IN THE SUPREME COURT OF MISSISSIPPI

KRISTI FULGHAM, *APPELLANT*

versus **No. 2007-DP-01312-SCT**

STATE OF MISSISSIPPI, *APPELLEE*

BRIEF OF APPELLEE

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Miss. Bar No. [redacted]

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record
Miss. Bar. No. [redacted]

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680
Facsimile: (601) 359-3796

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versus **NO. 2007-DP-01312-SCT**

STATE OF MISSISSIPPI, *Appellee*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The case at bar arises from Fulgham's conviction and sentence of death for the May 10, 2003, capital murder of her husband, Joey Fulgham. During the January Term of the Circuit Court of Oktibbeha County, Mississippi, the Grand Jury indicted Fulgham for the capital murder of Joey Fulgham while engaged in the commission of the crime of Robbery. C.P. 30. Fulgham was tried on December 5, 2006, on the indictment before a properly empaneled and sworn jury in the Circuit Court of said county. After hearing evidence and deliberating thereon, the jury returned a verdict of guilty of capital murder. C.P 1082. Following this verdict, the jury was presented with evidence in aggravation and mitigation of sentence and after deliberation, returned a sentence of death in the proper form:

> "We, the Jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the Capital

Murder:

The defendant intended that a killing of Joey Fulgham take place and the defendant contemplated that lethal force would be employed.

We, the Jury unanimously find beyond a reasonable doubt the following aggravating circumstances:

The capital murder was committed for pecuniary gain and the capital murder was committed during the commission of the crime of robbery.

We, the Jury, further unanimously find that after weighing the mitigating circumstances and aggravating circumstances that the mitigating circumstances do not outweigh the aggravating circumstances and that the Defendant should suffer the penalty of death."

/s/ Harold Grisham
Foreman of the Jury

C.P. 1181-2.

Fulgham now takes her automatic appeal from the conviction and sentence to this Court raising the following claims:

1. The Death Sentence Must Be Vacated Under Lockett And Its Progeny As Adriane Dorsey-Kidd Was Erroneously Excluded By The Trial Court As An Expert In The Field Of Social Work After She Was Accepted As An Expert In That Field.

2. Ms. Fulgham Must Have A New Sentencing Hearing As A Juror Requested And Received A Holy Bible During Penalty-Phase Deliberations. The Trial Court Committed Reversible Error In Overruling Ms. Fulgham's Motion For Mistrial.

3. Ms. Fulgham Must Have A New Sentencing Hearing As An Unauthenticated, Irrelevant And Inflammatory Document Was Erroneously Introduced To Prove Bad Character. Finally, The Unauthenticated Document Erroneously Introduced To Prove Bad Character Was Then Misappropriated By the Prosecutor As

Substantive Evidence Supporting A Death Sentence During The Prosecution's Summation.

4. Instructing The Jury To Consider The Miss. Code Ann. 99-19-101(5)(f) Aggravator Was Error.

5. The "Felony Murder" Aggravator At Miss. Code Ann. 99-19-101(5)(d)In This Case Is Unconstitutionally Duplicative And The Trial Court Erred In Submitting It To The Jury. In Light Of This, As Well As The Discussion In Claim 4 And Claim 23, No Lawful Aggravation Exists. Therefore, The Death Sentence Must Be Vacated.

6. The Trial Court Erred In Denying Ms. Fulgham's Motion To Supress Her June 2, 2004, Custodial Statement. Because The State Used This Custodial Statement During Ms. Fulgham's Penalty Phase, Ms. Fulgham's Death Sentence Must be Vacated.

7. Pursuant to Miss. Code Ann. 99-19-105(3)(c), Ms. Fulgham's Death Sentence Is Excessive And Disproportionate. Because of This, Her Death Sentence Must Be Vacated Under The Terms [sic] Terms Of Miss. Code Ann. 99-19-105(3)(c), The Due Process Clause Of The Federal And State Constitution And The Equal Protection Clause.

8. The Trial Court Erred In Refusing To Include Jury Instruction D-77A In The Jury Charge.

9. Because The Trial Court Erred In Refusing To Include Instruction D-77A In The Jury Charge, The Trial Court Necessarily Erred In Refusing To Include Ms. Fulgham's Two-Theory Instruction, Instruction D-77B, In The Jury Charge.

10. The Trial Court Erred In Refusing To Include Jury Instruction D-64 In The Jury Charge.

11. The Trial Court Erred In Refusing To Include Jury

Instruction D-71 In The Jury Charge.

12. The Trial Court Erred In Refusing To Include Jury Instruction D-89 or D-91 In The Jury Charge.

13. The Trial Court Erred In Refusing To Include Jury Instruction D-112 or D-113 In The Jury Charge.

14. The Trial Court Erred In Refusing Any And All of Ms. Fulgham's "Presumption Of Life" Instructions.

15. In Light of Claim 2, The Trial Court Erred In Refusing To Include Jury Instruction D-96 In The Jury Charge.

16. In Light of Claim 2, The Trial Court Erred In Refusing To Include Jury Instruction D-96 In The Jury Charge.

17. The Trial Court Erred In Refusing To Include Jury Instruction D-86 In The Jury Charge.

18. The Trial Court Erred in Refusing To Include Jury Instruction D-91A In The Jury Charge.

19. The Trial Court Erred In Denying Ms. Mallette's Pre-Trial Motion to Withdraw As Counsel.

20. The Trial Court Erred In Overruling Ms. Fulgham's Objection To Evidence That Ms. Fulgham Is Represented By The Office of Capital Defense Counsel. The Error Was Exacerbated When The State Emphasized Ms. Fulgham Was Represented By The Penalty-Phase Summation.

21. The Death Sentence Violates Miss. Code Ann. 99-19-105(3)(a) and Furman v. Georgia.

22. Miss Code Ann. 99-19-101 is Facially Unconstitutional.

23. The Conviction Must Be Vacated As A Jury Instruction D-48 Was Refused. This Error Was Exacerbated By

Improper Argument During The State's Summation.

24. The Trial Court Erred In Overruling Ms. Fulgham's Relevance Objection To Testimony From Vanessa Davis That Ms. Fulgham Engaged In An Incestuous, Pedophiliac Relationship With Her Half Brother.

25. The Trial Court Erred In Overruling Hearsay Objections Which Permitted The State To Present Inadmissible Evidence Concerning Ms. Fulgham's Purported Desire To Shoot A Dog.

26. The Trial Court Erred In Overruling A Hearsay Objection Which Permitted That State To Present Inadmissible Evidence Concerning Ms. Fulgham's Purported Declaration That Her Marriage Was Over.

27. The Trial Court Erred In Refusing To Include Jury Instruction D-13B In The Jury Charge. For the Same Reason, The Trial Court Erred In Refusing To Include Jury Instructions D-20 In The Jury Charge.

28. Because Of Claim 23 Through Claim 26, The Trial Court Erred In Refusing To Include Jury Instruction D-54A In The Jury Charge.

29. In Light Of Claim 23, The Trial Court Erred In Overruling Ms. Fulgham's Objection To Jury Instruction S-5 As This Instruction Further Aggravated The Manifest Error Created When The Court Refused To Include D-48 In The Jury Charge.

30. The Trial Court Erred In Refusing To Include Jury Instruction D-13 In The Jury Charge.

31. The Trial Court Erred In Overruling Ms. Fulgham's Objection To Jury Instruction S-3-A, Ultimately Included In The Jury Charge, As S-3-B. For The Same Reason, The Trial Court Erred In Refusing To Include Jury Instruction D-51 In The Jury Charge.

32. The Trial Court Erred In Refusing To Include Jury Instruction D-18 In The Jury Charge.

33. The Trial Court Erred In Refusing To Include Jury Instruction D-22 In The Jury Charge.

34. The Trial Court Erred In Refusing To Include Jury Instruction D-14 Or Jury Instruction D-15 In the Jury Charge.

35. In Light Of Claim 23 And Because The State Invited The Jury To Consider A Computer Tower As The Object Of The Robbery At Bar, Ms. Fulgham's Conviction Is Unsupported By The Evidence Adduced At Trial And Is Against The Overwhelming Weight Of The Evidence.

36. The Trial Court Erred In Transferring Venue To Union County.

37. The Aggregate Error In This Case Requires Reversal Of The Conviction And Death Sentences As A Matter Of Federal Constitutional Law.

38. The Aggregate Error In This Case Requires Reversal Of The Conviction and Death Sentence As A Matter Of State Law.

Fulgham filed a motion for new trial and a new sentencing hearing on January 16, 2007. C.P. 1261-1332. This motion was denied on July 18, 2007. Id. at 1351.

STATEMENT OF FACTS

On the May 9, 2003, Joey Fulgham, was murdered by rifle shot to the back of the head while sleeping in his own bed. He was robbed and left where he had been shot. This cold blooded murder was orchestrated by his wife Kristi Fulgham, who earlier, had picked up her half-brother, Tyler Edmonds, to bring him home with her to Longview, which was her

custom every other weekend. Fulgham's plan was to kill her husband, rob him and collect the proceeds from his life insurance. At some time in the early morning hours, Kristi with Tyler's help, shot and killed Joey Fulgham, with a rifle furnished by her brother at her request. Fulgham then robbed Joey while staging the scene to look like a home invasion. Her plans evolving, Fulgham then loaded her children into the car along with Tyler and proceeded to Jackson where she was to meet her boyfriend, Kyle Harvey, and then travel to the Mississippi Gulf Coast. Once there, Fulgham stayed at the Beau Rivage Casino and took the children to the beach and souvenir shops and restaurants spending the cash she he robbed from her husband until she received word that Joey Fulgham had been murdered on Sunday. At that point, she returned to Longview.

SUMMARY OF THE ARGUMENT

In this death penalty case, the State has responded to all thirty-eight (38) assignments of error and the numerous sub-parts thereto raised for review in this Court in Fulgham's two hundred and seventeen (217) page brief. Because of the length of the State's brief and the full explanation given for each of the numerous arguments presented, the State would request leave to dispense with a more detailed Summary of the Argument.

ARGUMENT

1. THE TRIAL COURT DID NOT COMMIT ERROR IN SUSTAINING THE STATE'S OBJECTION TO THE TESTIMONY OF A SOCIAL WORKER WHO WAS NOT A PSYCHIATRIST OR PSYCHOLOGIST

The Appellant avers that the trial court committed error in sustaining the State's

objection to the testimony of social worker, Adrienne Dorsey Kidd. App. at 8. The State objected to her testimony arguing that Kidd was not a psychiatrist or psychologist. Tr. 1167-8. The Appellant relies on the United States Supreme Court's opinion in *Wiggins v. State*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471(2003), in support of her claim that she was entitled the testimony of an expert in social work. The State submits that the Appellant's reliance on *Wiggins* is misplaced and that Fulgham's argument is without merit thus entitling her to no relief on this assignment of error.

The State objected to the testimony of Ms. Kidd as follows:

> BY MS. FAVER: Your Honor, I'm going to object at this time. Ms. Kidd is not authorized to give any opinions in the areas that are set forth in her report. She is a social worker, she is not a psychiatrist or a psychologist.
>
> BY THE COURT: Sustained.
>
> Tr. 1167-8.

The trial court then, outside the presence of the jury, entertained further argument which included a proffer of Ms. Kidd's "observations" which "dealt with parental bonding", "substance abuse", "lack of the biological father's input" and finally that "although she's been incarcerated for three years" Fulgham was "still very much a part of her children's lives." Tr. 1170. The State then cross examined Ms. Kidd who admitted that she had not administered "any psychological testing whatsoever", had not "actually observe[d] [the] defendant with her children at any point in time" and that the information she collected and compiled was not based on anything Kidd "personally observed." *Id.* at 1171-2. The

Appellant asserted that she was entitled to this social worker's testimony pursuant to *Wiggins, supra. Id.* at 1171. The trial court, following a reading of the *Wiggins* opinion, heard additional argument on the matter. The State correctly asserted that *Wiggins* does not stand for the proposition that Fulgham is entitled to the testimony of an expert in social work, but rather that "counsel has a duty to conduct an intensive social history to search for possible mitigators" which is indeed correct. *Id.* at 1175-6. The trial court properly determined that the testimony of Ms. Kidd would be nothing more than "information already . . . given to the jury by the people with first-hand knowledge." *Id.* at 1178. The trial court further noted that Kidd's proposed testimony:

> BY THE COURT:- - is not something of such a high degree of expertise and skill that would be outside of the knowledge of a common lay person, and the jury has already heard that, i.e., parents love their children. Children often love their parents. And if they are in multiply locations in homes, they don't get to interact as if they grew up in a more stable environment.
>
> I can't see where the testimony is subject to expertise or an expert needs to give that. The jury can arrive at that conclusion on their own, based on the direct evidence that they have heard and their knowledge, because they are reasonable people.
>
> I can't see where Ms. Kidd, in all due deference, would add anything to that body of knowledge to the jury. The objection is sustained.
>
> Tr. 1180-1.

Indeed, as the Court noted, the jury heard direct testimony regarding "parental bonding" and "lack of the biological father's input" from Fulgham's mother, Carol Morgan. Tr. 1112 -46. The jury also heard the testimony of Fulgham's long-time friend Sarah Ferguson who

testified that the Appellant was "a very good mother" and that her children were very important to her. Tr. 1158. In addition, the trial court allowed documents[1] to be introduced through Ms. Kidd which showed that the Appellant was "still very much a part of her children's lives." Tr. 1186-92. The record reflects, quite clearly, that the jury heard direct testimony from these witnesses on the same issues "observed" by the social worker. The trial court did not abuse its discretion in sustaining the State's objection to the testimony of the social worker as the jury heard such testimony through the aforementioned witnesses. *Wiggins* simply does not support the Appellant claim that she was otherwise entitled to the testimony of Kidd. *See Wiggins, supra.* Kidd compiled an "intensive social history of Kristi Fulgham" and the jury heard testimony from witnesses concerning all aspects of that history in accord with *Wiggins*. The testimony of Kidd would have been redundant and therefore unjustified as the Court held in *Loden v. State*, 971 so.2d 548 (Miss. 2007):

> ¶ 34. While "American Bar Association standards and the like ... are guides to determining what is reasonable ... they are only guides." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (emphasis added). *See also Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Furthermore, "[t]he State does not have a constitutional obligation to provide indigent defendants with the costs of expert assistance upon every demand." *Thorson*, 895 So.2d at 122. The lower court did not err in concluding that Mooers's *redundant services were not justified.* This Court finds there is no evidence to support that the learned circuit judge abused his discretion in so finding.
>
> 971 So.2d at 564.

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[1]Such documents included drawings, cards and letters made by Fulgham's children.

Moreover, Kidd's "observations" had she testified would have been little more than mere "speculation." *See Havard v. State*, 988 So.2d 322, 337 (Miss. 2008). The Appellant has failed to cite to any relevant prevailing authority which states that she was entitled to the testimony of social worker when the same evidence offered by such an "expert" was presented to the jury through the direct testimony of witnesses. The State would submit that the trial court did not commit error in sustaining the State's objection to the testimony of social worker Dorsey. This claim is devoid of merit. Accordingly, the Appellant is entitled to no relief on this assignment of error.

2. THE ARGUMENT THAT FULGHAM IS ENTITLED TO A NEW SENTENCING HEARING IS WITHOUT MERIT

The Appellant claims she is entitled to a new sentencing hearing because a jury member requested a Bible during deliberations. App. at 34. The State would submit this claim is without merit. The question squarely before the Court then, is whether the Bible constituted an external influence on the jury's deliberations which resulted in prejudice to the Appellant. In *Russell v. State*, 849 So.2d 95 (Miss. 2003), the Court was considered a similar challenge and held:

> ¶ 45. Russell next argues that the jury improperly used the Bibles that were in their hotel rooms to help them make a decision. Russell once again cites the unsworn statement of Sarah Powell and cites *Jones v. Kemp*, 706 F.Supp. 1534 (N.D.Ga.1989), and *State v. Harrington*, 627 S.W.2d 345 (Tenn.1981). A review of these cases shows that in each case a Bible was actually consulted during deliberations or Bible verses were read to the jury during deliberations. The situation in Russell's case is distinguishable.
>
> 849 So.2d at 112.

Just as in the *Russell* case, the facts in the case at bar are "distinguishable." Here, there is no evidence of any kind indicating that the Bible was read from or referred to in any way. Moreover, in this case, the trial court questioned the jury on the matter as follows:

> BY THE COURT:
>
> Ladies and gentlemen, after you were recessed last evening, it was brought to my attention and the attention of the attorneys that, at a request of one juror, a Bible was left in or given to the jury in the jury room, and that it remained in the jury room approximately 15 minutes before we recessed for the evening.
>
> I did not find out about that until subsequent to the recess, and neither did the attorneys.
>
> I have instructed you continuously throughout this trial, both in the guilt phase and in the sentencing phase, that the jury is to base their verdict and their findings solely on the proof and the evidence that is introduced during the course of the trial and the instructions of law that is given to the jury by the Court only.
>
> It might be construed by some that the jury is requesting instructions from a divine source, rather than the law, by having a Bible during their deliberations.
>
> During the deliberations, you can only consider the evidence and the testimony and the instructions of law.
>
> I know that it is common in the ordinary course of events for most of us, myself may be included, to seek such inspiration and help in making important decisions from other sources.
>
> However, when you are a juror, you can only base your findings on the proof and the evidence and the instructions of law and your own good common sense and reason.
>
> Had the request been made to me, by way of note through the bailiffs or anything else for any other source, I, of course, could not give you that, and

would tell you that. But I only found out about it after the fact, and not before the fact.

If any of you cannot base your verdict on the evidence presented in this case and the instructions of law that I give and that alone, please signify that by raising your hand at this time.

No jurors raised their hand, for the record. I do not know whether that was -- Bible was used in the jury room by any particular juror or all jurors, or whether any of it was read or not read, but can each of you tell me that if it was considered or read, could you disregard that source and put it out of your mind and base your decision solely, again, on the evidence and the law and the instructions that I have given and nothing else? If you do not think you could do so, please raise your hand.

Again, for the record, I see no hands.

Tr. 1304-6.

In this case, the trial court was made aware of the potential external influence upon the jury prior to the sentencing verdict and took steps necessary to ensure that there was no prejudice to Fulgham. In *Oliver v. Quarterman*, 541 F.3d 329 (5th Cir. 2008), the Fifth Circuit painstakingly analyzed the treatment of such a claim and held:

> Oliver rests his argument on Supreme Court precedent that, under the Sixth Amendment, forbids a jury from being exposed to external influences during its deliberations. *See Parker v. Gladden*, 385 U.S. 363, 364-65, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966) (stating that "the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel" (internal quotation marks omitted)); *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965) ("The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."); *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 98 L.Ed. 654 (1954) (stating that "private communication, contact, or tampering" with the jury is presumptively

prejudicial); *Mattox v. United States*, 146 U.S. 140, 149, 13 S.Ct. 50, 36 L.Ed. 917 (1892) (stating that "in capital cases [ ] the jury should pass upon the case free from external causes tending to disturb the exercise of deliberated and unbiased judgment").

Remmer provides our starting point for determining the Supreme Court's clearly established law regarding external influences on a jury. See 347 U.S. at 229, 74 S.Ct. 450. *Remmer* involved a third party who attempted to bribe a juror. *Id.* at 228, 74 S.Ct. 450. The juror notified the judge, who then informed the prosecutors. *Id.* The judge asked the FBI to investigate the incident, and the FBI concluded that the third party had made the statement to the juror in jest. *Id.* As a result, neither the judge nor the prosecutor told the defendant about the incident. *Id.* The jury found the defendant guilty, and he appealed after learning of the alleged bribery attempt. *Id.* The Supreme Court vacated the lower court's judgment that the defendant had not shown any prejudice and held that in a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229. *Remmer* thus prohibits jurors from being subjected to "private communication, contact, or tampering" and considers any such external influences presumptively prejudicial. *Id.*; cf. *United States v. Sylvester*, 143 F.3d 923, 933 (5th Cir.1998) (suggesting that "the presumption of prejudice and the assignment of the burden of proof are not triggered automatically but are imposed at the discretion of the district court").

