sent Wilson back to the jail. T. 205. The prosecution immediately announced they would seek the death penalty. T. 205.

While trial courts may decline to accept a guilty plea "in the exercise of sound discretion," Bennett v. State, 933 So.2d 930, 940-41 (Miss. 2006), a court may not reject a plea for arbitrary or capricious reasons unbounded by principles of law. *See Black's Law Dictionary* (Judicial and legal discretion). For the reasons set forth below, it can be concluded that the court's decision to refuse to accept the plea was arbitrary and capricious.

In any criminal case the court's action would be error, in this case because the abuse of discretion resulted in the eventual imposition of a death sentence it rises to violations of the state and federal constitutional rights to due process and to be free from cruel and unusual punishment found in the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States

and Sections 14 and 28 of the Mississippi Constitution of 1890.

Wilson concedes that had the court been concerned that Wilson was not receiving constitutionally adequate counsel the court would have been justified in terminating the plea hearing and also in terminating the services of the attorneys. This does not appear to be the court's concern. The court made no investigation into Wilson's complaints. Mere dissatisfaction, or more accurately, less than "total satisfaction" with counsel is not a basis to vacate a plea thus cannot justify refusing to accept the plea.

The trial court simply expressed no concern about the quality of representation at all. The court made no inquiry concerning the communication issues. The communication issues were set forth in greater detail in a second letter to the trial court from Wilson dated May 15, 2007. C.P. 167-69. The attorney's request for compensation prove that between March 5, 2007 and May 15, 2007, Johnstone never communicated with Wilson, C.P. 162, and Bristow wrote one letter and saw Wilson for no more than thirty minutes while the special venire was pulled. C.P. 159.

Less than 10 days after sending the second letter to the court, Wilson stood before the court and said he was satisfied with counsel. T. 208. The trial court then accepted the pleas. T. 217. There had been no improvement in the relationship between counsel and client, nor a demonstrable improvement in counsels' performance.

It is apparent that the trial court's concerns were not based on the quality of representation but rather on the defendant saying he was not satisfied. Because counsel in this case was selected by the trial court and not Wilson it is reasonable to assume that the sole reason the first plea which would have guaranteed Wilson a life sentence, was rejected by the court was that Wilson's lack of total satisfaction with counsel reflected on the court personally. Without question an arbitrary and capricious rejection of the pleas.

If this Court were to give the trial court the benefit of the doubt and assume the court was concerned about the quality of representation, it must hold that the trial court failed in its responsibility to ensure effective assistance of counsel. Had the court evaluated counsels' performance rather than punishing the defendant for raising a legitimate complaint the court would have been compelled to remove counsel. At that point the only remedy available for the constitutional violation would have been to allow Wilson the benefit of his bargain. Turner v. Tennessee, 940 F.2d 1000 (6th Cir. 1991) (where conviction is reversed because of ineffective assistance of counsel in decision to reject a plea offer failure to reinstate the offer constitutes prosecutorial vindictiveness); Hoffman v. Arave, 455 F.3rd 926 (9th Cir 2006) (where counsel's deficient performance causes plea to be rejected the remedy is to force state to reinstate offer).[1]

The court recognized its responsibility to ensure a fair trail, T. 204, yet confronted with an allegation of clearly deficient performance by appointed counsel the court took no action to investigate the matter or protect Wilson's rights. In The Mississippi Bar v. Raymond Wong, 2007-B-84, filed June 28, 2007, an attorney was suspended from the practice of law for six months for very similar conduct to that complained of by Wilson, i.e., failure to communicate with an incarcerated criminal defendant the lawyer had been appointed to represent. Id. at ¶ 13.

There are significant differences in the case that led to Wong's suspension and what the trial court knew in the instant case. Unlike Wilson, there is no indication that Wong's client was facing the death penalty.[2] And unlike Wong who had only received a prior private reprimand,

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[1] The Supreme Court of the United States granted Idaho's petition for certiorari. Arave v. Hoffman, 128 S.Ct. 532 (2007). The judgment of the Ninth Circuit was later vacated and remanded with instructions to the Ninth Circuit to dismiss the claim as moot following an agreement between Idaho and Hoffman that resulted in him being sentenced to life. See Arave v. Hoffman, 128 S.Ct. 749 (2008). In its petition for certiorari Idaho argued that there was no remedy for ineffective assistance of counsel in plea bargaining when the defendant was later convicted in a fair trial. The prosecution cannot make such an argument in this case because Wilson has never had a trial, at a minimum he would be entitled to have that.