Turner also involved an improper external influence on a jury. 379 U.S. at 467, 85 S.Ct. 546. There, two deputy sheriffs oversaw the sequestered jury. *Id.* As part of their duties, the deputies "ate with them, conversed with them, and did errands for them," although there was no evidence that the deputies spoke with the jurors about the case itself. *Id.* at 468, 85 S.Ct. 546. These same deputies also served as the prosecution's principal witnesses. *Id.* The Court held that the deputies' external contact with the jurors "subvert[ed] the[ ] basic guarantees of trial by jury." *Id.* at 473, 85 S.Ct. 546. In particular, the Court stated that "[t]he requirement that a jury's verdict must be based upon

the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id.* at 472, 85 S.Ct. 546 (internal quotation marks omitted).

In *Parker*, a court bailiff assigned to shepherd the sequestered jury stated to one of the jurors, while the jury was on a public sidewalk, "Oh that wicked fellow [petitioner], he is guilty." 385 U.S. at 363, 87 S.Ct. 468. On another occasion, the bailiff remarked to at least one juror, "If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it." *Id.* at 364, 87 S.Ct. 468. The Supreme Court deemed the bailiff's statements to be "private talk, tending to reach the jury by outside influence." *Id.* (internal quotation marks omitted). In a later decision describing *Parker*, the Court characterized the bailiff's statements as involving an improper "external influence." See *Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

Finally, the Court fleshed out the difference between an "external" and an "internal" influence on a jury in *Tanner*. *Id.* at 117, 107 S.Ct. 2739. T here, the Court considered allegations that a juror was intoxicated during the trial. *Id.* at 110, 107 S.Ct. 2739. The Court held that the Sixth Amendment did not require the district court to hold an evidentiary hearing, because juror intoxication is not an "external influence." *Id.* at 127, 107 S.Ct. 2739. In so holding, the Court noted that lower courts have distinguished between external influences, which a defendant can use to impeach a jury's verdict, and internal influences, which are not presumptively prejudicial. *Id.* at 117-18, 107 S.Ct. 2739. A juror is exposed to an external influence when the juror reads information not admitted into evidence, such as a newspaper article about the case, or hears prejudicial statements from others, as in *Parker* and *Remmer*. *Id.* at 117, 107 S.Ct. 2739. In contrast, internal influences, which provide no basis for relief, include allegations of physical or mental incompetence of a juror, such as claims that a juror was insane, could not sufficiently understand English, or had a severe hearing impairment. *Id.* at 119, 107 S.Ct. 2739.

These cases demonstrate that the Supreme Court has clearly established a constitutional rule forbidding a jury from being exposed to an external influence. Whether an influence is "external" or "internal" depends on the facts of each case, but at its core the distinction amounts to an examination of the "nature of the allegation" of an improper influence on the jury. *Tanner*, 483 U.S. at 117, 107 S.Ct. 2739; *see Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir.2006) ("Under clearly established Supreme Court case law, an influence

is not an internal one if it (1) is extraneous prejudicial information; i.e., information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering with a juror.' ") (internal citations omitted); *Robinson*, 438 F.3d at 373 (King, J., dissenting in part) ("If the 'nature' of the influence is that it impairs the juror's physical or mental ability to function effectively, it is an internal influence. Internal influences thus stand in stark contrast to their external counterparts, which come from without and carry the potential to bias the juror against the defendant."). Judge King, in his dissent from the denial of en banc rehearing in *Robinson*, cogently synthesized these Supreme Court cases:

> The external influences recognized by the Court in those decisions are factually diverse, but they share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant. This legal principle unifies the bailiff's remarks disparaging the defendant in *Parker*, the relationship of confidence between the jury and key prosecution witnesses in *Turner*, and the effort to bribe a juror in *Remmer*.

Robinson v. Polk, 444 F.3d 225, 231 (4th Cir.2006) (King, J., dissenting). It is against this backdrop that we must consider whether the jurors' consultation of the Bible amounted to an external influence that raises a presumption of prejudice.

B. The Bible as an External Influence on the Jury

Stemming from these clearly established Supreme Court precedents, it is clear that the prohibition of external influences from *Remmer*, *Turner*, and *Parker* applies to this factual scenario. *See* (Terry) *Williams*, 529 U.S. at 407, 120 S.Ct. 1495 (stating that a decision involves an unreasonable application of Supreme Court precedent if it "unreasonably refuses to extend [a legal principle from Supreme Court precedent] to a new context where it should apply"). Although there are no Fifth Circuit cases directly on point, language from the Eleventh, First, and Sixth Circuits bolsters this conclusion.

In *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir.2005), the Eleventh Circuit analyzed a similar situation under the *Remmer* line of cases and determined that the jury's use of the Bible was presumptively prejudicial, but

that the state had rebutted the presumption. During the punishment phase of the trial, the foreman, a Christian minister, brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer. Id. at 1301. The court noted that "[b]ecause it is undisputed that jurors in the guilt phase of McNair's trial considered extrinsic evidence during their deliberations, our analysis focuses on whether the State can rebut the resulting presumption of prejudice." The court held that the state had rebutted the presumption of prejudice because there was no evidence that the "innocuous" Bible passages in question had the effect of influencing the jury's decision. *Id.*

Even before this decision, a district court within the Eleventh Circuit undertook a similar approach to this question. In *Jones v. Kemp*, 706 F.Supp. 1534, 1558 (N.D.Ga.1989), a juror asked the court if he could take a Bible into the jury room, and the court said yes. The district court, on habeas review, stated that "[a] situation in which a jury, unsupervised by the court and unobserved by counsel, could reach a conclusion by consulting sources other than the legal charge of the court and evidence actually received by the court is not permitted." *Id.* at 1560. The court distinguished the situation of jurors bringing their own Bibles into the jury room to consult for personal inspiration or spiritual guidance. *Id.* "The sole issue here involves the at least implied court approval of a group jury reference to an extra-judicial authority-here the Christian Bible-for guidance in deciding the explicit, statutorily mandated, carefully worded guidelines which must be followed by a jury deliberating during the sentencing phase of a death penalty case." *Id.* The court did not analyze whether the state could rebut the presumption of prejudice.

The First Circuit also suggested that the presence of a Bible in the jury room amounts to an external influence on the jury's deliberations and that the Bible is no different from any other type of external influence that enters the jury's conscience. *See United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir.2008). That case does not directly align with the facts here, as it involved the direct review of a district court's mistrial declaration without the defendant's consent after the judge learned that the jury had consulted the Bible. *Id.* at 79. Nevertheless, the court's language is telling: the court stated that the district court erred in "treat[ing] the Bible in the jury room as qualitatively different from other types of extraneous materials or information that may taint a jury's deliberations." *Id.* at 88. The court held that "[b]ecause no special rule exists when the Bible is involved, the district court had a duty to investigate the colorable claim of juror taint in this case and explore and exhaust the alternatives to mistrial, just as it would in other situations where

extraneous materials have been brought into the jury's deliberations." Id. at 89 (internal quotation marks omitted). Thus, underlying the court's analysis was the conclusion that the jurors' use of a Bible in the jury room constituted an "external influence."

The Sixth Circuit implied, albeit in dicta, that the presence of a Bible in the jury room is an external influence that might prejudice the jury's deliberations. *See Coe v. Bell*, 161 F.3d 320, 351 (6th Cir.1998) (rejecting the petitioner's claim that the prosecutor's closing argument mentioning the Bible amounted to reversible error). The court distinguished the situation of a prosecutor invoking the Bible during his closing argument from the cases where the jury actually had a Bible in the jury room. *Id.* The court concluded that "there is error in [the cases involving a Bible in the jury room] not because the book was the Bible, but because the book was not properly admitted evidence." *Id.*

Moreover, in a case involving slightly different facts, the Pennsylvania Supreme Court vacated a death sentence when the prosecutor told the jury during closing arguments, "As the Bible says, 'and the murderer shall be put to death.' " *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630, 644 (1991). There, the prosecutor did not invoke well-known Biblical aphorisms reminding jurors to follow the law but instead sought to "interject[ ] religious law as an additional factor for the jury's consideration which neither flows from the evidence or any legitimate inference to be drawn therefrom." *Id.*; *see also Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir.2001) ("[A] prosecutor misleads a capital sentencing jury when he quotes scripture as higher authority for the proposition that death should be mandatory for anyone who murders his parents.").

The Ninth Circuit, sitting en banc, refused to determine one way or the other whether the jury's reliance on the Bible constituted an external influence. *Fields v. Brown*, 503 F.3d 755, 781-82 (9th Cir.2007) (en banc). In that case, a juror made notes "for" and "against" the death penalty based on his review of the Bible at home and then brought those notes into the jury room. *Id.* at 777-78. The court held, "[W]e do not need to decide whether there was juror misconduct because even assuming there was, we are persuaded that [the juror's notes] had no substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 781.

The only circuit to hold that the Bible is not an external influence is the Fourth Circuit. In *Robinson v. Polk*, 438 F.3d 350 (4th Cir.2006), a juror asked the

bailiff for a Bible and then read several passages out loud in the jury room-including at least one referring to "an eye for an eye"-to convince the other jurors to vote for a death sentence. *Id.* at 357-58. The court ruled that "reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence." *Id.* at 364. " [P]recisely because the Bible occupies a unique place in the moral lives of those who believe in it, its teachings cannot blithely be lumped together with a private communication, contact, or tampering with a juror without clear guidance from the Supreme Court." *Id.* at 366; see also *Lenz v. Washington*, 444 F.3d 295, 310-12 (4th Cir.2006) (following *Robinson*); *Billings v. Polk*, 441 F.3d 238, 248 (4th Cir.2006) (holding that a juror's reading of the Bible at home to assist his decision process did not raise a presumption of prejudice); *Burch v. Corcoran*, 273 F.3d 577, 591 (4th Cir.2001) (stating that the jury's consultation of a Bible was not "improper jury communication" because the "Bible quotes, whether stated from memory or read from the book, were ... statements of folk wisdom or of cultural precepts"). Judge King wrote a vigorous dissent in *Robinson*, which, given the Supreme Court's clear guidance regarding external influences and the analysis from the rest of the circuits, we find more persuasive than the majority's opinion. *See Robinson*, 438 F.3d at 368 (King, J., dissenting in part). Further, although we part company with the Fourth Circuit and join the majority of other courts to pass upon this issue, we note that the Fourth Circuit's cases are distinguishable in that they all involved a juror reading general Biblical statements, as opposed to a command that directly tracked the specific facts of those cases.

This analysis persuades us that when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line. The Supreme Court counsels us that a jury may not consult material that is outside the law and evidence in the case. The Bible passages in question here were not part of the law and evidence that the jury was to consider in its deliberations. Moreover, the jurors did not simply discuss their own understanding of religious law and morality or quote Bible passages from memory to aid the discussion. Instead, the jurors referenced a specific passage that stated that someone who engages in a particular act-striking a person with an object and killing him, as Oliver did to Collins-is a murderer and must be put to death. Most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence. Here, we face facts that are even more egregious than in those previous cases, as the

jurors consulted a specific passage that provided guidance on the appropriate punishment for this particular method of murder. As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.

The question before us is not whether a juror must leave his or her moral values at the door or even whether a juror may consult the Bible for his or her own personal inspiration during the deliberation process. This case is also not about whether jurors must forget that, generally, the Bible includes the concept of an "eye for an eye." *See Burch*, 273 F.3d at 591 (noting that the "Bible quotes, whether stated from memory or read from the book, were ... statements of folk wisdom or of cultural precepts"). Therefore, we need not address these issues. Instead, here, several jurors collectively consulted a Bible, in the jury room, and likely compared the facts of this case to the passage that teaches that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death.

The state urges us to consider solely whether the Bible passage at issue had any bearing on the factual questions the jury had to decide during the sentencing phase: whether Oliver presented a threat of future dangerousness and whether there was mitigating evidence to warrant a sentence of life imprisonment instead of death. This argument misses the mark. The Bible served as an external influence precisely because it may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into these factual areas. Further, the Bible passage in this instance was evidence of the "circumstances of the offense that militates for ... the imposition of the death penalty." Tex.Code Crim. Proc. Ann. art. 37.071(d)(1) (discussing the instructions the court must give to the jury in a death penalty case).

A contrary holding would eviscerate the rule from *Remmer* that jurors must rely on only the evidence and law presented in an open court room. It may be true that the Bible informs jurors' general outlook of the world and their moral values in particular, and jurors may constitutionally rely upon those morals in their deliberations. *See J.E.B. v. Alabama ex rel.* T.B., 511 U.S. 127, 149, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) (O'Connor, J., concurring) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (internal citation and quotation marks omitted)). But the particular passage at issue here does not generally inform a juror's moral understanding of the world. The jurors did not testify that they knew,

as people of faith, that someone who hits another over the head with an "instrument of iron" or a "hand weapon of wood" so that the person dies is a murderer and should be put to death. Instead, several jurors testified that they read this passage in the Bible while they were in the jury room debating Oliver's fate. Thus, the jury's use of the Bible here amounts to a type of "private communication, contact, or tampering" that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe. 347 U.S. at 229, 74 S.Ct. 450.

C. Harmless Error Analysis

Our inquiry, however, is not complete. We must next determine the effect the Bible had on the jury's decision to impose the death penalty. That is, given that there was a constitutional error because the jury consulted an external influence, we must determine if that constitutional error was harmless. See *Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir.2006) ("If the issue is a mixed question of law and fact, such as the assessment of harmless error, we review the district court's determination de novo.").

Normally, under *Remmer*, if prejudice is likely from the jury's consultation of an external influence, the court may place the burden of rebutting that presumption on the state. *See Remmer*, 347 U.S. at 229, 74 S.Ct. 450; United *States v. Sylvester*, 143 F.3d 923, 934 (5th Cir.1998) (stating that "only when the court determines that prejudice is likely should the government be required to prove its absence"); *see also United States v. Olano*, 507 U.S. 725, 739, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (stating that the ultimate inquiry is whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict"). However, on habeas review, we do not use the normal harmless error analysis. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993); *Pyles v. Johnson*, 136 F.3d 986, 994 (5th Cir.1998). Instead, habeas petitioners are not entitled to relief based on a constitutional error unless the error "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)); *see also Fry v. Pliler*, --- U.S. ----, 127 S.Ct. 2321, 2328, 168 L.Ed.2d 16 (2007) (holding that a federal court must assess the prejudicial impact of a constitutional error in a state court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*).

Other courts to consider the effect of a Bible in the jury room have not faced

similar facts, where the passage the jury read described the defendant's method of killing. For example, in *McNair v. Campbell*, the Eleventh Circuit noted that the two passages that the foreman had read to the jury did not contain "material which would encourage jurors to find a defendant guilty or to recommend the death penalty." 416 F.3d at 1308 (internal quotation marks omitted). Therefore, the Bible passages "merely had the effect of encouraging the jurors to take their obligations seriously and to decide the question of guilt or innocence based only on the evidence." *Id.* at 1309 (internal quotation marks omitted). In addition to the innocuous nature of the Bible passages at issue, the court noted that a juror brought in the extraneous evidence without the imprimatur of the court and that the state's case against the defendant was particularly strong. *Id.* These factors supported the court's view that the Bible passages did not prejudice the jury's decision. *Id.*

Similarly, the Ninth Circuit, sitting en banc, rejected the petitioner's argument of prejudice when a juror made notes "for" and "against" the death penalty based on his review of the Bible at home and then brought those notes into the jury room. *Fields v. Brown*, 503 F.3d 755, 776-82 (9th Cir.2007) (en banc). The court chose not to decide whether the juror's conduct was improper because, either way, the notes did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 781. The court rested its decision of no prejudice on the fact that the juror's notes had both a "for" and "against" part, the notes entered the jury room early in the deliberations and thus jurors could still take as much time as they needed to sort through the evidence and reflect on the appropriate punishment, the jury was instructed to base its decision solely on the facts and the law as presented during the trial, and the aggravating evidence was powerful given that the case involved multiple murders, rape, and kidnapping. *Id.* at 781-82.

While the facts before us regarding the jury's use of the Bible are perhaps more egregious than in these previous cases, the procedural posture here constrains our analysis. This is because here, the state court made a factual finding regarding the effect of the Bible on the jury, and we must defer to that factual finding unless Oliver presents "clear and convincing" evidence to the contrary. See 28 U.S.C. § 2254(e)(1). After hearing the testimony of four jurors at an evidentiary hearing on Oliver's motion for a new trial, the state court ruled that the jurors rendered their decision "in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing." In essence, the state court made a finding that the Bible did not prejudice the jury's decision. The effect of an ex parte communication on

a juror's impartiality is a question of "historical fact." *Rushen v. Spain*, 464 U.S. 114, 120, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (per curiam) (deferring to state court's finding of "historical fact" that the ex parte communications between a judge and a juror did not bias the jury's decision); *see also Patton v. Yount*, 467 U.S. 1025, 1036-37, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984) (holding that the question of juror impartiality is not a mixed question of law and fact but instead is "plainly one of historical fact"). A state court's post-trial factual finding regarding a juror's impartiality is entitled to a "presumption of correctness." *Rushen*, 464 U.S. at 120, 104 S.Ct. 453.

For example, in *Moody v. Johnson*, the state court conducted two evidentiary hearings and determined that the improper conversation between the bailiff and one of the jurors did not impact the jury's deliberations. 139 F.3d 477, 483 (5th Cir.1998). On habeas review, we noted that "[t]he determination of whether there was any improper conduct and its [e]ffect, if any, on juror impartiality are questions of historical fact that 'must be determined, in the first instance', by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts.' " *Id.* (*citing Rushen*, 464 U.S. at 120, 104 S.Ct. 453); *see, e.g., Schaff v. Snyder*, 190 F.3d 513, 534-35 (7th Cir.1999) (deferring to state court's post-trial factual finding that the extraneous statement the jury had heard regarding other similar charges against the defendant did not bias the jury's decision); *Crease v. McKune*, 189 F.3d 1188, 1193 (10th Cir.1999) (deferring to state court's factual finding that improper communication between the judge and a juror did not prejudice the habeas petitioner). In contrast, if the state court does not make factual findings regarding the effect of an external influence on the jury, then we simply conduct a harmless error analysis using the *Brecht* standard without having to defer to any state court findings. *See, e.g., Pyles*, 136 F.3d at 994-95 (analyzing the prejudicial effect of a juror improperly visiting the crime scene without mentioning whether the state court made any factual findings). But see *Dorsey v. Quarterman*, 494 F.3d 527, 531 (5th Cir.2007) (conducting a harmless error analysis without explicitly deferring to the state court's conclusion that the jury could continue deliberating even though two jurors had viewed evidence not in the record).

Oliver has failed to demonstrate that the state court's finding that the Bible did not influence the jury lacks "even fair support in the record." *Rushen*, 464 U.S. at 120, 104 S.Ct. 453 (internal quotation marks omitted). Although the record includes evidence that cuts both ways, given the highly deferential standard of habeas review, we conclude that at least four factors provide "fair

support in the record" for the state court's finding. *See id.; see also Nelson v. Quarterman*, 472 F.3d 287, 310 (5th Cir.2006) (en banc) ("We are mindful that under AEDPA a federal court may not grant habeas relief simply because it disagrees with the state court's resolution of an issue...."). First, there is contradictory evidence regarding whether the jurors' consultation of the Bible occurred before or after the jury reached its decision. Second, several jurors testified that the Bible was not a focus of their discussions. Third, the court instructed the jury that "[i]n deliberating upon the cause you are not to refer to or discuss any matter or issue not in evidence before you" and that "you are bound to receive the law from the Court."[18] Fourth, the jurors brought the Bibles into the jury room by themselves and without the imprimatur of the court. While Oliver makes several arguments that the Bible passages might have swayed the jury, he has not presented clear and convincing evidence to rebut the presumption of correctness that we must afford to the state court's factual finding, particularly given that the state court heard from the jurors themselves and concluded that the Bible did not prejudice their decision. *See Rushen*, 464 U.S. at 120, 104 S.Ct. 453 ("This finding of 'fact'-on a question the state courts were in a far better position than the federal courts to answer-deserves a high measure of deference ...." (internal quotation marks and citation omitted)); *Young v. Herring*, 938 F.2d 543, 559 n. 8 (5th Cir.1991) (noting that the trial judge is "uniquely qualified to appraise the prejudicial effect of a communication on the jury"). As Oliver has not presented clear and convincing evidence to rebut the state court's finding that the Bible did not influence the jury's decision, we cannot say that the jury's use of the Bible had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S.Ct. 1710.