[2] See *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guideline 10.5 – Relationship with the Client; Wiggins v. Smith, 539 U.S. 524 (2003)

Bristow had received a prior public reprimand. *The Mississippi Lawyer*, June 2005 at pp. 36-37.

Moreover, but for counsels' failure to adequately communicate with Wilson prior to the March 5, 2007, hearing, the plea would have been accepted as it was in May. The prejudice to Wilson is obvious and literally the difference between life and death. Strickland v. Washington, 466 U.S. 668 (1984), holds that in order to establish ineffective assistance of counsel a defendant must establish both that his attorney's representation "fell below an objective standard of reasonableness," id. at 688, and that the defendant was "prejudiced" by his attorney's substandard performance. Id. at 692. This standard applies to claims of ineffective assistance related to guilty pleas. Hill v. Lockhart, 474 U.S. 52, 58 (1985).

The "first half of the Strickland v. Washington test is nothing more than a restatement" of familiar standards. Hill, 474 U.S. at 58, (question is whether "counsel's representation fell below an objective standard of reasonableness."). As to the second prong, the focus is on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill, 474 U.S. at 59.

In this case there is of course a fairly unique twist. Wilson is not now seeking to vacate a plea based on ineffective assistance of counsel but rather is seeking the benefit of the plea bargain that he lost because of ineffective assistance of counsel. Nonetheless, ineffective assistance of counsel that causes a defendant to reject a plea is a viable claim just as ineffective assistance that causes a defendant to plea. See Davis v. State, 743 So.2d 326, 343 (Miss. 1999) (An attorney who fails to relay a plea offer to a client in a capital murder case in a way that the client can consider the agreement in making his decision to face trial meets the requirements of deficient conduct and prejudice under Strickland where the client is convicted and sentenced to death.); People v. Curry, 178 Ill.2d 509, 687 N.E.2d 877, 887 (1997) (ineffective assistance

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(ABA Guidelines are "guides to determining what is reasonable"); see also Walker v. State, 913 So.2d 198 (Miss. 2005) at ¶¶ 43-44 (death sentences must be subjected to "heightened scrutiny").

where defense counsel's recommendation to reject plea offer predicated on plainly erroneous understanding of sentencing law); State v. Kraus, 397 N.W.2d 671, 672-73 (Iowa 1986) (defense counsel's inaccurate legal advise which prompted defendant to reject plea bargain was ineffective assistance of counsel).

Based on the evidence before the trial court and now before this court there are only two possible conclusions that can be drawn. Either the trial court acted in an arbitrary and capricious manner and abused its discretion in refusing to accept Wilson's guilty plea or trial counsel rendered ineffective assistance of counsel resulting in Wilson not being sentenced to life rather than death.

Accordingly this Court must now vacate Wilson's death sentence and remand this cause to Lee County Circuit Court for imposition of a sentence of Life without Parole.

2. THE PROSECUTOR COMMITTED MISCONDUCT BY IMPROPERLY CROSS EXAMINING MITIGATION WITNESSES AND THEREBY DEPRIVED WILSON OF A FUNDAMENTALLY FAIR SENTENCING AND MANDATES HIS DEATH SENTENCE BE VACATED.

The defense called three witnesses in mitigation. Jan Stembridge, Wilson's former teacher, T. 319; Josh Estes, Wilson's friend, T. 328, and Nancy McGee, Wilson's mother T. 337. The prosecutor cross examined each of these witness extensively about alleged drug abuse by Wilson and Stembridge about an alleged assault on the victim's mother. T. 327. Ms. Stembridge had no knowledge of drug history or assaults yet the prosecutor went into detail with allegations. T. 324-26, 327. Estes had limited knowledge of Wilson smoking marijuana (a fact already in evidence) but no knowledge of any other drug abuse. T. 332. The prosecutor used similar tactics in cross-examining Wilson's mother. T. 356.

The questioning of Stembridge was particularly egregious and constituted the majority of her cross-examination. T. 324-26.

Q. Okay. Well, let's talk about that for a minute. For instance, did you know

that Mr. Wilson – were you aware that he had started drinking at the age of 14?

A. No.

* * *

Q. Okay. And that he was drinking heavily by the age of 23. Did you know that?

A. No.

Q. Okay. Did you know that he drank about a fifth every two days?

A. No.

Q. . . . . Did you know that he began smoking marijuana around the age of 14?

A. No.

* * *

Q. Okay. And you – did you have any way of knowing that by age 18 he was smoking a quarter to an ounce of marijuana daily?

A. No.

* * *

Q. Okay. And were you aware that occasionally he would smoke up to a quarter pound of marijuana per week?

A. No.

Q. Okay. You weren't aware of that?

A. No.

Q. That the past two years prior to his arrest, which would have been I suppose 2003 and 2004, that he was smoking a half to a complete ounce a week.

A. No.

Q. Okay. Were you aware that he had used crystal methamphetamine from the age of 20 to the age of 22?

A. No.

Q. Okay. That he was using a gram every one to two days after that time, and that he was – his method of ingesting the substance was to smoke it.

A. No.

* * *

Q. Did you know that he used cocaine from the ages of 20 to 22?

A. No.

Q. Okay. That he using half an ounce of cocaine every two weeks.

A. No.

Q. You didn't know that. Okay. Are you aware that he had taken LSD before?

A. No.

Q. Were you aware that he had taken Ecstacy before?

A. No.

Q. Were you aware that he had taken pills such as Lortab, Percocet, Xanex, Klonopin and Valium before?

A. No.

T. 324-26. There is no evidence in the record now before this Court to support the prosecutions questions. No witness was called to establish an evidentiary basis for these questions.

A prosecutor may not ask questions on cross examination without an evidentiary basis, as such questions are irrelevant and as in this case may be highly prejudicial. Lester v. State, 692 So.2d 755, 782 (Miss. 1997). In Walker v. State this court gave full treatment to the issue of cross-examination without a factual basis, in the context of prosecutorial misconduct. Walker v. State, 740 So.2d 873 (Miss. 1999). In Walker's trial the State's total failure to produce evidence in support of its claims of gang affiliation and threats asserted on cross examination of the defendant led this court to the determination that the death penalty was imposed based on an arbitrary factor. Walker, 740 So.2d at 884. This court concluded that it was error by the court to

permit the prosecutor to ask prejudicial questions when there was no basis in fact for them. Id. at 886.

This court took notice of other jurisdictions' treatment of the issue, citing United States v. Silverstein, 737 F.2d 864, 867-868 (10th Cir. 1984) (trial court erred in allowing prosecutor to repeatedly ask the same question of the defendant despite repeated denials of an alleged prejudicial fact, knowing that he could offer no proof of the fact); State v. Ballantyne, 623 P.2d 857, 860 (Ariz. Ct. App. 1981) (to ask a question which implies the existence of a prejudicial factual predicate which the examiner cannot support by evidence is unprofessional conduct and should not be condoned); Jones v. State, 385 So.2d 1042, 1043 (Fla. Dist. Ct. App. 1980) (prosecutor's insinuations during questioning of a witness that threats had been made against the witness by the accused without any attempt to show that the accused had either made such threats or was even aware that threats had been made against the witness constituted prejudicial error); People v. Lediard, 80 A. D.2d 237, 240-242 (1981) (prejudicial error for prosecutor to ask witness on cross examination in assault trial whether he knew that defendant had displayed a pistol to a bartender on night of the shooting where no such evidence was presented); Alexander v. State, 509 S.E.2d 56 (Ga. 1998) (murder conviction reversed where prosecutor previewed evidence that shooting would be gang related but offered no evidence to support assertion).

This court in Walker also relied on two Mississippi cases. 740 So.2d at 884. Hosford v. State involved other crimes evidence, where this court held that it is error for the prosecutor to insinuate the accused is guilty of other crimes for which he denies, and then make no attempt to prove them. Hosford v. State, 525 So.2d 789, 793 (Miss. 1998). Scott v. State is very similar factually to the case sub judice -- there the prosecutor during cross examination of a witness continuously insinuated that the witness had made certain statements in grand jury testimony with no evidence to establish that any statements had in fact been made. Scott v. State, 446

So.2d 580, 584 (Miss. 1984). This court held in Scott that such conduct was prejudicial error.

The prejudice is particularly great in a death penalty case. What may be harmless error in a case where less is at stake becomes reversible error when the penalty is death. Walker, 913 So.2d 198. The death sentence in this case was secured in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the corresponding provisions of our state constitution and must be vacated.

3. THE ADMISSION OF TESTIMONY BY DR. STEVEN HAYNE UNDERMINES THE RELIABILITY OF THE DEATH SENTENCE IMPOSED IN THIS CASE AND PRESENTS QUESTIONS OF IMPROPER EXPERT TESTIMONY AND INEFFECTIVE ASSISTANCE OF COUNSEL.