541 F.3d 334-44. [footnotes omitted]

The trial court addressed the issue of the Bible having been in the jury room and all jurors acknowledged they would "base their verdict on the evidence presented" and the "instructions of law." The jurors further agreed that they could "disregard that source and put it out of [their] mind[s] and base [their] decision[s] solely. . .on the evidence and the law and the instructions" given them and "nothing else." Tr. 1305-6. There was no prejudice. The Appellant's argument is without merit and she is therefore entitled to no relief on this

assignment of error.

3. FULGHAM'S ARGUMENT REGARDING STATE'S EXHIBIT 12 IS WITHOUT MERIT

Fulgham argues next that the trial court committed error in admitting State's Exhibit 12. App. at 54. The State would submit that this claim is without merit. As the Appellant correctly states, "State's Exhibit 12 was marked for identification purposes during the testimony of Kyle Harvey." App. at 53, (Tr. 796). This exhibit was later admitted into evidence during the cross-examination of Dr. Mark Webb. Tr. 1104. In *Burns v. State*, 729 So.2d 203 (1998), the Court discussed such a claim holding:

> ¶ 63. The State argues that there were four witnesses who testified as to the authenticity of the letters-Willie Agnew, a male trustee at the jail, testified that he received letters from Burns that were to be delivered to Contina Kohlheim; Officer Bell, the jail administrator, testified that he took known writing samples from Burns; Ted Burkes, a document examiner with the State Crime Lab, testified that the letters written to Kohlheim were "probably prepared" by Burns and that a comparison of the signatures on the letters and the known sample revealed a "strong probability" that they were written by the same person; Contina Kohlheim testified that she received letters she believed to be written by Burns while they were both incarcerated in the Tupelo City Jail; and Kenneth Gill, a fingerprint examiner with the Mississippi Crime Lab, testified that Burns' fingerprints were on the letters received from Kohlheim purportedly written by Burns.
>
> ¶ 64. This Court has held that "[r]elevancy and admissibility of evidence are largely within the discretion of the trial court and this Court will reverse only where that discretion has been abused." *Hentz v. State*, 542 So.2d 914, 917 (Miss.1989) (citing *Burt v. State*, 493 So.2d 1325, 1326 (Miss.1986); *Carter v. State*, 310 So.2d 271, 273 (Miss.1975); and M.R.E. 103(a)). In *Hentz*, this Court further said that the admissibility of the letters only becomes a concern once they have been authenticated. *Id.* "A person's handwriting may be authenticated by a handwriting expert or by a lay witness with a prior familiarity with that person's handwriting." *Id.* (citing *Henry v. State*, 484

So.2d 1012, 1014 (Miss.1986); and M.R.E. 901(b)(2)). Rule 901 reads in its pertinent part as follows:

> Rule 901. Requirement of Authentication Or Identification
>
> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustration. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> (1) Testimony of Witness With Knowledge. Testimony that a matter is what it is claimed to be.
>
> (2) Non-expert Opinion on Handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
>
> (3) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
>
> * * * * * *
> (10) Other Methods. Any method of authentication or identification provided by the Mississippi Supreme Court or by the Constitution of Mississippi.

729 So.2d at 217-19.

Kyle Harvey, Fulgham's boyfriend, was certainly familiar with her handwriting, and testified that the letter was written by the Appellant after having been properly qualified to do so. Tr. 796. The trial court did not therefore abuse its discretion in admitting State's Exhibit 12. As the Court in *Burns, supra*, held:

¶ 73. It was within the discretion of the trial judge to determine whether there was sufficient evidence to determine whether Burns wrote the letters. *Gayten v. State*, 595 So.2d 409, 415-16 (Miss.1992); Miss.R.Evid. 104(b). Upon a determination that Burns wrote the letters, they are admissions. As discussed above, there was adequate evidence to link Burns to the letters. The trial judge did not abuse his discretion in allowing the letters to be admitted into evidence.

729 So.2d at 220.

There was certainly "adequate evidence to link [Fulgham] to the letter" in this case. *Id.* The trial court did not, therefore, abuse its discretion in admitting State's Exhibit 12 into evidence. Should the Court however, determine there was an abuse of discretion in admitting State's Exhibit 12, the State submits the error was harmless considering the testimony of Dr. Mark Webb. During the cross-examination of Dr. Webb the following exchange occurred:

EXAMINATION BY MS. FAVER: (Cont'g)

Q. Lastly, Doctor. I'm going to ask you to read State's Exhibit 12 marked for identification that was also written by this defendant at the time she was in the county jail in June 2003.

A. Okay.

Q. Doctor, did you review those letters prior to giving you opinion, not only in September of '04, but in your update of April of '06?

A. No, they don't look familiar.

Q. Doctor, not - - without going into such graphic details of the second letters, how would you describe the person who wrote those?

A. A person who is, again, back in a dysfunctional male relationship.

Q. A person who is incarcerated in the county jail who writes letters to a trusty that she has no physical contact with, can't get to him, and writes things about

having wet dreams, how she wants him to send his boxer shorts into her cell so she can be close to him, a month after her husband is killed, that she supposedly loves so much, that's a dysfunctional person to you?

A. Yes.

Tr. 1003.

The question posed to Dr. Webb in this exchange clearly details the contents of Fulgham's letter identified as State's Exhibit 12. The jury was therefore presented with this information through the cross-examination of Dr. Webb without objection. *Id.* The Appellant did not object to the questioning of Dr. Webb which detailed the contents of the letters and for that matter did not at any time during the guilt or sentencing phase assert that the letter was not indeed written by Fulgham while incarcerated. Therefore, any claim that the Appellant suffered prejudice as a result of the trial court's admission of State's Exhibit 12 into evidence is without merit. The Appellant cannot prevail on this claim as she has failed show that the trial court abused its discretion in allowing the introduction of State's Exhibit 12 into evidence and further that Fulgham has failed to demonstrate the prejudice necessary to provide her with the relief she seeks. Again, the State submits this claim is without merit. The Appellant is entitled to no relief on this assignment of error.

4. THE TRIAL COURT'S USE OF THE PECUNIARY GAIN AGGRAVATOR WAS NOT ERROR

The Appellant argues that the trial court committed error in granting the pecuniary gain aggravator found in Miss. Code Ann. § 99-19-101(5)(f). App. at 68. The State submits the trial court's use of this aggravator was proper considering the facts of this case and was

therefore not violative of this Court's previous holdings in *Willie v. State*, 585 So.2d 660 (Miss. 1991) or *Ladner v. State*, 584 So.2d 743 (Miss. 1991). Fulgham's argument is without merit.

In *Willie v. State, supra*, the Court condemned the trial court's combined use of the robbery and pecuniary gain aggravators holding:

> The trial judge instructed the jury that it could consider four aggravating circumstances. The jury unanimously found two-that the capital murder was committed while Willie was engaged in the commission of the crime of robbery and the capital murder was committed for pecuniary gain. Willie asks that we revisit our prior decisions whereby we have held that these two aggravators may be given as separate and distinct aggravating circumstances.
>
> Our recent decision in *Ladner v. State*, 584 So.2d 743 (Miss.1991), significantly affects this issue. Prior to *Ladner*, we allowed a jury to consider both aggravators in its deliberations on the grounds that "[t]he evidence supports both as it reveals the robbery was committed for pecuniary gain during the course of which the homicide occurred," and proof of one aggravator was sufficient for the jury to impose a sentence of death. *Tokman v. State*, 435 So.2d 664, 669 (Miss.1983), cert. denied, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984). However, we recommended that trial judges use caution and close scrutiny. *Jones v. State*, 517 So.2d 1295, 1300 (Miss.1987), reversed on other grounds, 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988).
>
> *In Ladner, we observed that in a particular case the evidence may be such that the aggravating circumstances of robbery and pecuniary gain are both clearly supported by the evidence.* In the absence of such a case, we held that the pecuniary gain aggravator should not be given. *Ladner*, 584 So.2d 743.
>
> Today, we go one step further. Not only should the two aggravators not be given as separate and independent aggravators *when they essentially comprise one*, they may not be given. When life is at stake, a jury cannot be allowed the opportunity to doubly weigh the commission of the underlying felony and the motive behind underlying felony as separate aggravators. Accord, *People v. Bigelow*, 37 Cal.3d 731, 209 Cal.Rptr. 328, 340, 691 P.2d 994, 1006 (1984),

> modified by 44 Cal3d 375, 243 Cal.Rptr. 842, 749 P.2d 279 (1988), cert. denied, 488 U.S. 871, 109 S.Ct. 188, 102 L.Ed.2d 157 (1988); *Cook v. State*, 369 So.2d 1251, 1256 (Ala.1978); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867, 874 (1977), cert. denied, 434 U.S. 912, 98 S.Ct. 313, 54 L.Ed.2d 198 (1977); *Provence v. State*, 337 So.2d 783, 786 (Fla.1976), cert. denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). To the extent that *Wiley v. State*, 484 So.2d 339 (Miss.1986), cert. denied, 479 U.S. 906, 107 S.Ct. 304, 93 L.Ed.2d 278 (1986), our seminal case on this issue, and its progeny dictate otherwise, these cases are hereby overruled. *See Wiley*, 484 So.2d at 351 and progeny, including *Minnick v. State*, 551 So.2d 77, 96-97 (Miss.1988), reversed on other grounds, 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); *Jones v. State*, 517 So.2d 1295, 1300 (Miss.1987), reversed on other grounds, 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988); see also, cases preceding *Wiley*, including *Gray v. State*, 472 So.2d 409, 419 (Miss.1985), reversed on other grounds, 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987); *Jordan v. State*, 464 So.2d 475, 478 (Miss.1985), vacated on other grounds, 476 U.S. 1101, 106 S.Ct. 1942, 90 L.Ed.2d 352 (1986); *Booker v. State*, 449 So.2d 209, 221 (Miss.1984), vacated on other grounds, 472 U.S. 1023, 105 S.Ct. 3493, 87 L.Ed.2d 626 (1985); *Irving v. State*, 441 So.2d 846, 849 (Miss.1983); *Tokman v. State*, 435 So.2d 664, 668 (Miss.1983), cert. denied, 467 U.S. 1256, 104 S.Ct. 3547, 82 L.Ed.2d 850 (1984); *Gilliard v. State*, 428 So.2d 576, 586 (Miss.1983), cert. denied, 464 U.S. 867, 104 S.Ct. 40, 78 L.Ed.2d 179 (1983); and *Smith v. State*, 419 So.2d 563, 568 (Miss.1982), cert. denied, 460 U.S. 1047, 103 S.Ct. 1449, 75 L.Ed.2d 803 (1983). This decision is to be prospective and will take effect from this date forward.
>
> 585 So.2d at 680-81. [emphasis added]

The facts of this case make it distinguishable from those noted by the Court in both *Willie* and *Ladner*. The trial court was keenly aware of the Court's holding in both Willie and Ladner as well as the distinction which would allow the granting of both aggravators as the following exchange clearly shows:

> BY MR. LAPPAN: . . . With that objection noted, Mr. Clark is correct, the Supreme Court has spoken. When you have a capital indictment underlying offense being robbery, and you have a pecuniary gain aggravator, it's

duplicative, that's Willie v. State, and it's - -

BY THE COURT: Might not - -

BY MR LAPPAN: Yeah, Willie v. State. Is it Ladner? Ladner v. State, Your Honor. So that's as he said, double dipping.

Secondly, Judge, just to address what Mr. Clark stated, if Kristi Fulgham is sentence to death, she's sentenced on this conviction. Not for any other conduct. She was convicted of capital murder.

And so we would - - object to pecuniary gain, but actually, Judge I - - I also, as to the SSP-4-B instruction, I have some more objections, if I may, to the aggravators.

BY THE COURT: On the pecuniary gain - -

BY MR. LAPPAN: Yes, sir.

BY THE COURT: - - aggravator, it is impermissible to have both, if robbery is the underlying felony and pecuniary gain. You can't have them both.

BY MR. LAPPAN: Yes, sir.

BY THE COURT: In one. The life insurance issue is not the pecuniary gain that makes it capital murder, is it?

BY MR. CLARK: No, sir, Your Honor.

BY THE COURT: The pecuniary gain type aggravator goes to another type of conduct, does it not?

Tr. 1201-02.

After closely scrutinizing the facts of this case and recognizing that the pecuniary gain aggravator went to the life insurance proceeds, separate and distinct from the robbery, the

trial court properly determined both aggravators were warranted.[2] The facts of this case clearly supported both aggravators as the trial court properly held. The Appellant's claim is without merit and she is therefore entitled to no relief on this assignment of error.

5. FULGHAM'S CLAIM THAT THE USE OF THE UNDERLYING FELONY AS AN AGGRAVATING CIRCUMSTANCE IS WITHOUT LEGAL MERIT AS IS THE CLAIM CHALLENGING THE SUFFICIENCY OF THE INDICTMENT

The Appellant argues next that the trial court erred in submitting jury instruction SSP-4-B to the jury. App. at 73. In truth, the Appellant is raising two issues this Court has previously decided on numerous occasions, that being whether the decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002), apply to Mississippi's capital murder sentencing scheme. They do not, as presented in the case sub judice. See *Berry v. State*, 882 So.2d 157 (Miss.2004); *Jordan v. State*, 918 So.2d 636 (Miss. 2005). The Appellant's claim that the use of the underlying felony of robbery as an aggravating circumstance is improper, is devoid of legal merit. In *Ross v. State*, 954 So.2d 968 (Miss. 2007):

> ¶ 120. Relying primarily on *Ring* and *Apprendi*, Ross maintains that the use of the underlying felony of armed robbery as an aggravating circumstance upon which the jury relied in returning a sentence was improper. However, evidence of the underlying crime can properly be used both to elevate the crime to capital murder and as an aggravating circumstance. *See Bennett*, 933 So.2d at 954; *Goodin v. State*, 787 So.2d 639, 654 (Miss.2001); *Smith*, 729

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[2]The Appellant makes much of the trial court's consideration of this Court's holding in *Byrom v. State*, 863 So.2d 836 (Miss. 2003) as support for the pecuniary gain aggravator, however, such protestations are of no moment as the facts in this case clearly support both aggravators.

So.2d at 1223; *Bell v. State*, 725 So.2d 836, 859 (Miss.1998); *Crawford v. State*, 716 So.2d 1028, 1049-50 (Miss.1998). Furthermore, the United States Supreme Court has held that there is no constitutional error in using the underlying felony as an aggravator. *Lowenfield v. Phelps*, 484 U.S. 231, 233, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). The Supreme Court stated in *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), that "[t]he aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."

¶ 121. The use of the underlying felony as an aggravator was not error.

954 So.2d at 1014.

This claim is without legal merit as is Fulgham's claim challenging the sufficiency of the indictment. In *Goff v. State*, 14 So.3d 625 (Miss. 2009), the Court recently revisited a challenge to the sufficiency of an indictment, such as the one presented here and held:

¶ 172. Count I of the indictment, which charges Goff with capital murder pursuant to Mississippi Code Section 97-3-19(2)(e), that Goff:

> In George County, Mississippi, on or about August 27, 2004, did then and there willfully, unlawfully, and feloniously, and with or without any design to effect the death, kill and murder Brandy S. Yates, a human being, while in the commission of the crime and felony of Robbery, as defined by Section 97-3-73, Miss.Code of 1972, as amended.

¶ 173. Goff argues that his death sentence must be vacated because the indictment failed to include a statutory aggravating factor or the mens rea standard required for capital murder. In support of this argument, Goff cites *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

¶ 174. This Court repeatedly has rejected this type of argument. *See, e.g., Spicer*, 921 So.2d at 319; *Brown v. State*, 890 So.2d 901, 918 (Miss.2004); *Stevens v. State*, 867 So.2d 219, 225-27 (Miss.2003). We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. *Spicer*, 921 So.2d at 319

(citing *Brown*, 890 So.2d at 918).

> ¶ 175. The purpose of an indictment is to furnish the defendant with notice and a reasonable description of the charges against him so that he may prepare his defense. *Spicer*, 921 So.2d at 319 (citing *Williams v. State*, 445 So.2d 798, 804 (Miss.1984)). An indictment is required only to have a clear and concise statement of the elements of the crime with which the defendant is charged. *Id.*
>
> ¶ 176. Under Mississippi law, the underlying felony that elevates the crime to capital murder must be identified in the indictment along with the section and subsection of the statute under which the defendant is being charged. *Bennett v. State*, 933 So.2d 930, 952 (Miss.2006) (citing Miss.Code Ann. § 99-17-20). In addition, "[o]ur death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment." *Spicer*, 921 So.2d at 319 (quoting *Brown*, 890 So.2d at 918).
>
> ¶ 177. When Goff was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required. *See Stevens*, 867 So.2d at 227. This assertion of error is without merit.
>
> 14 So.3d at 655.

This claim is also without legal merit. *Id*; see also *Lynch v. State*, 951 So.2d 549 (Miss. 2007); *Brawner v. State*, 947 So.2d 254 (Miss. 2006). The Appellant is therefore entitled to no relief on either of these assignments of error.

6. THE APPELLANT'S ARGUMENT CONCERNING HER JUNE 2, 2004 STATEMENT IS WITHOUT MERIT

The Appellant's next argument is that the trial court committed error in refusing her motion to suppress her statement. App. at 81. The State submits this claim is barred from consideration and is alternatively devoid of merit.

As the Appellant concedes, [t]he State neither introduced nor mentioned any of Ms. Fulgham's custodial statements during the first phase of this matter." App. at 85. Nor did the State introduce her statement during the penalty phase. The "gravamen" of the Appellant's claim centers on the penalty phase cross examination by the State of Dr. Mark Webb which follows, in pertinent part:

> Q. Okay. Doctor, the other collateral sources that you listed here is statements to George Carrithers. May I have those, please? You reviewed these also, did you not, Doctor?
>
> A. Correct.
>
> Q. I believe there's two separated statements. May 12th, and then again on June 2nd. May I approach the witness, Your Honor?
>
> BY THE COURT: You may.
>
> A. Okay.
>
> Q. Those are the other statements that you reviewed after the two-year period back in 2006, when you gave your update; is that correct?
>
> A. That's correct.
>
> Q. And I believe your testimony is even after reviewing those statements, where she completely blames everything on her 13-year-old brother, and says he did it, he did it, he did it, that still would not change your diagnostic impression of this defendant?
>
> A. It would not change my actual diagnosis of her PTSD and panic disorder, no.
>
> Tr. 1099-1100.

Although the Appellant failed to object to this exchange and while the State would relish an

assertion of the contemporaneous objection bar, this Court's recent decision in *Goff,supra*, suggests otherwise. *See Goff*, 14 So.3d 625, 640. In *Sanders v. State*, 835 So.2d 45 (Miss. 2003) the Court detailed the standard necessary for overturning a trial court's ruling on a motion to suppress, holding:

> ¶ 15. This Court in *Baldwin v. State*, 757 So.2d 227 (Miss.2000), discussed the heavy burden which must be met in order for an appellate court to overturn a trial court's decision regarding a motion to suppress:
>
> > A trial court is also given deference in the admissibility of an incriminating statement by a criminal defendant. In *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996), this Court held that the defendant seeking to reverse an unfavorable ruling on a motion to suppress bears a heavy burden. The determination of whether a statement should be suppressed is made by the trial judge as the finder of fact. *Id.* "Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence." *Balfour v. State*, 598 So.2d 731, 742 (Miss.1992); *Alexander v. State*, 736 So.2d 1058, 1062 (Miss.Ct.App.1999).
>
> *Baldwin*, 757 So.2d at 231. "Where, on conflicting evidence, the lower court admits a statement into evidence this Court generally must affirm." *Dancer v. State*, 721 So.2d 583, 587 (Miss.1998) (citing *Morgan v. State*, 681 So.2d 82, 87 (Miss.1996)).
>
> ¶ 16. The United States Supreme Court and this Court have consistently held when a suspect invokes his right to counsel, all interrogation must cease until the lawyer is present, unless the suspect himself reinitiates communication with the police. *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Grayson v. State*, 806 So.2d 241 (Miss.2001); *Mettetal v. State*, 602 So.2d 864 (Miss.1992). The United States Supreme Court in *Edwards* stated that:
>
> > [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be

> established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. [An accused], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1884-85.

¶ 17. In *Mettetal v. State*, 602 So.2d 864 (Miss.1992), the defendant, after killing a Panola County Deputy Sheriff in an attempt to escape custody, made a full confession and waiver of rights to law enforcement officials. Mettetal filed a pre-trial motion to suppress his statement, but his motion was denied. *Id.* at 867. At the hearing, Mettetal argued he made repeated requests for an attorney, but he was never provided with legal counsel. *Id.* Law enforcement officials testified Mettetal never requested an attorney, and had he made such a request, the interrogation would have stopped and an attorney would have been provided. *Id.* at 867-68. This Court held the trial court used the correct standard in denying the motion to suppress. *Id.* at 868. Mettetal testified he understood his rights, and his contention that he asked for an attorney was refuted by three different law enforcement officials. *Id.*

¶ 18. In *Grayson v. State*, 806 So.2d 241 (Miss.2001), the defendant was interrogated by law enforcement officials and requested a lawyer four times before the interview ceased. However, several days later the defendant re-initiated conversation with the Sheriff's Department and made a written statement during the interview. *Id.* at 246-47. This Court held the defendant "clearly waived any right to an attorney he might theoretically have had at the time he confessed." *Id.* at 248.

¶ 19. According to the record, especially Sanders's own testimony at the suppression hearing, Sanders did not request an attorney, if he requested an attorney at all, until after Sheriff Pace asked him if he would like to discuss his arrest. He stated he would rather wait until his attorney was present. His statement then indicates that Sanders re-initiated the conversation with the sheriff and undersheriff by discussing his charges and the possible punishment he could receive. The trial court used the correct standard in finding that Sanders offered to talk to the sheriff after being advised of his constitutional rights, and thus, waived his Sixth Amendment right to counsel.

¶20. Sanders also claims his statement was not voluntary due to the fact he was promised a charge of murder instead of capital murder if he confessed. However, both Sheriff Pace and Undersheriff Riggs testified no promises were made to Sanders to induce him to give a statement. The trial court again used the correct standard in finding Sanders's statement was given freely and voluntarily. He was advised of his rights at least three times, and on one of those occasions was able to recite his rights back to the sheriff. In *Crawford v. State*, 716 So.2d 1028, 1037 (Miss.1998), this Court stated:

> [W]hether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or made a decision contrary to the overwhelming weight of the evidence. *Balfour v. State*, 598 So.2d 731, 742 (Miss.1992).

The trial court's ruling is supported by the record and, therefore, is affirmed by this Court.

835 So.2d at 50-1. [footnote omitted]

While the Appellant rages over the trial court's denial of the motion to suppress, the record is clear. Fulgham initiated contact with officers and gave a proper waiver of her right to counsel. The suppression hearing conducted on the matter clearly shows the trial court's desire to apply the proper standard. C.P. 825 - 898. In the Order denying the motion to suppress, the trial court issued findings of fact and conclusions of law in keeping with the prior decisions of this Court regarding such claims. C.P. 902. The trial court applied the correct legal standard, exhibited no manifest error, and the decision to deny the motion to suppress was in no way contrary to the overwhelming weight of the evidence. *See Sanders, supra*. The trial court did not abuse its discretion in denying the Appellant's motion to suppress her June 2, 2003 statement. This claim is without merit and the Appellant is entitled

> So.2d 468 (Miss.1984); *Booker v. State*, 449 So.2d 209 (Miss.1984). In *Evans v. State*, 422 So.2d 737, 747 (Miss.1982), as in *Doss*, this Court held that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the manner in which it was committed as well as the defendant. Like the defendant in *Doss*, the defendant in Evans had shot a store clerk during the course of a store robbery.
>
> 14 So.3d at 670.

The Appellant shot and killed Joey Fulgham during the course of a robbery. Additionally, the Appellant murdered Joey Fulgham for pecuniary gain, the proceeds from his life insurance policies. The record clearly supports the conviction and sentence of death. The Appellant's clam that "the jury . . . [was not] made aware of the child neglect suffered by Ms. Fulgham and the extent of the love that she and her children maintain for each other" is specious in light of the arguments presented in Claim 1., *supra*, which the Appellee incorporates herein. The jury, in fact, did hear such testimony from witnesses. This claim is without merit and the Appellant is entitled to no relief on this assignment of error.

8. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING JURY INSTRUCTION D-77A

The Appellant next subscribes error to the trial court for refusing jury instruction D-77A which reads:

> The Court instructs the jury that if the State has relied on circumstantial evidence to establish an aggravating circumstance, then the evidence for the State must be so strong as to establish the aggravating circumstances not only beyond a reasonable doubt, but must exclude every other reasonable hypothesis other than establishment of the aggravating circumstance.
>
> Put differently, all of the facts and circumstances, taken together, must be inconsistent with any with any reasonable theory or conclusion other than the

existence of the aggravating circumstance. All of the facts and circumstances, taken together, must establish to your satisfaction the existence of the aggravating circumstances beyond a reasonable doubt.

C.P. 1138.

While the Appellant offers a litany of cases in support of her claim that she was entitled to this instruction none stand for that proposition. As the trial court duly noted, this instruction did not "carry over to the sentencing phase, according to the current status of the law." Tr. 1217. The Appellant was not entitled to this instruction pursuant to this Court's holding in *King v. State*, 960 So.2d 413 (Miss. 2007):

> ¶ 69. King argues that the trial court erred in refusing to give jury instruction DSP-19, which required that the State's evidence be strong enough "to exclude every other reasonable hypothesis, or supposition" and that "facts or circumstances in this case acceptable to two reasonable interpretations" be resolved in the defendant's favor, because the State's case rested entirely on circumstantial evidence. King argues that while he confessed to the burglary, he did not confess to Patterson's killing or any of the facts supporting the HAC and "avoiding arrest" aggravators. Therefore, King argues that the jury's finding of those aggravators could have been based only on inferences from circumstantial evidence, amounting to reversible error by the trial court in refusing to give instruction DSP-19. The State submits that this case is not entirely circumstantial, as King's admission to being in Patterson's home and burglarizing it took this case out of the realm of pure circumstance.
>
> ¶ 70. In *Lynch v. State*, 877 So.2d 1254, 1268 (Miss.2004), this Court discussed the issue of whether circumstantial evidence language is required in a sentencing instruction. This Court held that:
>
> > [I]t is true that in circumstantial evidence cases the state must prove the defendant's guilt beyond a reasonable doubt and to the exclusion of every other hypothesis consistent with innocence. *See, Jones*, 797 So.2d at 927; *Henderson*, 453 So.2d at 710; *Jackson v. State*, 684 So.2d 1213, 1229 (Miss.1996) (quoting *Isaac v. State*, 645 So.2d 903, 909 n. 7 (Miss.1994)). However, this Court has never held that circumstantial

> evidence language is required in charging the jury as to the requirements of Miss.Code Ann. § 99-19-101(7).
>
> In order to impose the death penalty, a Mississippi jury must make a written finding of one or more of the following factors:
>
> (a) The defendant actually killed;
>
> (b) The defendant attempted to kill;
>
> (c) The defendant intended that a killing take place;
>
> (d) The defendant contemplated that lethal force would be employed.
>
> ....
>
> [W]e conclude that the jury instruction is not clearly erroneous because it comports with the requirements of Miss.Code Ann. § 99-19-101(7) and this Court's jurisprudence regarding the State's burden of proof as to the elements set out in the statute. *Id.*
>
> As we previously discussed, Instruction SSP-4A properly set out the requirements under Miss.Code Ann. § 99-19-101(7)(Rev.2000). See supra Issue X(A). Further, the jury's finding that King actually killed Patterson indicates its rejection of any other reasonable hypothesis of his participation in the crime. Therefore, King's argument that he was entitled to DSP-19 based on the circumstantial evidence as to whether he killed Patterson is without merit. Further, we have already found the trial court did not err in giving the instructions on the HAC or "avoiding arrest" aggravators, as these were sufficiently supported by the evidence. See supra Issues IX and X(C). Accordingly, we find this issue devoid of merit.
>
> 960 So.2d at 446-7.

The Appellant's claim that she was entitled to this circumstantial instruction at sentencing is clearly contrary to the prior holdings of this Court. *Id.* The Appellant's argument is without merit and she is entitled to no relief on this assignment of error.

9. THE ASSIGNMENT OF ERROR CONTENDING THAT THE TRIAL COURT ERRED IN REFUSING JURY INSTRUCTION D-77B IS WITHOUT MERIT.

The Appellant next contends that the trial court committed error in refusing jury instruction D-77B, which reads:

> During the penalty phase, I instruct you that if there be a fact or circumstance in this case which is susceptible of two interpretations, one favorable and the other unfavorable to Ms. Fulgham and if, after considering all the other facts and circumstances, there is a reasonable doubt regarding the correct interpretation, then you must resolve such doubt in favor of Ms. Fulgham and place upon such fact or circumstance the interpretation most favorable to Ms. Fulgham.
>
> C.P. at 1140.

Recently, in *Goff v. State*, 14 So.3d 625 (Miss. 2009), the Court succinctly stated the history of the two-theory instruction such as the one challenged in the case sub judice and held as follows:

> ¶ 148. Goff asserts that the trial court erred by refusing to grant a properly submitted circumstantial evidence (two-theory) instruction citing *Parker v. State*, 606 So.2d 1132, 1140-41 (Miss.1992). Goff contends that, because this was a purely circumstantial evidence case, he was entitled to the instruction, and the court's denial of the instruction resulted in the jury not being fully and fairly instructed on the law, thus mandating reversal.
>
> ¶ 149. Goff sought to invoke the so-called "two-theory" circumstantial evidence instruction by submitted instruction D-14, which reads:
>
> > The Court instructs the jury that if there may be a fact or circumstance in this cause susceptible of two interpretations, one favorable and the other unfavorable to the Defendant, and when the jury has considered such fact or circumstance with all other evidence, there is a reasonable doubt as to the correct interpretation, then you, the jury, must resolve such doubt in favor of the Defendant, and place upon such fact or

circumstance the interpretation most favorable to the Defendant.

¶ 150. The trial court refused the instruction on the basis that Goff was not entitled to both it and the typical circumstantial-evidence instruction (to the exclusion of every reasonable hypothesis consistent with innocence), and because the necessary burden of proof was included in the elements instruction.

¶ 151. This Court has held in matters where the case is based on "purely" circumstantial evidence, that the defendant is entitled to a two-theory instruction, as well as the general circumstantial-evidence instruction. *Parker*, 606 So.2d at 1140-41 (quoting *Henderson v. State*, 453 So.2d 708, 710 (Miss.1984)). However, despite Goff's contention to the contrary, *Parker* is distinguishable from the case *sub judice*. As we explained, a circumstantial-evidence case (for the purposes of granting a "two-theory" instruction) is one in which there is neither an eyewitness nor a confession to the crime. *State v. Rogers*, 847 So.2d 858, 863 (Miss.2003) (citing *Mangum v. State*, 762 So.2d 337, 344 (Miss.2000)); *Stringfellow v. State*, 595 So.2d 1320, 1322 (Miss.1992); *see also Randolph v. State*, 852 So.2d 547, 567 (Miss.2002) (Carlson, J., concurring).

¶ 152. In Goff's statement to investigators, he admitted setting fire to the motel room. This constituted a confession to one of the crimes set forth in the indictment. Instruction D-14 sought to cover, in toto, all the evidence submitted in the State's case. Thus, based on *Rogers*, the trial court's decision to deny a "two-theory" instruction in this matter ultimately was correct. *Rogers*, 847 So.2d at 863. Therefore, this assignment of error is without merit.

¶ 153. Since its inception in Mississippi jurisprudence at the turn of the twentieth century in *Thompson v. State*, 83 Miss. 287, 35 So. 689 (1904), the "two-theory" circumstantial-evidence rule (in its different forms) has been condemned repeatedly by this Court, and for diverse reasons.FN29 Six years after *Thompson*, we noted the problem behind this type of instruction:

> The court instructs the jury that if there is any fact or circumstance proven by the evidence in this case upon which the jury can place a reasonable construction favorable either to the state or the defendant, it is the duty of the jury to accept that construction favorable to the defendant, although the one favorable to the state is more reasonable.

83 Miss. at 287, 35 So.2d. at 689.

It rarely happens on the trial of a criminal case that two reasonable theories, one favorable to the state and the other favorable to the defendant, do not arise out of and to some extent find support in the evidence. If acted upon literally by juries, this instruction in most cases would amount to a peremptory instruction to find the defendant not guilty.

Runnels v. State, 96 Miss. 92, 96, 50 So. 499 (1909).FN30 Yet, without either deciding the rule's legal validity, or denouncing *Thompson, supra*, *Runnels* simply held that when a criminal defendant is given the necessary instructions that guilt must be proven beyond a reasonable doubt, refusal of this instruction will not constitute reversible error. *Id.*; *see also* (in chronological order) *Roux v. City of Gulfport*, 97 Miss. 559, 52 So. 485 (1910) (holding same, but reading *Runnels* as condemning the substance of the *Thompson* instruction); cf. *Saucier v. State*, 102 Miss. 647, 59 So. 858 (1912) (affirming, without comment, the trial court's refusal to allow the instruction in *Thompson* phraseology) (citing *Runnels and Roux*); *Wiley v. State*, 129 Miss. 196, 91 So. 906 (1922) (same) (citing *Runnels*, *Roux*, and *Saucier*); *Brady v. State*, 128 Miss. 575, 91 So. 277 (1922) (same) (citing same).

¶ 154. Later, we expressly denounced *Thompson*, stating as follows:

> The principle sought to be invoked in this instruction was never applicable to testimony, except that of circumstantial evidence alone, and was improperly applied in Thompson v. State, 83 Miss. 287, 35 So. 689, to the testimony of eyewitnesses; and, as stated above, has since been disapproved many times. Its effect has been to mislead the jury and to prevent it from exercising its discretion in settling questions of veracity under proper instructions by the court.

Fisher v. State, 150 Miss. 206, 227-28, 116 So. 746, 750-51 (1928) (emphasis added)(citing *Runnels*, *Roux*, *Saucier*, *Wiley*, and *Brady*); cf. *Williams v. State*, 163 Miss. 475, 482, 142 So. 471, 472 (1932) (without commenting on *Thompson*, holding that our trial courts are not required to give a two-theory instruction when its substance is covered by other instructions).

¶ 155. In *Micker v. State*, 168 Miss. 692, 152 So. 286 (1934), we expressly held the two-theory instruction as phrased in *Thompson* ("even though the hypothesis of guilt be the more probable") to be an inaccurate

statement of law in any case. *Id.* at 698-99, 152 So. 286 (emphasis added). We added that, even if correctly drawn, it would not be applicable where the conviction was based principally on eyewitness testimony. *Id.* (citing *Williams*, 163 Miss. 475, 142 So. 471). *See also Jones v. State*, 183 Miss. 408, 184 So. 810 (1938) (determining that the two-theory instruction, when correctly drawn, is not applicable to cases resting on direct testimony).

¶ 156. In *Yarbrough v. State*, this Court opined that the two-theory instruction, whether correctly drawn or not, should not be given in any case. *Yarbrough*, 202 Miss. 820, 830, 32 So.2d 436, 440 (1947) (emphasis added). *Yarbrough* reached this conclusion, first, because "there are always two theories, that of the State of guilt and that of the defendant of innocence, ... the instruction, in effect, is a peremptory for the defendant." *Id.* Second, "it places upon the trial judge the burden and danger of saying the case is purely one of circumstantial evidence, whereas, in many cases, this is a very difficult question." *Id. Yarbrough* nevertheless left the two-theory instruction (if drawn correctly) in place and affirmed the trial court's denial of the instruction on the basis that the case did not rest entirely upon circumstantial evidence and that the defendant had been granted the general circumstantial-evidence instruction, "to the exclusion of every reasonable hypothesis." *Id.*; *see also Lott v. State*, 204 Miss. 610, 37 So.2d 782 (1948) (affirming the trial court's denial of a requested two-theory instruction in *Thompson* phraseology).

¶ 157. In *Simmons v. State*, 208 Miss. 523, 44 So.2d 857, 858-59 (1950), we affirmed the trial court's denial of the two-theory instruction, on a finding that the case was not circumstantial. Notably, *Simmons* construes *Runnels*, as condemning a two-theory instruction, no matter how phrased. *Id.*

¶ 158. Five years later, in *Coward v. State*, 223 Miss. 538, 78 So.2d 605 (1955), we held that the refused two-theory instruction, identical to one proffered in the case *sub judice*, "is never proper except where the case rests entirely upon circumstantial evidence." *Coward*, 78 So.2d at 610.FN31 *Coward* added, "even in a case based entirely on circumstantial evidence, if an instruction is allowed that the evidence must exclude every reasonable theory other than that of guilt, that is held to embody the essentials of the two-theory instruction, ... refusal of the [two-theory instruction] is not reversible error." *Id.* (citing *Yarbrough*, 32 So.2d at 440).

¶ 159. Then came *Nester v. State*, 254 Miss. 25, 179 So.2d 565 (1965). In this case, we held that, because the evidence presented was so

circumstantial, the two-theory instruction should have been granted along with the general circumstantial-evidence instruction, which had been given. *Id.* at 566 (emphasis added). Nester cited no case law for authority; rather the Court relied solely on Alexander, Mississippi Jury Instructions, (1953) Section 172, for its decision. *Id.*

¶ 160. In *Kitchens*, 300 So.2d at 926, we affirmed the trial court's refusal to grant a two-theory instruction, both because the evidence was not entirely circumstantial and the general circumstantial-evidence instruction had been granted. Following in line with *Coward*, the *Kitchens* Court added, "even in a case based entirely on circumstantial evidence, if an instruction is allowed that the evidence must exclude every reasonable theory other than that of guilt, that is held to embody the essentials of the two-theory instruction, ... refusal of the latter is not reversible error." *Id.* (quoting *Coward*, 78 So.2d at 610).

¶ 161. Yet we changed course in *Henderson v. State*, 453 So.2d 708 (Miss.1984), and held the trial court in error for refusing to give both the general circumstantial-evidence instruction and the "two-theory" instruction. *Id.* at 710. Ignoring *Kitchens*, *Henderson* stated:

> Where all the evidence tending to prove the guilt of the defendant is circumstantial, the trial court must grant a jury instruction that every reasonable hypothesis other than that of guilt must be excluded in order to convict. *Sanders v. State*, 286 So.2d 825, 828 (Miss.1973); *Matula v. State*, 220 So.2d 833, 836 (Miss.1969). Also where the evidence is purely circumstantial, the trial court must grant a "two-theory" instruction. *Johnson v. State*, 347 So.2d 358, 360 (Miss.1977); *Nester v. State*, 254 Miss. 25, 29, 179 So.2d 565, 566 (1965).