This Court is no doubt well aware of the many issues surrounding the pathologist Dr. Steven Hayne. Dr. Hayne's credibility as a witness and the reliability of his medical findings are at least objectively questionable in every case. In this case Dr. Hayne had performed the autopsy on Malorie Conlee, T. 292, and was called to testify in this case in support of the "especially heinous" aggravating circumstance. The death sentence rests heavily on Hayne's testimony, C.P. 152-53, and he was the witness through whom numerous photographs of the deceased child were introduced. T. 294.[3]

The defense filed a motion for funds to hire a pathologist, C.P. 104-05, but did not support this motion with an affidavit of an expert as required by this Court and instructed to do by the trial court. T. 24. Thus defense counsel had no means of challenging Dr. Hayne other than cross-examination. Counsel's attempt at cross examination was virtually incoherent. T. 313-14.

This failure of counsel to properly prepare for Hayne presents further problems for Wilson in this direct appeal. Because there was no independent autopsy or review of Hayne's findings this

[3] The only evidence offered to support any aggravating circumstance was the confession and pleas of Wilson, which were challenged in the trial court. This case is therefore very similar to Edmonds v. State, 955 So. 2d 787 (Miss. 2007), where this Court reversed a conviction resulting from Hayne's testimony despite an admissible confession from the defendant.

Court can neither fully asses the reliability of Hayne's testimony in this case nor the effectiveness of counsel's representation. That is, present counsel recognizes that there are potential claims of improper and even erroneous expert testimony as well as ineffective assistance of counsel but these claims cannot be raised in this appeal because they are not "fully apparent from the record." MRAP Rule 22 (b).

To determine if there is error in Hayne's findings and/or prejudice to Wilson resulting from performance of counsel an independent review of the autopsy as well as other investigation prior to presenting these claims to this Court. Consistent with due process Wilson must be allowed to present any evidence discovered in a post-conviction review. Branch v. State, 882 So.2d 36 (Miss. 2004). Accordingly, Wilson reserves these claims, for post-conviction review if that is necessary. Havard v. State, 928 So.2d 771 (Miss. 2006).

However based just on the face of this record, Wilson submits this Court is justified in vacating the death sentence based on Hayne's involvement in this case. Hayne testified that he was the "Chief State Pathologist for the Department of Public Safety in the State of Mississippi." T. 291. This testimony is not true. There is no such position and Hayne does not meet the qualifications to serve as the State Medical Examiner. Edmonds v. State, 955 So. 2d 787, 802-03 (Miss. 2007) (Diaz J., concurring).

Edmonds was decided on May 10, 2007, before Hayne's testimony in this case, yet he was accepted with out challenge or qualification by anyone nor was this misleading if not false testimony regarding his stature questioned. T. 292. Since Edmonds was reversed based on improper testimony by Hayne, two men convicted in separate cases in part based on testimony by Hayne, have been fully exonerated. *Clarion Ledger*, February 10, 2008, 1B; *Clarion Ledger*, April 27, 2008; see also *Clarion Ledger*, November 5, 2007.

These news articles are just the tip of the iceberg. Hayne's questionable qualifications have

been chronicled in the *New York Times, The Wall Street Journal*, and *Reason* magazine as well and have lead the state legislature to fund, for the first time in almost twenty years, the position of State Medical Examiner. In a death penalty case, taking into consideration this Court's "heightened scrutiny" on review, it would be a violation of due process and the need for reliability in death sentences to allow this sentence to stand based on testimony provided by Hayne. See Ross v. State, 954 So.2d 968, 1018 (Miss. 2007); Caldwell v. Mississippi, 472 U.S. 320 (1985).

4. THE INTRODUCTION OF IMPROPER VICTIM IMPACT TESTIMONY VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION, ARTICLE 3, SECTIONS 14, 26, AND 28 OF THE MISSISSIPPI CONSTITUTION.

The defense filed a motion to exclude victim impact evidence at sentencing and the prosecution confessed the motion. T. 61-62. However the prosecution reversed its position during the sentencing proceeding and the court allowed them to call Mr. Bennie Conlee, the victim's grandfather. T. 368. Mr. Conlee was asked what he believed the appropriate punishment would be and he unequivocally asked fro the death penalty. T. 372.

Although some types of victim impact evidence are admissible, testimony about the surviving victims' opinions about the appropriate punishment are prohibited by the Eighth and Fourteenth Amendments.