Id. *Johnson*, cited by Henderson for authority, affirmed the trial court's decision denying the requested two-theory instruction both because the requested instruction did not contain the language "reasonable doubt" and the case was not entirely circumstantial. *Johnson*, 347 So.2d at 360. Johnson, in addressing the appellant's argument, merely opined that "[t]he two-theory instruction may be given only in an entirely circumstantial evidence case." *Id.*

¶ 162. We hold today that *Kitchens* provides the better rule: "In a case based entirely on circumstantial evidence, if an instruction is allowed that the evidence must exclude every reasonable theory other than that of guilt, that is

> held to embody the essentials of the two-theory instruction, ... refusal of the latter is not reversible error." *Kitchens*, 300 So.2d at 926 (quoting *Coward v. State*, 223 Miss. 538, 78 So.2d 605 (1955)). To the extent that *Parker*, *Henderson*, and other cases suggest otherwise, they are hereby overruled.
>
> 14 So.3d at 659-63. [footnotes omitted]

Here, the trial court granted Instruction C-12[3] which clearly embodied "the essentials of the two-theory instruction." C.P. 996. Instruction C-12 reads:

> The Court instructs the jury that the law presumes every person charged with the commission of a crime to be innocent. The presumption places upon the State the burden of proving the Defendant guilty beyond a reasonable doubt and *to the exclusion of every reasonable hypothesis*, consistent with innocence. The presumption of innocence of the Defendant prevails unless overcome by evidence which satisfies the jury of the Defendant's guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis, consistent with innocence. The Defendant is not required to prove her innocence.
>
> C.P. 996 [emphasis added]

The Appellant even concedes that Instruction C-12 was indeed a circumstantial instruction and amazingly proceeds to claim she was somehow entitled the improper instruction, D-77B. App. at 102. Instruction C-12 clearly conforms to the requirements of this Court's holding in *Goff, supra*, regarding such instructions. This claim is without legal merit. The Appellant is entitled to no relief on this assignment of error.

10. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTION D-64.

The Appellant next argues that the trial court committed error in refusing jury

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[3]That State argued that this was not a purely circumstantial case, offering evidence in support of that contention, and continues that assertion here. Tr. 945-50.

instruction D-64 which reads as follows:

> You have found Ms. Fulgham guilty of capital murder. You must now decide the appropriate punishment in this case.
>
> Before I instruct you on specific matters regarding Ms. Fulgham's sentence, I will instruct you on the general principles that will govern your deliberations in this sentencing phase. In explaining your duties, I must offer as complete an explanation as possible concerning the legal matters that must govern your deliberations. I cannot stress to you enough that the focus of your deliberations during this phase is not the same as in an ordinary case. Punishment by death is a unique punishment. It is final. It is irrevocable. You must render a decision on the evidence free from anger and prejudice.
>
> C.P. 1130.

The trial court properly refused this instruction, agreeing with the State that such an instruction was prohibited pursuant to this Court's holding in *Thorson v. State*, 895 So.2d 85, 109 (Miss. 2004). Tr. at 1210. In *Thorson*, the Court held, in regards to this type of instruction:

> ¶ 54. Thorson next argues that the trial court erred in refusing to grant Jury Instruction DS-6. The first part of the instruction mirrored an instruction already granted by the trial court which explained the procedure used in a capital murder case. The trial court also explained this procedure to the jury during voir dire. However, the final sentences of the instruction read, "The death penalty is a unique punishment. It is final and irrevocable. You must render a decision based on the evidence free from passion and prejudice." The State objected to this instruction stating that these sentences were improper. The trial court announced his concerns regarding the instruction finding:
>
> > It sounds to me in the second paragraph that the Court is arguing to the jury the defense. The only way I will give DS-6 is to delete the second paragraph, which I think is repetitious with the first sentencing instruction actually.
>
> Thorson submitted the instruction as originally read, and the trial court refused

the instruction. Thorson argues that the trial court erred in refusing to grant the instruction because the jury was not instructed that (1) the focus of the capital sentencing decision is not the same as an ordinary case, (2) the sentence of death is a unique situation in that it is irrevocable and final, and (3) the jury's sentencing decision must be made free from passion and prejudice.

¶ 55. Thorson cites three cases to support these propositions. *Woodson v. North Carolina*, 428 U.S. 280, 303-04, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976) ("[D]eath as a punishment is unique in its severity and irrevocability."); *Flores v. Johnson*, 210 F.3d 456, 459 (5th Cir.2000) ("Death is the most final, and most severe, of punishments."). While these general propositions are true, none of these cases stands for the proposition that the jury must receive an instruction stating that a death sentence proceeding is different from an ordinary criminal proceeding. Thorson has failed to cite any relevant authority in support of this assertion. This Court has continuously held that such failure to cite relevant authority "obviates the appellate court's obligation to review such issues." *Simmons v. State*, 805 So.2d at 487 (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss.1998)). Therefore, this issue is not properly before the Court and is procedurally barred from our consideration.

¶ 56. Procedural bar notwithstanding, the trial court properly denied Jury Instruction DS-6. As previously stated, during voir dire, the trial court properly informed the jury that sentencing was different in capital cases. The trial court generally explained to the jury that it would determine the penalty which would be imposed. The jury was further subjected to the death qualification process conducted during voir dire. The jury was also instructed that it should "consider and weigh any aggravating and mitigating circumstances, [ ], but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." (emphasis added). Therefore, the jury was fully instructed to make its decision free from "passion" and "prejudice." We find this issue to be without merit.

895 So.2d at 109-10.

Pursuant to this Court's holding in *Thorson*, this claim is barred as the Appellant has failed to cite to any relevant authority in support of her claim. Additionally, and without

waiving the applicable bar, the State submits this argument is without merit. The Appellant is therefore entitled to no relief on this assignment of error.

11. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING MERCY INSTRUCTION D-71

The trial court committed no error in refusing jury instruction D-71 which reads:

> As the death penalty is never required, you may always find that Ms. Fulgham should be sentenced to life in prison or life without the possibility of parole.

C.P. 1134.

Despite the Appellant's protestations to the contrary, jury instruction D-71 is nothing more than a mercy instruction, as the trial court properly held. Tr. 1214. This Court has repeatedly held that such an instruction is prohibited. A capital defendant is not entitled to the so-called "life option" instruction informing the jury of its right to return a sentence of life regardless of whether or not aggravating factors are found. This "life option" was fully covered in the standard form instruction given to the jury as Instruction SSP-5. C.P. 1087. *See Branch v. State,* 882 So.2d 36, 71 (Miss. 2004); *Edwards v. Thigpen*, 595 F.Supp. 1271 (S.D.Miss. 1984), affirmed sub non, *Edwards v. Scroggy*, 849 F.2d 204 (5th Cir.1988), cert. denied sub nom, *Edwards v. Black*, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 597 (1989). *See Foster v. State*, supra, 639 So.2d at 1300-01. Further, this instruction is a type of mercy instruction and should not be given. *Ballenger v. State*, 667 So.2d at 1264-65.

This claim is totally without merit as Fulgham's proposed instruction was clearly a mercy instruction. The Appellant has presented no authority to cause this Court to revisit its

previous opinions on this claim. This claim must be denied.

12. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTIONS D-89 OR D-91

The Appellant argues next that the trial court committed error in refusing instructions D-89 and D-91.

A. Instruction D-89

Jury instruction D-89 reads:

> As the weighing of mitigation against aggravation is not a counting procedure, each of you is free to weigh one mitigating circumstance more heavily than another mitigating circumstance.
>
> Because the procedure you must follow is not a mere counting process of aggravating circumstances versus the number of mitigating circumstances, each of you, individually, must apply a reasoned moral judgment as to whether this case calls for life imprisonment or whether death is the only appropriate punishment.
>
> C.P. 1147.

The trial court properly refused this instruction as being repetitious of Instruction SSP-5. Tr. 1228-9. Instruction SSP -5,"correctly states the law", which the Appellant concedes. App. at 116, Footnote 137. Instruction SSP-5 reads as follows:

> The Court instructs the jury that is must be emphasized that the procedure that you must follow is not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances. Rather, you must apply your reasoned judgment as to whether this situation calls for life imprisonment or whether it requires the imposition of death, in light of the totality of the circumstances present.
>
> C.P. 1087

This Court has repeatedly held the language of Instruction SSP-5 to be a proper statement of the law. *See Branch v. State, supra*, and *Goodin v. State*, 787 So.2d 639 (Miss. 2001); see also *Edwards v. State*, 737 So.2d 275 (Miss.1999), and *Watts v. State*, 733 So.2d 214 (Miss.1999). The language of instruction D-89 was clearly repetitious and therefore properly refused by the trial court. As this Court clearly stated in *Goodin, supra*:

> ¶ 15. Disputes about jury instructions in the trial courts should be based on more than a quest for technical purity. The question for the trial courts should be: do the instructions fairly state the laws of Mississippi? A fair reading of our precedents and the instructions in this case dictate the obvious appropriateness of the instruction given. We find the trial court did not err in granting sentencing instruction S-2 for the jury to consider in determining the sentence to impose.
>
> 787 So.2d at 644.

As the Appellant concedes, Instruction SSP-5 was a proper statement of the law and therefore "fairly announce[d] the law of the case and create[d] no injustice." *Id.* at 644. Accordingly "no reversible error [can] be found" in the case *sub judice* through the trial court's refusal of instruction D-89. The Appellant has cited to no authority which would entitle her to this instruction in light of the trial court's proper statement of the law in Instruction SSP-5. This argument is devoid of merit. The Appellant is entitled to no relief on this assignment of error.

B. Instruction D-91

The Appellant next avers that the trial court committed error in refusing her a mercy instruction. Instruction D-91 reads:

> You may sentence Ms. Fulgham to life imprisonment if you find that only one mitigating circumstance exists and multiple aggravating circumstances exist. You may also sentence Ms. Fulgham to life imprisonment if you find that no mitigating circumstance exists. You are not required to find any mitigating circumstances in order to return a sentence of life imprisonment. Similarly, the finding of an aggravating circumstance does not require that you return a sentence of death, nor would your individual determination that aggravating circumstances outweigh mitigating circumstances.
>
> You, the Jury always have the option to sentence Ms. Fulgham to life imprisonment, whatsoever findings you make.
>
> C.P. 1149.

This type of instruction has repeatedly been characterized as a "mercy instruction" by this Court, one to which Fulgham was not entitled. This Court has held that a defendant is not entitled to an instruction that states "even if the aggravating circumstances outweigh the mitigating circumstances the jury is free to return a life sentence." *Holland v. State*, 705 So.2d 307, 354 (Miss. 1997); *Carr v. State*, 655 So.2d 824, 849-50 (Miss. 1995), cert. denied, ___ U. S. ___, 116 S.Ct. 782, 133 L.Ed.2d 733 (1996); Foster v. State, 639 So.2d 1263, 1299-1300 (Miss. 1994), cert. denied, 514 U.S. 1019, 115 S.Ct. 1365, 131 L.Ed.221, reh. denied, 514 U.S. 1123, 115 S.Ct. 1992, 131 L.Ed.2d 878 (1995); *Hansen v. State*, 592 So.2d 114, 151 (Miss.1991); *Clemons v. State*, 535 So.2d 1354, 1360-61 (Miss. 1988); *Nixon v. State*, 533 So.2d 1078, 1100 (Miss. 1987); *Cole v. State*, 525 So.2d 365, 374 (Miss.1987); *Lockett v. State*, 517 So.2d 1317, 1338 (Miss. 1987); *Wiley v. State*, 484 So.2d 339, 349 (Miss. 1985); *Johnson v. State*, 477 So.2d 196, 221-22 (Miss. 1985); *Cabello v. State*, 471 So.2d 332, 348 (Miss. 1985); *Jordan v. State*, 464 So.2d 475, 479 (Miss.1985); *Hill v. State*,

432 So.2d 427, 442 (Miss. 1983). Such an instruction is nothing more than a mercy instruction and results in a verdict based on whim and caprice. *See Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993); *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

Fulgham is not entitled to an instruction reading "[y]ou may also sentence Ms. Fulgham to life imprisonment if you find that no mitigating circumstance exists." Such an instruction results in a verdict based on "whim and caprice." *Ballenger v. State*, 667 So.2d 1242, 1264-65 (Miss. 1995); *Carr v. State*, 655 So.2d 824, 849-50 (Miss. 1995), cert. denied, 516 U. S. 1076, 116 S.Ct. 782, 133 L.Ed.2d 733 (1996); *Mack v. State*, 650 So.2d 1289, 1330-31 (Miss. 1994); *Foster v. State, supra*, 639 So.2d at 1299-1300; *Ladner v. State*, 584 So.2d 743, 61-62 (Miss. 1991); *Williams v. State*, 544 So.2d 782, 788 (Miss. 1987); *Clemons v. State, supra*, 535 So.2d at 1360-61; *Nixon v. State, supra*, 533 So.2d at 1100; *Johnson v. State, supra*, 477 So.2d at 221-22; *Jordan v. State, supra*, 464 So.2d at 479-80; *Hill v. State, supra*, 432 So.2d at 441-42; *Jordan v. State*, 365 So.2d 1198, 1205 (Miss. 1978). Nor is a defendant entitled to an instruction that states "[y]ou are not required to find any mitigating circumstances in order to return a sentence of life imprisonment." *Ballenger v. State, supra*, 667 So.2d at 1265; *Billiot v. State*, 454 So.2d 445, 465-66 (Miss. 1984); *Bullock v. State*, 391 So.2d 601, 610 (Miss. 1980).

The trial court did not err in refusing jury instruction D-91. The Appellant was not entitled to a mercy instruction and Fulgham has failed to cite to relevant authority which

would require the Court to revisit its previous holdings. This argument is devoid of merit. The Appellant is entitled to no relief on this assignment of error.

13. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTIONS D-112 AND D-113

Here, the Appellant argues that the trial court committed error in refusing jury instructions D-112 and D-113. The State would submit that the trial court properly refused both instructions.

A. Instruction D-112

Instruction D-112 reads:

> If you cannot, within a reasonable time, agree as to punishment, I will dismiss you and impose a sentence of imprisonment for life without the benefit of parole. If you cannot agree, know that any of you may inform the bailiff of this.
>
> C.P. 1155.

The trial court refused this instruction. Tr. 1249. The trial court was correct in refusing this instruction pursuant to this Court's holding in *Wilcher v. State*, 697 So.2d 1087 (Miss. 1997) which states in pertinent part:

> Instruction S-5 was given over defense objection, and provided as follows:
>
> > "The Court instructs the Jury that all twelve jurors must agree on the verdict before the verdict can be returned into Court." Wilcher asserts that giving this instruction was reversible error because it failed to clarify that if, within a reasonable time, the jury failed to agree unanimously it must cease deliberations and report its findings to the Court.
>
> Miss.Code Ann. § 99-19-103 (Supp.1994) provides that "[i]f the jury cannot,

within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment of life." The statute does not (as Wilcher contends) allow the jury to determine what constitutes a "reasonable time" for deliberations and report its findings to the court.

Furthermore, jury instructions "are not to be read unto themselves, but with the jury charge as a whole." *Carr v. State*, 655 So.2d 824, 848 (Miss.1995); *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). Instruction S-1A makes clear the options the jury had in returning to the courtroom:

> (1) ... we ... find unanimously that the Defendant should suffer death.
>
> (2) We, the Jury, find that the Defendant should be sentenced to life imprisonment. [or]
>
> (3) We, the Jury are unable to agree unanimously on punishment.

Thus, when read as a whole, the jury instructions properly informed the jury that they could return to the courtroom and report that they were unable to agree unanimously on punishment. Therefore, Wilcher's argument is without merit.

In addition, Wilcher alleges that the "error" in granting S-5 was compounded by the fact that the trial judge refused to give proposed defense instruction D-12, which would have instructed the jury as follows:

> The Court instructs the jury that if you cannot, within a reasonable time, agree as to punishment, you must cease deliberations immediately and return the following verdict:
>
> "We, the Jury, cannot agree as to punishment."
>
> This verdict should be written on a separate sheet of paper. In that event, the Court will dismiss the Jury and sentence the Defendant in the manner provided by law.

As stated earlier, there is no authority for allowing the jury to determine what constitutes a "reasonable time" for deliberations. Moreover, even if the jury had never been instructed on what would happen if they could not agree, there

would have been no error. In *Stringer v. State*, this Court held that the trial judge did not err by failing to inform the jury that, "if they were unable to agree within a reasonable time on the punishment to be imposed, [the defendant] would be sentenced to life imprisonment." *Stringer*, 500 So.2d 928, 945 (Miss.1986).

The [defendant's] argument creates an illusion of prejudice, which has no logical basis. If the jurors were unable to unanimously find that the aggravating circumstances were sufficient to impose the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, then they could not return a death sentence. Further, in the event they could not unanimously agree after a reasonable period of deliberation, it would be the trial judge's duty under Miss.Code Ann. § 99-19-103 to dismiss the jury and impose a sentence of life imprisonment on the jury.

Id. (quoting *King v. State*, 421 So.2d 1009, 1018 (Miss.1982)).

In addition, "[A]n instructional error will not warrant reversal if the jury was fully and fairly instructed by other instructions." *Collins v. State*, 594 So.2d 29, 35 (Miss.1992); *Heidel v. State*, 587 So.2d 835, 842 (Miss.1991).

A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

Heidel v. State, 587 So.2d 835, 842 (Miss.1991) (citations omitted). To the extent proposed instruction D-12 would have instructed the jury on valid legal concepts, the jury was "fully and fairly instructed" on those concepts in S-1A and S-5. Therefore, Wilcher's arguments on this point are without merit.

697 So.2d at 1106-7.

This instruction was properly refused by the trial court. The Appellant's argument to the contrary is unsupported by the authority of this Court. *Wilcher* clearly holds that Fulgham was not entitled to this instruction. The Appellant's claim is therefore, without merit.

Fulgham is entitled to no relief on this assignment of error.

B. Instruction D-113

The Appellant argues next that the trial court was in error in refusing jury instruction D-113. App. 118. This instruction was refused by the trial court on the grounds that it was repetitious. Tr. 1249

Instruction D-113 reads:

> If you fail to reach a verdict as to penalty this will have no effect on the verdict you have already returned at the guilt trial. If you do not reach a verdict as to penalty. Ms. Fulgham will be sentenced to life imprisonment without the possibility of parole or probation.
>
> C.P. 1156.

The Appellant was not entitled to this instruction as the language therein was "adequately covered" by Instructions SSP-5[4], D-75[5], D-83A[6], D-109[7]. The trial court properly refused instruction D-113 on the grounds that it was repetitive. Tr. 1249. The Appellant's claim is without merit and she is therefore, entitled to no relief on this assignment of error.

14. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING FULGHAM'S "PRESUMPTION OF LIFE" INSTRUCTIONS

The Appellant avers that the trial court committed error in refusing four jury

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[4]C.P. 1087.

[5]C.P. 1104.

[6]C.P. 1106.

[7]C.P. 1107.

instructions. App. 120. Specifically, Fulgham ascribes error to the trial court's refusal of instructions D-67, D-68, D-69 and D-77. App. 120. The State submits that the Appellant was not entitled to any of the aforementioned instructions and further that the trial court committed no error in refusing same. Each of the aforementioned instructions constitute "presumption of life" instructions which are prohibited pursuant to *Jackson v. State*, 684 So.2d 1213, (Miss. 1996). The Court in *Jackson* found such instructions to be improper, holding:

> There is no merit to Jackson's arguments. Eligibility for parole, actions of the parole commission and the judge's determination of the configuring of sentences are not the proper subject either of closing arguments or jury instructions. *Williams v. State*, 544 So.2d 782, 798 (Miss.1987)(Jessie Derrell Williams); *Williams v. State*, 445 So.2d 798 (Miss.1984)(Walter Williams, Jr.). *See also, Griffin v. State*, 557 So.2d 542, 553 (Miss.1990)(prosecutor's mention of possibility of parole during closing arguments contributed to cumulative errors warranting reversal of case). In so far as the jury instruction is concerned, in *Chase v. State*, 645 So.2d 829 (Miss.1994), where it was asserted that an instruction allowed by the trial court improperly shifted to the defense the burden of proving that mitigating circumstances outweighed aggravating circumstances, we flatly rejected the appellant's argument that "a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment." *Chase*, 645 So.2d at 860. *See also, Leatherwood v. State*, 435 So.2d 645, 650 (Miss.1983)(if defendant "had not been convicted of a capital offense, there would be no need for the sentencing hearing and he would simply be sentenced to serve a life term. This does not mean though that the procedure is unfair or faulty.") Accordingly, we find no merit in either argument.
>
> 684 So.2d at 1233.