The United States Supreme Court has held that the Eighth Amendment does not erect a *per se* bar against introduction of victim impact testimony. Payne v. Tennessee, 501 U.S. 808, 827 (1991). That Court explained that a "State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id; see also id. at 825 (a State may properly conclude that the jury should have before it "evidence of the specific harm caused by the defendant"); Conner v. State, 632 So. 2d 1239, 1276 (Miss. 1993).

In reaching this holding, the United States Supreme Court overruled its decision in Booth v. Maryland, 482 U.S. 496 (1987).[4] In Booth, the Court found that the Eighth Amendment barred testimony and argument relating to the victim and the impact of the victim's death on the victim's family. In addition, Booth also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence violates the Eighth Amendment. Booth, 482 U.S. at 508. In Payne, the Court left untouched this second aspect of the holding of Booth. Payne, 501 U.S. at 830 n.2; see also id. at 833 (O'Connor, J., concurring); id. at 835 n.1 (Souter, J., concurring). Therefore, because Booth's prohibition on testimony concerning opinions about characterizations of the defendant or opinions about the crime remains, the prosecutor's decision to elicit opinion testimony from the victims' family members violated the Eighth Amendment.

The overwhelming consensus of federal and state courts is that opinion testimony about the appropriate sentence remains out of bounds. For example, in Lynn v. Reinstein, 68 P.3d 412 (Ariz. 2003), the Arizona Supreme Court held that "the Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case." Id. at 414.[5] See also Wimberly v. State, 759 So. 2d 568, 572 (Ala. Crim. App. 1999) ("Payne did not overrule that portion of Booth that proscribed consideration of the victim family members' characterizations or opinions about the defendant, the crime, or their beliefs as to an appropriate punishment"); State v. Hoffman, 851 P.2d 934, 941 (Idaho 1993) (a sentencer "is not to consider statements by the victim's family which amount to the family's opinion regarding the

[4]The Supreme Court also overruled its holding in South Carolina v. Gathers, 490 U.S. 805 (1989), which had prohibited testimony about the personal qualities of the victim.

[5]Given "the clarity of the Supreme Court's Eighth Amendment analysis on this point," the Arizona Supreme Court felt it unnecessary to analyze whether state statutes allowed opinion testimony. *Id.* at 414, n.2.

sentence which should be imposed on the defendant"); State v. Bernard, 608 So. 2d 966, 970 (La. 1992) ("Evidence of the victim's survivors' opinions about the crime and the murderer is clearly irrelevant to any issue in a capital sentencing hearing."); Farina v. State, 680 So. 2d 392, 399 (Fla. 1996); Kaczmarck v. State, 91 P.3d 16, 37 (Nev. 2004); People v. Towns, 675 N.E.2d 614 (Ill. 1996); People v. Pollock, 89 P.3d 353, 370 (Cal. 2004); State v. Muhammed, 678 A.2d 164, 172 (N.J. 1996); Parker v. Bowersox, 188 F.3d 923, 931 (8th Cir. 1999); Woods v. Johnson, 75 F.3d 1017, 1038 (5th Cir. 1996).

The interjection of this prejudicial opinion testimony denied Wilson his right to a fundamentally fair trial. "Due process, at a minimum, requires that the state try an individual in an atmosphere free from unnecessarily prejudicial influences that prevent a defendant from receiving fundamental fairness. Handley v. Pitts, 623 F.2d 23, 26 (6th Cir. 1980); see also Gardner v. Florida, 430 U.S. 349, 358 (1977) (any decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion"); cf. Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

The prosecutor's decision to elicit testimony from the victim's survivor about his opinion concerning the appropriate sentence was improper, and therefore, Wilson's death sentence must be vacated.

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

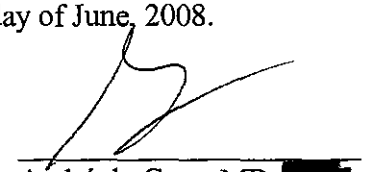
This Court has a longstanding adherence to the cumulative error doctrine, particularly in capital cases. Ross v. State, 954 So.2d 968 (Miss. 2007). Under this doctrine, even if any one error is not sufficient to require reversal, the cumulative effect of them does mandate such an action. Jenkins v. State, 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 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 William Wilson respectfully requests this Court vacate his death sentence.

Respectfully submitted this the 26th day of June, 2008.



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CERTIFICATE OF SERVICE

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This the 26th day of June, 2008.

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