Pursuant to this Court's holding in *Jackson*, the Appellant was not entitled to these "presumption of life" instructions. The trial court, therefore, committed error in refusing

these improper instructions. This claim is devoid of legal merit. The Appellant is entitled to no relief on this assignment of error.

15. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTION D-78

The Appellant claims error in the trial court's refusal of jury instruction D-78 which reads:

> The Court instructs the Jury that if, after consideration of all the evidence and the instructions of the Court, and after free consultation with your fellow juror, you have any reasonable doubt as to the existence of an aggravating circumstance, you must vote against a finding of that aggravating circumstance.
>
> Unless all reasonable doubt is completely removed from your mind by the evidence which you have seen and heard during the course of the trial, you must never vote to find an aggravating circumstance. Unless all reasonable doubt is completely removed from your mind by the evidence and the evidence only, you must never retreat from your opinion in this regard because of pressure from you fellow jurors, or because of the lateness of the hour, for the mere purpose of returning a unanimous verdict, or for any other reason whatsoever.
>
> C.P. 1141.

This instruction was refused by the trial court as being argumentative. Tr. 1218. The State submits this instruction was improper as it is argumentative and for the reasons stated in Claim 2., *supra*, which the State respectfully incorporates herein. This argument is devoid of merit. The Appellant is therefore entitled to relief of this assignment of error.

16. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTION D-96

The Appellant continues her assault on the trial court's refusal to grant jury

instructions by asserting the court was in error in refusing instruction D-96 which reads as follows:

> As a matter of law, a sentence of death is more severe than any other sentence you can pass on Ms. Fulgham. Notions of 'death being too good' for those convicted of capital murder are contrary to the law. Should you sentence Ms. Fulgham to death, you sentence her to the most severe punishment that is before you.
>
> C.P. 1152

This instruction was refused by the court below again as being argumentative. Tr. 1234. This instruction is clearly improper. The record in this case reflects that the jury in this case was properly instructed. See SSP-2 at C.P. 1085, SSP-5 at C.P. at 1087, D-66 at C.P. 1102, D-75 at C.P. 1104, D-82B at 1105, D-83A at C.P. 1106, D-109 at C.P. 1107. As in the preceding argument, the State incorporates herein the arguments presented in Claim 2., *supra*, and submits that this claim is likewise devoid of merit. The Appellant is entitled to no relief on this assignment of error.

17. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTION D-86

The Appellant next claims the trial court was in error in refusing jury instruction D-86. This instruction was refused based on the Appellant's mistaken reliance on this Court's opinion in *Brown v. State*, 749 So.2d 82 (Miss. 1999), and because it was repetitious. Tr. 1228. The instruction reads:

> The very purpose of mitigation is to reveal evidence that the defendant is not as bad a person as might be believed from evidence that was introduced in the first phase of this trial.

C.P. 1146.

The Appellant's reliance on *Brown* is indeed misplaced as that opinion does not support the claim that Fulgham was entitled to this instruction. Indeed, the Appellant has failed to cite to any authority which supports her position. The issue of mitigating circumstances was clearly and fairly presented to the jury. Specifically, Instruction D82-B defined mitigating circumstances as "anything relevant that helps convince you to impose a sentence less than death." C.P. at 1105. In addition, Instruction D-83A states:

> Mitigating circumstances differ from aggravating circumstances because you are not required to be convinced beyond a reasonable doubt that a mitigating circumstance exists before you may take that circumstance into account as you deliberate in this case. You may consider a mitigating circumstance if you believe that there is any evidence to support it no matter how weak you determine that evidence to be. Each of you must decide for yourself what weight and what consideration is to be given to mitigating circumstances.
>
> C.P. at 1106.

The jury was further instructed on what to consider as mitigation, such as domestic abuse, childhood neglect, familial devotion, disadvantaged background, emotional and/or mental deficits and sympathy. C.P. 1112-17. This claim has absolutely no legal merit. The Appellant is entitled to no relief on this assignment of error.

18. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING JURY INSTRUCTION D-91A

Fulgham argues next that the trial court committed error in refusing jury instruction D-91A. The State submits and the Appellant agrees, that this instruction is a mercy instruction. App. at 131. Such instructions, have repeatedly been held to be improper by this

Court. The trial court, therefore, did not commit error in refusing this mercy instruction.

Jury instruction D-91A reads

> 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.
>
> C.P. 131.

In *Chamberlin v. State*, the Court addressed the specific language of D-91A in a jury instruction offered in that case and held:

> ¶ 80. Whether to give a jury instruction is within the sound discretion of the trial court. *Goodin v. State*, 787 So.2d 639, 657 (Miss.2001). Chamberlin argues that the trial court erred when it refused to give two proposed instructions, D-3 and D-10. Proposed instruction D-3 read:
>
> > A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame 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.*
>
> ¶ 81. Proposed instruction D-10 read:
>
> > 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.

¶ 82. Chamberlin argues that *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), required the trial court to give a mercy instruction in this case. However, *Marsh* does not speak to or even consider the issue of whether a mercy instruction is required. Rather, the *Marsh* Court held that "the States enjoy a constitutionally permissible range of discretion in imposing the death penalty." *Marsh*, 126 S.Ct. at 2525 (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 308, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990)) (internal quotations omitted). "[T]he States are free to determine the manner in which a jury may consider mitigating evidence," i.e., whether the evidence should be viewed through the lens of mercy. *Marsh*, 126 S.Ct. at 2523.

¶ 83. That discretion allows trial courts to avoid the potential arbitrariness of an emotional decision encouraged by a mercy instruction.

This Court has repeatedly held that "capital defendants are not entitled to a mercy instruction." *Jordan v. State*, 728 So.2d 1088, 1099 (Miss.1998) (citing *Underwood v. State*, 708 So.2d 18, 37 (Miss.1998); *Hansen v. State*, 592 So.2d 114, 150 (Miss.1991); *Williams v. State*, 544 So.2d 782, 788 (Miss.1987); *Lester v. State*, 692 So.2d 755, 798 (Miss.1997); *Jackson v. State*, 684 So.2d 1213, 1239 (Miss.1996); *Carr v. State*, 655 So.2d 824, 850 (Miss.1995); *Foster v. State*, 639 So.2d 1263, 1299-1301 (Miss.1994); *Jenkins v. State*, 607 So.2d 1171, 1181 (Miss.1992); *Nixon v. State*, 533 So.2d 1078, 1100 (Miss.1987)). "The United States Supreme Court has held that giving a jury instruction allowing consideration of sympathy or mercy could induce a jury to base its sentencing decision upon emotion, whim, and caprice instead of upon the evidence presented at trial." *Id.* (citing *Saffle v. Parks*, 494 U.S. 484, 492-95, 110 S.Ct. 1257, 1262-64, 108 L.Ed.2d 415 (1990)).

Howell v. State, 860 So.2d 704, 759 (Miss.2003). *See also Ross*, 954 So.2d at 1012 (holding there was no error in refusing the defendant's proposed instruction specifically citing mercy or sympathy as a mitigator since "a capital defendant is not entitled to a sympathy instruction, because, like a mercy instruction, it could result in a verdict based on whim and caprice"); *King v.*

State, 784 So.2d 884, 890 (Miss.2001) ("neither side is entitled to a jury instruction regarding mercy or deterrence"); *Wiley v. State*, 750 So.2d 1193, 1204 (Miss.1999) ("[T]he State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.").

¶ 84. Additionally, the requested instruction D-10 states 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." This Court has found that "a defendant is not entitled to an instruction that the jury may return a life sentence even if the aggravating circumstances outweigh the mitigating circumstances or if they do not find any mitigating circumstances." *King v. State*, 960 So.2d 413, 442 (Miss.2007) (citing *Holland v. State*, 705 So.2d 307, 354 (Miss.1997), *Hansen v. State*, 592 So.2d 114, 150 (Miss.1991), *Goodin v. State*, 787 So.2d 639, 657 (Miss.2001), *Foster v. State*, 639 So.2d 1263, 1301 (Miss.1994)). "[T]his Court has repeatedly refused to accept instructions that would nullify the balancing of aggravating and mitigating factors, since such instructions might induce verdicts based on whim and caprice." *Ross*, 954 So.2d at 1012 (citing *Manning v. State*, 726 So.2d 1152, 1197 (Miss.1998), overruled in part by *Weatherspoon v. State*, 732 So.2d 158 (Miss.1999)).

¶ 85. The trial court did not abuse its discretion in refusing either instruction. This issue is without merit.

989 So.2d at 342-3.

Clearly, the trial court did not abuse its discretion in refusing this mercy instruction. The Appellant's argument is without merit. Fulgham is entitled to no relief on this assignment of error.

19. THE TRIAL COURT COMMITTED NO ERROR IN DENYING COUNSEL'S PRE-TRIAL MOTION TO WITHDRAW

The Appellant argues next that the trial court committed error in denying co-counsel's motion to withdraw. App. at 132. This argument is merely a continuation of the argument

presented in Claim 6., *supra*. The Appellant avers that this "Claim never would have ripened had the State simply not mentioned nor characterized the content of Ms. Fulgham's June 2 custodial statement before the jury." App. at 133 fn. 157. Accordingly, the State respectfully incorporates arguments presented in the Claim 6., *supra*, herein. In *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006) held:

> ¶ 215. In *Taylor v. State*, 435 So.2d 701, 703 (Miss.1983), this Court held, "the trial court has discretion in considering a motion of an attorney to be discharged." Additionally, "certain restraints must be put on the reassignment of counsel lest the right be 'manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.' " *Id.* (quoting *United States v. Bentvena*, 319 F.2d 916, 936 (2d Cir.1963)).
>
> 941 So.2d at 783.

Here, as in the *Rubenstein* case, the record does not support the Appellant's contention that the trial court erred in denying the motion to withdraw. The court heard the motion, "read the transcripts of the suppression hearing", "read Ms. Mallette's brief or memo" and held:

> BY THE COURT: I read the transcripts of the suppression hearing. I read Ms. Mallette's brief or memo. I agree with her on the statements that the Court made about witnesses in a case. I think those statements were made in the record prior to the taking of any testimony before the Court heard the testimony as to what she actually did or did not do. The testimony Ms. Mallette gave has, in my opinion, not shown that she is a material and necessary witness in the case of the facts. She was the only testimony period, and she says it was quite lengthy. I don't recall her testimony being lengthy at all. I thought it was quite brief.
>
> She was called by Tommy Whitfield, a deputy Sheriff of Oktibbeha County out of courtesy he says and stated to her that her client had requested to talk to the officers, and that the officers, the following day, talked to her. And that when she arrived at the jail or the following day after her request,

they went over her rights with her and explained them to her again on tape and in writing. The defendant made no inculpatory statement as to her involvement in the commission of a capital murder at all that I saw in the statements, other than she was present and might have been a witness is the only inculpating statements. She might have made some inculpating statements that she could have been, by some stretch, accessory after the fact to a homicide. But she basically reiterated a statement that she had given before to law enforcement officers. Same statements, same - - however in more detail - - same everything that she had already given.

Ms. Mallette didn't see her client that day. I think when she arrived at the jail, the officers did not allow her entry during the interview and that's it. That's her testimony. I cannot see how she can be used as a material and necessary witness in the course of the trial, or why she should be allowed to withdraw.

Tr. 229-30.

The trial court did not abuse its discretion in denying the motion to withdraw. Moreover, the Appellant has failed to show how she was prejudiced by the denial of this motion to withdraw as she was more than adequately represented by counsel at trial. For the reasons stated above and for those stated in Claim 6., *supra*, the State submits this claim is without merit.

20. THE APPELLANT'S CLAIM THAT THE TRIAL COURT COMMITTED ERROR IN OVERRULING AN OBJECTION REGARDING WHO HIRED DR. WEBB IS WITHOUT MERIT

The Appellant avers that the trial court was in error in overruling an objection as to who hired Dr. Webb. App. at 140-1. As the Appellant concedes, the State has a right to question an expert regarding compensation. *Id.* at fn. 170. In *Bennett v. State*, 933 So.2d 930 (Miss. 2006) the Court allowed much more intense questioning of an expert holding:

> ¶ 62. The State's questioning of Dr. Ward was entirely proper. Bias, prejudice and credibility are always in issue, and the State's questions were proper attempts to inquire into Dr. Ward's personal feelings about Dr. Hayne and her forthrightness in the reasons for leaving her employment. Wide latitude is permitted in cross-examination to show bias or motive and the affect on a witness's credibility. *See Byrom*, 863 So.2d at 896-97. This assignment of error is without merit.
>
> 933 So.2d at 947.

The State was permitted to question Dr. Webb regarding his compensation as it was relevant to the issue of bias, prejudice and credibility. *Id.* This claim is without merit. The trial court did not abuse its discretion in overruling the Appellant's objection to this line of questioning. Fulgham is entitled to no relief on this assignment of error.

The Appellant further avers that the State "exacerbated" this alleged error during the penalty phase summation. App. at 140-1. This claim is barred from consideration on direct review as Fulgham failed to contemporaneously object to the State's comments. Tr. 1280. As this Court held in *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006):

> ¶ 190. Rubenstein also argues that the District Attorney expressed personal opinions about witnesses in the State's rebuttal closing argument. The *record reflects that of the excerpts cited by Rubenstein, the defense made no contemporaneous objections.* In *United States v. Young*, 470 U.S. 1, 20, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court stated that bolstering statements made by the prosecution do not amount to plain error as to require reversal. *As the defense did not raise any objection to preserve this assignment of error for appellate review, it is procedurally barred.*
>
> 941 So.2d 779. [emphasis added]

Accordingly, this assertion of error is barred from consideration on direct review. *Id.* Alternatively, and without waiving the procedural bar, the State also submits that this claim

is additionally without merit for the reasons stated herein. The Appellant is entitled to no relief on this assignment of error.

21. THE APPELLANT'S CLAIM THAT HER SENTENCE OF DEATH WAS ARBITRARY IS WITHOUT LEGAL MERIT

In this argument, the Appellant claims that her sentence of death was the result of "nothing more than the unreasoned and fatal culmination of an entirely arbitrary sentencing proceeding." App. at 146. In so doing, the Appellant relies in this Court's opinions in *Walker v. State*, 740 So.2d 873 (Miss. 1999) and *Taylor v. State*, 672 So.2d 1246 (Miss. 1996) as well as the United States Supreme Court's holding in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Appellant bases her claim on "evidence of bad character","information from a custodial statement" the denial of one of her counsel's "motion to withdraw." App. at 146. For the reasons stated in the preceding Claims, specifically Claims 3,20, and 19, which the Appellee respectfully incorporates herein, this claim is without merit. The Appellant is entitled to no relief on this assignment of error.

22. MISS. CODE ANN. § 99-19-101 IS NOT UNCONSTITUTIONAL

The Appellant next assails the whole of Mississippi's death penalty framework claiming the "capital sentencing mechanism in the State of Mississippi, violates her Eighth and Fourteenth Amendment rights in that the death penalty constitutes cruel and unusual punishment." App at 148. The State submits that the Appellant failed to raise this claim at trial and is therefore barred from asserting it on direct review. *See Walker v. State*, 913 So.2d

198, 217 (Miss. 2005)("[f]ailure to raise an issue at trial bars consideration on an appellate level"). Alternatively, and without waiving the procedural bar, this claim is without merit

In *Puckett v. State*, 737 So.2d 322 (Miss. 1999), the Court considered such a claim as the one presented here and held:

> ¶ 131. Puckett's final assignment of error alleges Mississippi's death penalty statute is unconstitutional. Specifically, Puckett maintains "[t]he Mississippi death penalty constitutes cruel and unusual punishment for all of the reasons set forth by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)." Puckett also cites "[t]he American Bar Associations' recent call for a moratorium on the death penalty" in support of his argument.
>
> ¶ 132. However, as the State correctly points out, "[n]either *Furman* nor the American Bar Association is controlling or even persuasive authority." Mississippi's death penalty statutes have been reviewed and upheld as constitutional in light of *Furman* as well as later United States Supreme Court cases. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Johnson v. State, 476 So.2d 1195, 1201 (Miss.1985); *Billiot v. State*, 454 So.2d 445, 464 (Miss.1984); *Williams v. State*, 445 So.2d 798, 809 (Miss.1984); *Edwards v. State*, 441 So.2d 84, 90 (Miss.1983); *Smith v. State*, 419 So.2d 563, 566 (Miss.1982); *Bullock v. State*, 391 So.2d 601, 611 (Miss.1980); *Coleman v. State*, 378 So.2d 640, 647 (Miss.1979); *Washington v. State*, 361 So.2d 61, 66 (Miss.1978); *Gray v. State*, 351 So.2d 1342, 1344 (Miss.1977); *Jackson v. State*, 337 So.2d 1242, 1249 (Miss.1976).
>
> 737 So.2d at 363.

Certainly, constitutional challenges to Miss. Code Ann § 99-19-101 have been both legion and meritless. *See Brown v. State*, 890 So.2d 901 (Miss. 2004), cert. denied, 544 U.S. 981, 125 S.Ct. 1842, 161 L.Ed.2d 735(2005); *Grayson v. State*, 879 So.2d 1008 (Miss. 2004), cert. denied 543 U.S. 1155, 125 S.Ct. 1301, 161 L.Ed.2d 122 (2005); *Grayson v. State*, 806 So.2d

241, 252 (Miss.2001); *Simmons v. State*, 805 So.2d 452, 507 (Miss.2001); *Edwards v. State*, 737 So.2d 275, 307 (Miss.1999); *Berry v. State*, 703 So.2d 269, 286 (Miss.1997); *Evans v. State*, 725 So.2d 613, 683-84 (Miss.1997); *West v. State*, 725 So.2d 872, 894-95 (Miss.1998); *Holland v. State*, 705 So.2d 307, 319-20 (Miss.1997); *Evans v. State*, 725 So.2d 613 (Miss. 1997), cert. denied 525 U.S. 1133, 119 S.Ct. 1097, 143 L.Ed.2d 34 (1999); *Gray v. State*, 351 So.2d 1342, 1344 (Miss.1977); *Bell v. Watkins*, 381 So.2d 118, 124 (Miss.1980); *See also Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir.), reh'g denied, 685 F.2d 139 (5th Cir.1982). This claim, while barred, is alternatively without legal merit. The Appellant is entitled to no relief on this assignment of error.

23. JURY INSTRUCTION D-48 WAS PROPERLY REFUSED BY THE TRIAL COURT

The Appellant argues that the trial court committed error in refusing jury instruction D-48. App. at 148. The court refused this instruction stating that is was "repetitious." Tr. 971. Jury instruction D-48 reads:

> For you to find Kristi Fulgham guilty of capital murder, you must also agree, unanimously and beyond a reasonable doubt, that Ms. Fulgham robbed Joey Fulgham of the same item. If all twelve of you do not agree on the same criminal act which supports the State's allegation of robbery, you must find Kristi Fulgham not guilty of capital murder.
>
> C.P. 1025.

As the State correctly pointed out at trial, the Appellant had "already been instructed that they all have to find all the elements of capital murder beyond a reasonable doubt." Tr. 971. The trial court noted further that this must be done "to the exclusion of every reasonable

hypothesis consistent with innocence." *Id.* This language is evident in Instruction S-2B which reads:

> The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence, that on or about May 10, 2003, the Defendant, Kristi Fulgham, acting alone or with another, did, unlawfully, willfully, and feloniously, with or without the design to effect death, kill Joey Fulgham, a human being, without authority of law and not in necessary self defense while engaged in the commission of the crime of Robbery, then you shall find the Defendant guilty as charged with capital murder.
>
> If the State has failed to prove any one or more of these elements, then you shall find the Defendant not guilty of capital murder and proceed in your deliberations to consider the lesser included charge of murder.
>
> C.P. 1001.

The trial court further instructed the jury on the elements of robbery in Instruction S-4 which reads:

> The Court instructs the Jury that Robbery, as mentioned in these instructions, is defined as unlawfully, willfully, and feloniously taking, stealing and carrying away some property from the presence of another person, either by violence to the person or by threats and intimidation.
>
> C.P. 1004.

The jury was further instructed in Instruction S-5:

> The Court instructs the Jury that the Defendant is charged with Capital Murder for killing Joey Fulgham while engaged in the commission of the crime of Robbery. The phrase "while engaged in the commission of" includes the actions of the Defendant leading up to the robbery, the actual robbery, and/or the flight from the scene of the robbery.
>
> C.P. 1005.

Clearly, the jury was properly instructed on the elements of robbery and capital murder. The trial court did not abuse its discretion in refusing jury instruction D-48. Further, the State submits the Appellant cites to relevant authority which would have entitled her to this instruction in light of the evidence presented and the instructions given. Therefore, as the held in *Goff, supra*:

> ¶ 99. Having been properly instructed on the elements of robbery and capital murder, taking the State's evidence as a whole, it was reasonable for the jury to conclude that Goff murdered Brandy while engaged in the crime of robbery. Goff's charge that the evidence in this matter does not support his conviction of capital murder with the underlying felony of robbery is without merit.
>
> 14 So.3d at 650.

This claim is without legal merit. The Appellant is therefore entitled to no relief on this assignment of error.

24. THE TRIAL COURT DID NOT ERR IN OVERRULING FULGHAM'S OBJECTIONS TO THE TESTIMONY OF VANESSA DAVIS

The Appellant ascribes error to the trial court claiming three instances of error during the testimony of Vanessa Davis.[8] The Appellant claims first, that the trial court committed error by "permitting the State to present evidence of a romantic relationship between Ms. Fulgham and her 13-year old half brother, Tyler Edmonds." App. at 168. Next, Fulgham claims error occurred when Davis testified "concerning Ms. Fulgham's purported desire to shoot a dog." Id. at 177. The Appellant's final claim of error regarding the testimony of

[8]See Appellant's Claims 24-6, respectively.

Davis is that the trial court committed error in allowing testimony "concerning Ms. Fulgham's purported declaration that her marriage was over." Id. at 184. The State submits these claims are devoid of merit.

A. Bad-Character Evidence

In this claim, the Appellant argues that the trial court committed error in overruling an objection to the testimony of Ms. Davis regarding her impressions of the relationship between Appellant and her brother, Tyler Edmunds. App. at 168. As the Court held in *Culp v. State*, 933 So.2d 264 (Miss. 2005):

> ¶ 33. This Court has held that under M.R.E. 611(b) counsel conducting cross-examination is entitled to broad discretion in the subject matter of the questioning. *Craft v. State*, 656 So.2d 1156, 1162 (Miss.1995). The trial court has discretion to restrict that latitude when the subject matter of questioning has no relevance. *Mixon v. State*, 794 So.2d 1007, 1013 (Miss.2001). However, lack of relevance will be found only when the information that counsel is attempting to elicit is wholly extraneous and unprovoked by direct examination. *Black v. State*, 506 So.2d 264, 268 (Miss.1987). One is deprived of the right to cross-examine when the trial court fundamentally and substantially restricts it. *Murphy v. State*, 453 So.2d 1290, 1292 (Miss.1984). This Court has interpreted this to mean that the party is deprived of the opportunity without fault on their part. *Myers v. State*, 296 So.2d 695, 701 (Miss.1974). Counsel's active decision regarding whether or not to file certain motions, call certain witnesses, ask certain questions, and make certain objections falls within the ambit of trial strategy. *Cole v. State*, 666 So.2d 767, 777 (Miss.1995). The tactical choice of counsel to seek testimony on a particular subject is a personal one and not a restriction by the trial court. Murphy, 453 So.2d at 1293.
>
> 933 So.2d at 276.

Here, the trial court overruled the objection to Davis' testimony regarding her impressions of the relationship between the Appellant and her brother. Tr. 732-33. This testimony was

relevant in that it went to the State's theory that Fulgham was manipulative. However, even were the Court to determine that the trial court was in error, the State submits that this evidence was unimportant in relation to "everything else the jury considered on the issue in question." *See Tanner v. State*, 764 So.2d 385, 399-400 (Miss.2000). This claim is without merit and the Appellant is therefore entitled to no relief on this assignment of error.

B. Admissions

The Appellant next claims that the trial court erred in overruling objections to Davis' testimony regarding Fulgham's admissions that she wanted a gun to shoot a dog and that her marriage was over. App. at 177, 184. The State submits these claims are without merit. The trial court properly ruled that Davis' testimony was proper as it was "the defendant's statement that she [was] testifying about." Tr. 731. Likewise, Davis' testimony regarding statements made by the Appellant that her marriage "wasn't going to work out" constitute admissions and was not hearsay. Tr. 734. Mississippi Rule of Evidence 801(d)(2) provides an exception to the general rule of excluding hearsay evidence when the statement was an admission by a party-opponent. *See Conley v. State*, 790 So.2d 773, 787(¶ 43) (Miss.2001) Further, "[it is irrelevant that the defendant did not intend it to be a statement against interest and that it was self-serving when made." *Id.* The trial court did not abuse its discretion in allowing Davis' testimony regarding Fulgham's admissions pursuant to Mississippi Rule of Evidence 801(d)(2). *See Alexander v. State*, 759 So.2d 411, 415 (Miss. 2000) (holding, admissions, by their very definition are not hearsay). Therefore, this issue is without merit.

The Appellant is entitled to no relief on this assignment of error.

25. THE TRIAL COURT PROPERLY EXCLUDED JURY INSTRUCTIONS D-13B AND D-20

The Appellant claims error in the trial court's refusal to grant jury instructions -13B, a so called "two-theory" instruction and jury instruction D-20. App. at 187, 189. The State submits the trial court committed no error in refusing both instructions.

A. Jury Instruction D-13B

This instruction reads as follows:

> In considering circumstantial evidence, if the circumstantial evidence and all of the evidence in the case balance out - - that is - - are susceptible of two equally reasonable constructions, one indicating guilt and the other innocence, then, you should find Ms. Fulgham innocent.
>
> C.P. 1018.

The trial court refused this instruction on the grounds that it was repetitious. Tr. 965. The jury was indeed given a circumstantial evidence instruction in S-2B which reads:

> The Court instructs the jury that if you find from the evidence in this case beyond a reasonable doubt and *to the exclusion of every reasonable hypothesis* consistent with innocence, that on or about May 10, 2003, the Defendant, Kristi Fulgham, acting alone or with another, did, unlawfully, willfully, and feloniously, with or without the design to effect death, kill Joey Fulgham, a human being, without authority of law and not in necessary self-defense, while engaged in the commission of the crime of Robbery, then you shall find the Defendant guilty as charged of capital murder.
> If the State has failed to prove any one or more of these elements, then you shall find the Defendant not guilty of capital murder and proceed in you deliberations to consider the lesser included charge of murder.
>
> C.P. 1001. [emphasis added]

In the case *sub judice*, a proper circumstantial evidence instruction was given. *See Jones v. State*, 962 So.2d 1263, 1272 (Miss. 2007). Jury instruction D-48 was merely a restatement of this instruction and was therefore properly refused. As the *Jones* Court held:

> "In determining whether error exists in granting or refusing jury instructions, the instructions must be read as a whole; if the instructions fairly announce the law and create no injustice, no reversible error will be found." *Martin v. State*, 854 So.2d 1004, 1009 (Miss.2003).
>
> *Id.*

The jury was properly instructed. The Appellant's claim is without merit and she is therefore entitled to no relief on this assignment of error.

26. THE TRIAL COURT PROPERLY EXCLUDED JURY INSTRUCTION D-54A

The Appellant argues next that the court committed error in refusing jury instruction D-54A. App. at 190. The trial court refused this instruction holding it to be repetitious and further that "there is no requirement in this state that any verdict be to a moral certainty." Tr. 974. The State submits that the trial court properly refused jury instruction D-54A as being repetitious and that Appellant's reliance on *Speaks v. State*, 136 So. 921 (Miss. 1931) is misplaced.

Jury instruction D-54A reads:

> The court instructs the jury that it is the duty of each and every juror on the panel to make up his own verdict for himself, and to be governed by his own judgment and conscience alone after conferring with his fellow jurors. If any single juror on this panel, after conferring with his fellow jurors, is not satisfied by the evidence to a moral certainty of the guilt of the defendant, then it is the sworn duty of the said juror to vote not guilty, and never to yield his

judgment but firmly stand by it so long as he is not satisfied beyond a reasonable doubt of the defendant's guilt even though every other juror on the panel disagree with him.

C.P. 1029.

The jury in this case was properly charged. See Instructions C-1at C.P. 992, C-11 at 995, C-12 at C.P. 996, C-12(a) at C.P. 999, S-2(B) at C.P. 1001. Moreover, in *Speaks, supra*, the instruction in question was warranted only in cases "where there is a serious conflict in the evidence upon the ultimate issue of the defendant's guilt." *Id.* Such was not the case here. There was no "serious conflict in the evidence" concerning Fulgham's guilt. Further, as the trial court correctly noted, "Mississippi law does not require a finding of guilt to a moral certainty." *See Jordan v. State*, 995 So.2d 94, 104 (Miss. 2008). In *Billiot v. State*, 454 So.2d 445 (Miss. 1984), the Court expressly held in regards to this type of instruction, that "the language used by the appellant was 'to a moral certainty'. That is not the burden of proof in a circumstantial evidence case." *Id* at 462. The Appellant was not entitled to this instruction because the jury was properly instructed and the evidence in this case does not support comparison to the scenario in *Speaks*. The Appellant's argument is without merit and she is entitled to no relief on this assignment of error.

27. THE TRIAL COURT COMMITTED NO ERROR IN GRANTING JURY INSTRUCTION S-5.

The Appellant contends that the trial court committed error in granting jury instruction S-5. App. 192. Specifically, Fulgham avers that this instruction misled "the jury as to the correct legal standard" and did "not adequately inform the jury as to the law." Id. The State

would submit that this argument is without merit.

Instruction S-5 reads:

> The Court instructs the Jury that the Defendant is charged with Capital Murder for killing Joey Fulgham while engaged in the commission of the crime of Robbery. The phrase "while engaged in the commission of" includes the actions of the Defendant leading up to the robbery, the actual robbery, and/or the flight from the scene of the robbery.

C.P. 1005.

The trial court granted this instruction following the State's citation of numerous cases in which this instruction was given. Tr. 957-8. This instruction was a proper statement of the law. As the Court held in *Goff, supra*:

> ¶ 93. This Court has stated that "the intent to rob, which is required to prove the underlying felony of robbery, can be shown from the facts surrounding the crime." *Walker v. State*, 913 So.2d 198, 224 (Miss.2005) (quoting *Lynch v. State*, 877 So.2d 1254, 1266 (Miss.2004)). Mississippi recognizes the "one continuous transaction rationale" in capital cases. *West v. State*, 553 So.2d 8, 13 (Miss.1989). We have construed our capital murder statute and held that "the underlying crime begins where an indictable attempt is reached...." *Pickle v. State*, 345 So.2d 623, 626 (Miss.1977). "An indictment charging a killing occurring 'while engaged in the commission of' one of the enumerated felonies includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony." *Turner v. State*, 732 So.2d 937, 950 (Miss.1999) (quoting *West*, 553 So.2d at 13).

14 So.3d at 649-50.

Jury Instruction S-5 was properly administered and is a proper statement of the law. The argument of the Appellant is without merit. Fulgham is entitled to no relief on this assignment of error.

28. THE TRIAL COURT PROPERLY REFUSED JURY INSTRUCTION D-13

The trial court properly refused jury instruction D-13 which reads:

> Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> C.P. 1017.

This instruction was clearly repetitious of Instruction S-2B[9] and was therefore properly refused by the trial court. C.P. at 1001. The State would submit that this claim is devoid of merit. Fulgham is entitled to no relief on this assignment of error.

29. THE TRIAL COURT COMMITTED NO ERROR IN GRANTING JURY INSTRUCTION S-3B OR IN REFUSING JURY INSTRUCTION D-51

The Appellant next challenges the trial court's granting of instruction S-3B and refusal of instruction D-51 which, according to Fulgham, "required the jury to first unanimously find Ms. Fulgham innocent of capital murder before considering the lesser offense of murder." App. at 197. She is mistaken. The State would submit that this claim is without legal merit.

A. Instruction S-3B:

Instruction S-3B reads as follows:

> The Court instructs the Jury that if you unanimously find that the State has failed to prove all the elements of the crime of Capital Murder, you may then

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[9]C.P. 1001.

> proceed in your deliberations to consider the lesser charge of Murder. However, it is your duty to accept the law given to you by the Court; and if the facts and the law warrant a conviction of the crime of Capital Murder, then it is your duty to make such a finding, and not be influenced by your power to find a lesser offense. This provision is not designed to relieve you from the performance of an unpleasant duty. It is included to prevent a failure of justice if the evidence fails to prove the original charge but does justify a verdict for the lesser crime.
>
> Therefore, if you believe from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the Defendant, Kristi Fulgham, acting alone or with another, did on or about May 10, 2003, unlawfully, willfully, and feloniously, of her malice aforethought, kill and murder Joey Fulgham, a human being, without authority of law and not in necessary self defense, then you shall find the Defendant guilty of the lesser included offense of Murder.
>
> C.P. 1002-3.

This Court has previously considered this type of "acquit first" claim in the case of *Gray v. State*, 728 so.2d 36 (Miss. 1998). There, the Court unequivocally held, in regards to a claim of this nature:

> ¶ 207. In the alternative, Gray's claim as to this issue is without merit. This Court has considered such "acquit-first" instructions before. There is nothing in Mississippi jurisprudence that prohibits such an instruction. *Carr*, 655 So.2d at 848. Jury "(... instructions should be read in their entirety to determine if there was error)." *Walker*, 671 So.2d at 608 (quoting *Chase*, 645 So.2d at 852). Gray's claim that the instruction coerces jurors into convicting of capital murder even though they may believe him guilty only of simple murder is unfounded. This Court has held such a result is not required or warranted from this instruction. *Chase*, 645 So.2d at 852.
>
> 728 So2d at 75.

Instruction S-3B was proper. The Appellant's claim is without merit. Fulgham is not entitled to relief on this assignment of error.

B. Instruction D-51

Continuing her objection to Instruction S-3B, the Appellant ascribes error to the trial court for failing to grant instruction D-51. App. at 198. The trial court refused this instruction as being repetitious. Tr. 973. The Appellant's "acquittal first" argument is misplaced in light of the precedent of this Court. *See Gray, supra.* For the reasons stated herein and in the preceding claim, the State submits that this instruction was not warranted and was therefore properly refused by the trial court. The Appellant's claim regarding instruction D-51 is without merit and she is therefore entitled to no relief on this assignment of error.

30. JURY INSTRUCTION D-18 WAS PROPERLY REFUSED BY THE TRIAL COURT

The Appellant argues next that she was entitled to jury instruction D-18 which reads:

> Guilt by association is neither a recognized nor tolerable concept in our criminal law.
>
> C.P. 1022.

The trial court properly refused this instruction. Tr. 967. As the State noted in its objection to this instruction, "[t]here's no authority that says that this instruction has to be granted." *Id.* There is no relevant prevailing authority cited by the Appellant that supports her claim that she was somehow entitled to this instruction. The record in this case supports the State's position that jury was properly instructed in this case. Fulgham is therefore not entitled to relief on this assignment of error.

31. THE TRIAL COURT PROPERLY REFUSED JURY INSTRUCTION D-22

The Appellant argues next that trial court committed error in refusing jury instruction D-22 which reads:

> Each person testifying in this case is a witness. You, individually, must determine the believability of the witnesses. I instruct you that you may consider the following factors in weighing the testimony of a witness:
>
> 1. the intelligence of the witness;
> 2. the ability of the witness to observe and accurately remember;
> 3. the sincerity, or lack of sincerity, of a witness;
> 4. the demeanor of the witness;
> 5. the extent to which the testimony of the witness is supported or contradicted by other evidence;
> 6. whether discrepancies in testimony are the result of innocent mistake or deliberate falsehood; and
> 7. any other characteristics noted by you.
>
> I instruct you that you may reject or accept all or any part of the testimony of a witness; or you may reject parts, but accept other parts of the testimony of a witness.
>
> After making you own judgment, give the testimony of each witness the credibility, if any, you think it deserves.
>
> C.P. 1024.

The trial court refused this instruction as being repetitious. Tr. 968. The Appellant relies on *Chatman v. State*, 761 So.2d 851 (Miss. 2000), as support for her claim. However, as was the case in *Chapman*, no error was committed by the trial court in refusing this instruction. In *Chapman*, the Court held that:

[i]n order to prevail on a claim that the trial court's refusal to give a requested instruction was an abuse of discretion, a defendant must show that his requested instruction was (1) a correct statement of the law, (2) not substantially covered in the jury charges as a whole, and (3) of such importance that the court's failure to instruct the jury on that issue seriously impaired the defendant's ability to present his given defense. *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir.1998). In our view, here, that cannot be done.

¶ 16. Our law is clear. A court must view jury instructions as a whole, and not individually, in order to decide whether the jury was adequately instructed. *Morgan v. State*, 741 So.2d 246, 253 (Miss.1999). Further, "an instructional error will not warrant reversal if the jury was fully and fairly instructed by other instructions." *Collins v. State*, 594 So.2d 29, 35 (Miss.1992). Here, the jury was adequately instructed by the trial court. Instruction C-1 properly informs the jury of the things it should consider when weighing witness testimony. The pertinent part of C-1 provided:

> It is your duty to determine the facts and to determine them from the evidence produced in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy and prejudice. Your verdict should be based on the evidence and not upon speculation, guesswork, or conjecture.
>
> You are the sole judges of the facts in this case. Your exclusive province is to determine what weight and what credibility will be assigned the testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

Thus, Chatman fails the second prong of *Davis* test, which he put forth. Further, if a defendant fails the second prong of *Davis* the third prong is also failed.

¶ 17. Although it is clear that D-1 goes into greater detail than C-1, credibility was not a critical issue to Chatman's defense. No witness identified Chatman, and there was no dispute as to whether a robbery and assault occurred. It is clear that Chatman's statement, which he admitted to giving, was the cause of his conviction. No witness could give first hand knowledge

of his involvement. It follows that for this reason as well Chatman fails the third prong of *Davis*. Therefore, the circuit court did not abuse its discretion in refusing Chatman's requested Jury Instruction D-1.

V.

¶ 18. For these foregoing reasons, the judgment of the circuit court is affirmed.

761 So.2d at 854-5.

In the case *sub judice,* the trial court gave Instruction C-01which adequately instructed the jury on what to consider when weighing witness testimony. That instruction reads:

> Members of the jury, you have heard all of the testimony and received the evidence introduced in the course of this trial. The Court will presently instruct you as to the rules of law which you will use and apply to this evidence in reaching your verdict.
>
> It is your duty as jurors to follow the law which I shall state to you. On the other hand, it is your exclusive province to determine the facts in this case and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you by the Court.
>
> Both the State of Mississippi and the Defendant(s) have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case and that you will reach a just verdict regardless of what the consequences of such verdict may be.
>
> *It is your duty to determine the facts and to determine them from the evidence in open court. You are to apply the law to the facts and in this way decide the case. You should not be influenced by bias, sympathy, or prejudice. Your verdict should be based on the evidence and not on speculation, guesswork, or conjecture.*
>
> *You are the sole judges of the facts in this case. Your exclusive province is to determine what weight and what credibility will be assigned the*

testimony and supporting evidence of each witness in this case. You are required and expected to use your good common sense and sound honest judgment in considering and weighing the testimony of each witness who has testified in this case.

Although you as jurors are the sold judges of the facts, you are duty-bound to apply the law as stated in these instructions to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but you must consider these instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be it would be a violation of your sworn duty to base your verdict upon any other view of the law than that given in these instructions by the Court.

Arguments, statements, and remarks of counsel are intended to help you understand the evidence and apply the law, but are not evidence. Any argument, statement, or remark having no basis in the evidence should be disregarded by you.

The evidence which you are to consider consists of the testimony of the witnesses and the exhibits offered and received. Production of this evidence in court is governed by rules of law.

From time to time during the trial, it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourself with the reasons for the Court's rulings since they are controlled and governed by rules of law. You should not infer from any rulings by the Court on these motions or objections to the evidence that the Court has any opinion on the merits of this case favoring one side of [sic] another. You should not speculate as to possible answers to questions which the Court did not require to be answered. Further, you should not draw any inference from the content of those questions. You are to disregard all evidence which was excluded by the Court from consideration during the course of the trial.

C.P. 992-94. [emphasis added]

This Instruction contains the exact same language as Instruction C-1in *Chatman* which the Court held to be proper. *See Chatman, supra.* Therefore, the Appellant cannot satisfy the

second or third requirements of *Chatman* and her argument must fail. *Id.* This claim is clearly without merit. Fulgham is entitled to no relief on this assignment of error.

32. THE TRIAL COURT COMMITTED NO ERROR IN REFUSING JURY INSTRUCTIONS D-14 AND D-15

The Appellant argues that the trial court committed error in refusing jury instructions D-14 and D-15. App. at 203. Both instructions were properly refused by the trial court. The State submits that both claims related to these instructions are without merit.

A. Instruction D-14

Instruction D-14 reads:

> In your deliberations, you are bound to give Kristi Fulgham the benefit of any reasonable doubt of her guilt that arises out of the evidence or want of evidence in this case.[1] There is always a reasonable doubt of a defendant's guilt when the evidence simply makes it probable that the defendant is guilty. Mere probability of guilt will never warrant you to convict Kristi Fulgham. It is only when on the whole evidence you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him guilty. You might be able to say you believe Kristi Fulgham guilty and yet, if you are not able to say on your oath, beyond a reasonable doubt, that she is guilty, it is your sworn duty to find Kristi Fulgham not guilty.
>
> C.P. 1019. [footnote omitted]

This instruction was refused by the trial court after the following exchange:

> BY THE COURT: . . . Instruction D-14?
>
> BY MR LAPPAN: Judge, I don't have a copy of your instructions on this issue, but if this is covered by yours, I will happily withdraw it. I don't have a copy of what you're going to be giving - -
>
> BY THE COURT: Wait a minute. Let me read it and check.

BY MR. LAPPAN: Thank you, sir.

BY THE COURT: Okay. This is mere probability. It will be refused. I think I've instructed them properly on that. Mere probability is not to be used.
And this is argumentative, also, so it is refused. Mine, I don't think is argumentative.

Tr. 965.

The trial court's instruction C-12 properly instructed the jury and was not argumentative. That instruction reads:

> The Court instructs the jury that the law presumes every person charged with the commission of a crime to be innocent. This presumption places upon the State the burden of proving the Defendant guilty beyond a reasonable doubt and to the exclusion of every reasonable hypothesis, consistent with innocence. The presumption of innocence prevails unless overcome by evidence which satisfies the jury of the Defendant's guilt beyond a reasonable doubt and to the exclusion of every reasonable hypothesis, consistent with innocence. The Defendant is not required to prove her innocence.

C.P. 996.

The Appellant was not entitled to instruction D-14 in light of the aforementioned instruction. As this Court held in *Leedom v. State*, 796 So.2d 1010 (Miss. 2001), when confronted with virtually the same instruction:

> ¶ 38. Leedom argues the court erred in denying the defense instruction on reasonable doubt, which read:
>
> > The Court instructs the Jury that you are bound, in deliberating upon this case, to give the defendant the benefit of any reasonable doubt of the defendant's guilt that arises out of the evidence or want of evidence in this case. There is always a reasonable doubt of the defendant's guilt when the evidence simply makes it probable that the defendant is guilty. Mere probability of guilt will never warrant you to convict the

> defendant. It is only when on the whole evidence you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him/her guilty. You might be able to say that you believe him/her to be guilty, and yet, if you are not able to say on your oaths, beyond reasonable doubt, that he/she is guilty, it is your sworn duty to find the defendant "Not Guilty."

A trial court need not grant an otherwise valid instruction if the subject matter contained in the proposed instruction is adequately covered in another instruction. *Laney v. State*, 486 So.2d 1242, 1246 (Miss.1986). In the case at bar, no fewer than eight instructions informed the jury of the appropriate standard of proof. Those include instruction C-4:

> The Court instructs the jury that if the jury, from all the evidence in this case, or from the lack of evidence, has reasonable doubt in their minds as to the guilt of the defendant, then it is you sworn duty to find the defendant not guilty of any charge.

¶ 39. We find this assignment of error also without merit.

796 So.2d at 1021

The trial court properly instructed the jury on reasonable doubt. See Instruction C-12. Further, the language of instruction D-14 was argumentative and therefore improper. Additionally, the Appellant failed to cite to any relevant prevailing authority which authorizes this instruction. Accordingly, the Appellant's argument must therefore fail. The State would also submit that Fulgham failed to allege with specificity as to why she was entitled to this instruction which she is required to do. This claim is devoid of merit. Fulgham is entitled to no relief on this assignment of error.

B. Instruction D-15

The Appellant also claims error in the trial court's refusal of jury instruction D-15.

App. at 204. Again, the Appellant makes no argument as to why she was entitled to this instruction opting instead to mistakenly rely on "case authority cited in the annotations." This "authority" however is not authority at all for purposes of direct review with this Court. The State submits that this claim is also without merit.

Instruction D-15 reads:

> A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence.[1] Reasonable doubt exists when, after weighing and considering all the evidence, using reason and common sense, jurors cannot say that they have a settled conviction of the truth of the charge.
>
> C.P. 1020. [footnote omitted]

The trial court properly refused this instruction as it was clearly repetitious.[10] Tr. 966. As noted in the preceding claim, the trial court instructed the jury on the issue of reasonable doubt. Instruction D-15 was clearly repetitious. The Appellant's argument is barred and is alternatively without merit. Fulgham is entitled to no relief on this assignment of error.

33. THE CLAIM REGARDING THE WEIGHT OF THE EVIDENCE IS WITHOUT MERIT

Fulgham avers that her "conviction cannot stand as it is unsupported by the evidence." App. at 208. The Appellant bases her claim on arguments presented previously regarding jury instruction D-48[11] and testimony regarding the robbery of the victim's computer. App. at 205. As the Court recently held in *Goff, supra*:

---

[10]See Instruction C-12.

[11]See Claim 23.

¶ 88. Essentially, when a defendant successfully challenges a jury's verdict based on the weight of the evidence, the defendant is entitled to have a different jury pass on the evidence. *See Smith v. State*, 925 So.2d 825, 832 (Miss.2006) ("this Court has not hesitated to invoke its authority to order a new trial and allow a second jury to pass on the evidence where it considers the first jury's determination of guilt to be based on extremely weak or tenuous evidence") (citations & internal quotation marks omitted). However, "the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict." *Bush*, 895 So.2d at 844. This Court will disturb a verdict only "when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." *Id.*

¶ 89. Investigator Smith testified on cross-examination that she released the wallet to Detective Lambert at the scene, where he then sealed it. She stated that she did not submit the wallet to the crime laboratory for testing because there did not appear to be any biological evidence of any sort that required such submission. Similarly, the jury had before it the fact that no tests were conducted on the wallet for fingerprints. These were factual questions, with attendant inferences that could have led in any number of directions, for the jury to resolve.

¶ 90. We find that the lack of biological and fingerprint evidence does not preponderate against the verdict so as to sanction an unconscionable injustice. *Bush*, 895 So.2d at 844.

¶ 91. Finally, based on the framing of Goff's argument for this issue, it is unclear whether he seeks to challenge the State's proof with regard to the intent element for the crime of robbery. In support of his argument with regard to the location of the wallet, *Goff* cites *Young v. Zant*, 506 F.Supp. 274 (M.D.Ga.1980), aff'd, 677 F.2d 792 (11th Cir.1982). In *Young*, the petitioner sought habeas corpus relief under 28 U.S.C. § 2254, from his death sentence imposed by a Georgia state court, following his jury conviction of murder, armed robbery, and robbery. 506 F.Supp. at 276. The district court granted relief, *inter alia*, as it pertained to petitioner's sentence, based on its finding that the evidence was insufficient to sustain a conviction based on robbery. *Id.* at 280-81.

¶ 92. However, based on our reading of *Young*, the decision dealt only with the element of intent, not with whether that victim's wallet was in his

presence at the time of the murder. *Id.* at 280-81. Moreover, the district court's stated reasoning for granting relief was based on a finding that the "only relevant evidence presented at trial *indicated* that petitioner did not contemplate the taking of any money until after the shots had been fired and the blows had been struck." *Id.* at 280. (emphasis added). Thus, we find *Young* distinguishable from the matter before us.

¶ 93. This Court has stated that "the intent to rob, which is required to prove the underlying felony of robbery, can be shown from the facts surrounding the crime." *Walker v. State*, 913 So.2d 198, 224 (Miss.2005) (quoting *Lynch v. State*, 877 So.2d 1254, 1266 (Miss.2004)). Mississippi recognizes the "one continuous transaction rationale" in capital cases. *West v. State*, 553 So.2d 8, 13 (Miss.1989). We have construed our capital murder statute and held that "the underlying crime begins where an indictable attempt is reached...." *Pickle v. State*, 345 So.2d 623, 626 (Miss.1977). "An indictment charging a killing occurring 'while engaged in the commission of' one of the enumerated felonies includes the actions of the defendant leading up to the felony, the attempted felony, and flight from the scene of the felony." *Turner v. State*, 732 So.2d 937, 950 (Miss.1999) (quoting *West*, 553 So.2d at 13).

¶ 94. The State's theory of the case was that Goff went back to the Rocky Creek Inn the night of August 26, 2004, to get back what was rightfully his, the money in Brandy's wallet. The evidence, although circumstantial, supports this theory.

¶ 95. During the State's case-in-chief, evidence was presented through James's testimony, that after Goff's departure from the motel earlier that afternoon, Brandy feared his return. Based on the motel clerk's testimony, when Goff returned to the motel at approximately 11:30 p.m., he came to the front desk multiple times trying to gain access into room 121, before eventually being told that the door was locked from the inside.

¶ 96. Additional evidence was presented that Goff had received a significant sum of money from his mother for a business that he had planned to start. There also was evidence adduced, still during the State's case, that Goff was supporting Brandy and that Goff was the source of the cash found inside her wallet.

¶ 97. A number of reasonable inferences could be drawn from the facts

surrounding the issue of Goff's intent. While some may be competing is of no matter. As is true in cases based on direct testimonial evidence, any conflicts created by the circumstantial evidence presented were for the jury to resolve. *Ratliff v. State*, 515 So.2d 877, 882 (Miss.1987); see also Kitchens, 300 So.2d at 926-27.

¶ 98. As with the issue regarding the presence of Brandy's wallet, we find nothing in the record that points in favor of Goff with sufficient force that compels us to conclude that no rational trier of fact could have found him guilty on the intent element of robbery beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence. Billiot, 454 So.2d at 461; cf. *Bush v. State*, 895 So.2d at 843.

¶ 99. Having been properly instructed on the elements of robbery and capital murder, taking the State's evidence as a whole, it was reasonable for the jury to conclude that Goff murdered Brandy while engaged in the crime of robbery. Goff's charge that the evidence in this matter does not support his conviction of capital murder with the underlying felony of robbery is without merit.

14 So.3d at 649-50.

Contrary to the protestations of the Appellant, the jury in the case *sub judice* was "properly instructed on the elements of robbery and capital murder.[12]" *Id.* Further, it was clearly "reasonable for the jury to conclude that [the Appellant] murdered [Joey Fulgham] while engaged in the crime of robbery" based on the evidence presented. *Id.* This claim is without merit. The Appellant is entitled to no relief on this assignment of error.

34. THE APPELLANT'S CLAIM THAT THE TRIAL COURT ERRED IN TRANSFERRING VENUE TO UNION COUNTY IS WITHOUT LEGAL MERIT

The Appellant avers next that the trial court somehow erred in not granting her the

[12]See Claim 23.

venue of her own choosing. Specifically, Fulgham claims the trial court erred in transferring venue to Union County because such a transfer would not "resolve the taint of media attention" and further that Union County represented a "demographic disparity." App. at 211. Because the trial court's transfer of venue to Union County was proper and because the Appellant has failed to show how she was prejudiced as a result, the State submits this claim is without merit.

In *Ruffin v. State*, 992 So.2d 1165 (Miss. 2008) the Court held in regards to reviewing a trial court's decision to grant or deny a change of venue, holding that:

> ¶ 26. This Court reviews a trial court's decision to grant or deny a change of venue for abuse of discretion. *King v. State*, 960 So.2d 413, 429 (Miss.2007) (citing *Howell v. State*, 860 So.2d 704, 718 (Miss.2003)).
>
> ¶ 27. A change of venue may be granted only if the defendant makes a satisfactory showing that he cannot receive a fair and impartial trial where the offense is charged. *King*, 960 So.2d at 429 (citing *Byrom v. State*, 927 So.2d 709, 715 (Miss.2006)). " '[U]pon proper application, there arises a presumption that [an impartial trial cannot be had]; and, the State then bears the burden of rebutting that presumption.' " *White v. State*, 495 So.2d 1346, 1348 (Miss.1986) (quoting *Johnson v. State*, 476 So.2d 1195 (Miss.1985)). "Proper application" is met by complying with the change-of-venue statute found at Section 99-15-35 of the Mississippi Code Annotated (Rev.2007). White, 495 So.2d at 1348-49. Under Section 99-15-35, a change of venue must be requested "in writing, sworn to by the prisoner, made to the court, ... supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged...." Miss.Code Ann. § 99-15-35 (Rev.2007). An application for change of venue must strictly comply with this statute. *Baldwin v. State*, 732 So.2d 236, 241 (Miss.1999) (citing Purvis v. State, 71 Miss. 706, 14 So. 268 (1894)) (statutory deficiency where motion included two affidavits, but was not sworn to by the petitioner).

992 So.2d at 1174.

The trial court determined that change of venue was indeed warranted. Tr. 136. In considering the Appellant's motion the trial court properly considered the requests made by Fulgham for transfer to designated counties. Tr. 132-5. The trial court then transferred venue to Union County and the Appellant filed her objection. C.P. 786, 808-20. In her objection, as stated previously, the Appellant claims a transfer to Union County would not eliminate the taint of media coverage. Id. at 810. This claim was unsupported at trial and is not supported on direct review. Further, the Appellant has not even attempted to show that she did not receive a fair and impartial trial, resting instead on her objection to the transfer to Union County. C.P. 808-20. Likewise, devoid of support is the Appellant's contention that she was entitled to a transfer of venue to a county with certain racial demographics. She is mistaken. The Court condemned this practice in *Howard v. State*, 945 So.2d 326 (Miss. 2006), holding:

> ¶ 26. Howard argues that his trial counsel were ineffective in failing to pursue a change of venue. Howard asserts that "due to his being an African-American and the victim being white, it was imperative that he be tried in a county where the racial makeup was more favorable to him." He contends that because the first trial was conducted in Lowndes County, the second trial should have been held elsewhere.
>
> ¶ 27. Howard argues that since "black defendants who kill white victims are more likely to ... receive a death sentence, it was incumbent upon Howard's trial attorneys to pursue a change in venue." Howard relies on *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). McCleskey requires proof "that the decisionmakers in his case acted with discriminatory purpose." *Id.* at 292, 107 S.Ct. at 1767. Howard "offers no evidence specific to his own case that would support an inference that racial

considerations played a part in his sentence." *Id.* at 292-93, 107 S.Ct. at 1767. Additionally, this precise argument was rejected in *Mitchell v. State*, 886 So.2d 704 (Miss.2004):

> Mitchell asserts that counsel was ineffective due to his failure to "actively" seek a change of venue. Since he is an African-American and the victim was white, Mitchell maintains that "it was imperative that he be tried in a county where the racial make-up was more favorable to him." This Court, however, has previously held that "a defendant has no right to a change of venue to a jurisdiction with certain racial demographics." *De La Beckwith v. State*, 707 So.2d 547, 597 (Miss.1997). Mitchell was entitled only to a trial by an impartial jury representing a fair cross-section of the community. *Lanier v. State*, 533 So.2d 473, 477 (Miss.1988). A motion for a change of venue is not automatically granted in a capital case. There must be a satisfactory showing that a defendant cannot receive a fair and impartial trial in the county where the offense is charged. *Gray v. State*, 728 So.2d 36, 65 (Miss.1998). Mitchell has made no such showing.

Mitchell, 886 So.2d at 709. Howard has not offered any proof that he did not receive "a fair and impartial trial in the county where the offense [was] charged." *Id.*

> ¶ 28. Howard also alleges that there was a great deal of pretrial publicity which prevented a fair trial. The record does not support this allegation. During voir dire, the circuit court asked potential jurors who had been exposed to media accounts of the case, if they could "lay that aside and base [their] verdict solely on" what they heard in the courtroom. Only one prospective juror responded that she could not and she was not seated on the jury.

945 So.2d at 341-2.

The Appellant has certainly not presented "evidence specific to [her] own case that would support an inference that racial considerations played a part in his sentence" nor has the Appellant offered any proof that she did not receive a fair and impartial trial. *Id.* This claim

is completely and wholly unsupported and the record fails to support the Appellant's assertion that the trial court abused its discretion in transferring venue to Union County. This claim is devoid of merit. Fulgham is entitled to no relief on this assignment of error.

35. THE APPELLANT'S CLAIMS OF CUMULATIVE ERROR ARE WITHOUT MERIT.

In her final two claims the Appellant claims that "aggregate error[s]" warrant reversal of her conviction and sentence of death as a matter of both state[13] and federal law[14]. See App. at 214, 216. She is mistaken. The State would submit that there is nothing to cumulate that requires reversal of either the conviction or sentence in this case. The State further submits that there are no errors or "near errors" that can be cumulated to require the granting of relief in this case.

The State respectfully submits that there is no error in this case, cumulative or otherwise. The substance, if any, of each issue raised by Fulgham has been refuted by substantial authority outlined above. Based on this authority, the State submits that the Appellant's assignments of error on appeal are without merit. "Where there is no reversible error in any part, ... there is no reversible error to the whole." *Doss*, 709 So. 2d at 400 (quoting *McFee v. State*, 511 So. 2d 130, 136 (Miss. 1987)).

Alternatively, however, even if this Court were to find errors to exist, the State submits that such errors are not substantial enough to warrant reversal. A criminal defendant

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[13]See Appellant's Claim 37.

[14]See Appellant's Claim 38.

is not entitled to a perfect trial, only a fair trial. *Sand v. State*, 467 So. 2d 907, 911 (Miss. 1985). Fulgham has presented no evidence that she did not receive a fair and impartial trial. This claim is without merit. The Appellant is entitled to no relief on this assignment of error.

CONCLUSION

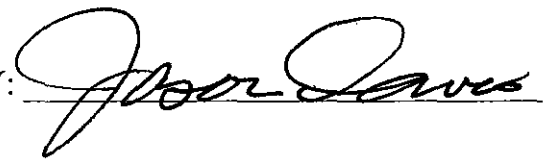
For the above and foregoing reasons and arguments, the State respectfully submits that the sentence of death imposed by the trial court should be affirmed.

Respectfully submitted,

JIM HOOD
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
Miss. Bar No. [redacted]

JASON L. DAVIS
SPECIAL ASSISTANT ATTORNEY GENERAL
Counsel of Record
Miss. Bar No. [redacted]

BY: 

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 220
Jackson, Mississippi 39205
Telephone: (601) 359-3680

CERTIFICATE

I, Jason L. Davis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR APPELLEE to the following:

The Hon. Lee J. Howard
Circuit Court Judge
Sixteenth Circuit Court District
P.O. Box 1344
Starkville, MS 39760

Frank Clark, Esq.
Office of the District Attorney
P.O. Box 1044
Columbus, MS 39759

James Lappan
Office of Capital Defense Counsel
510 George Street, Suite 300
Jackson, MS 39202

This the 12th day of November, 2009.

JASON L. DAVIS