IN THE SUPREME COURT OF MISSISSIPPI
No. 2007-DP-01312-SCT

KRISTI FULGHAM, Appellant,

versus

THE STATE OF MISSISSIPPI, Appellee.

ORIGINAL BRIEF OF THE APPELLANT

APPEALED FROM OKTIBBEHA COUNTY CIRCUIT COURT

James Lappan
Miss. Bar N[redacted]
Office of Capital Defense Counsel
510 George Street, Suite 300
Jackson MS 39202
(601) 576-2316

ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PERSONS

Kristi Fulgham v. State of Mississippi (No. 2007-DP-01312-SCT)

Pursuant to Mississippi Rule of Appellate Procedure 28(a)(1), the undersigned counsel of record certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications of recusal.

Kristi Fulgham
Defendant/Appellant
Death Row
Pearl, MS 39208

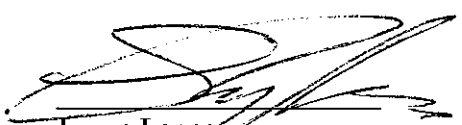
The Hon. Lee J. Howard
Circuit Court Judge
Sixteenth Circuit Court District
Post Office Box 1344
Starkville, MS 39760

Stephanie Mallette, Esq.
Post Office Box 80170
Starkville, MS 39759

Frank Clark, Esq.
Assistant District Attorney
Sixteenth Circuit Court District
P.O. Box 1044
Columbus, MS 39701

Patricia Faver, Esq.
Oktibbeha County Hospital
P.O. Box 1506
Starkville, MS 39759

Vicki Dennis
Intern, District Attorney's Office (as of July 9, 2007)
P.O. Box 1044
Columbus, MS 39701



James Lappan
Attorney for Kristi Fulgham

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STATEMENT OF THE CASE

Called upon for opening statement in a case where the State chose to seek the death penalty, Assistant District Attorney Frank Clark stood before Kristi Fulgham's jury on the morning of Wednesday, December 5, 2006. He began as follows:

> Good morning, ladies and gentlemen. It's all about the money. That's what the evidence in this case is going to show. That with this defendant, it is always all about the money. It's always about possessions and material things.
>
> (R. 663).

During the opening of its opening statement, the prosecution set its course.

With the exception of the impropriety of admitting inadmissible and inflammatory evidence entirely unrelated to the accusation at bar, it was a course from which the prosecution did not deviate. Namely, the prosecution introduced evidence that Ms. Fulgham stole cash from her husband's wallet and that she also yearned for life-insurance proceeds she believed she would receive at her husband's death. See Part II(B) of Claim 23, infra. Also, while the prosecution presented no evidence that a computer tower was stolen -- by Ms. Fulgham or by anyone else -- the prosecution nonetheless offered the theft of a computer tower as an *actus reus* for the jury to consider in reaching a patchwork verdict. See Claim 35, infra; see also Claim 23, infra.

If the prosecution was duty-bound to present evidence that Ms. Fulgham was a conniving and greedy wife who lived a life that was "always about possession and material things," then the prosecution would have gone a long way in fulfilling this duty when the State rested. See Part II(B) of Claim 23, infra.

However, the State was not duty bound to disparage Ms. Fulgham.[1]

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[1] Surely, it is beyond contradiction that the State believed it was duty bound to disparage Ms. Fulgham. *Inter alia*, the State introduced evidence that she engaged in an incestuous, pedophiliac relationship with her thirteen-year-old half brother. During the penalty phase, the State introduced unauthenticated and non-rebuttal evidence of bad

The State was duty bound to prove to a unanimous jury, beyond a reasonable doubt, that Ms. Fulgham committed a robbery and, during the course of that robbery, her husband, Joey Fulgham, was killed. The State presented a circumstantial case. See Claim 8 and 9, infra.

The charge conference held on Thursday, December 6, 2006, marked the beginning of the end for the State's misadventure into indiscriminate disparagement rather than evidence of a robbery.

Jury Instruction D-48 was submitted. (R. 971).

Jury Instruction D-48, the refusal of which is the subject matter of Claim 23, infra, reads as follows:

> 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.
>
> (CP. 1025).

Defense counsel explained that D-48 was constitutionally required. According to defense counsel: "My issue, Judge, is that Kristi's entitled to have all 12 jurors agree that Kristi robbed this item, whether it be the case or something else. The jury must agree on what object Kristi stole from her husband if they're going to convict her of robbery. That's the point of this instruction. It's a unanimous verdict instruction." (R. 972).

Notwithstanding that explanation and the ten cases cited in the annotation for D-48, see CP. 1025, the State opposed D-48 because "we don't have special verdicts and interrogatories to the jurors. There's no authority for granting this instruction." (R. at 971). In addition, the State

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character. This unfortunate, unprofessional and lethal retreat from the State's role to fearlessly and zealously represent the government – see Hosford v. State, 525 So. 2d 789, 792 (Miss. 1988) (citing Adams v. State, 202 Miss. 68, 75, 30 So. 2d 593, 596 (1947) -- is specifically briefed in Claims 3, 20 and 24, infra.

offered that the jury has "already been instructed that they all have to find all the elements of capital murder beyond a reasonable doubt." Id.[2]

The Court refused D-48 as repetitious. (R. at 971 and 972).

Perhaps emboldened by Ms. Fulgham's failure to secure a lawful instruction at D-48, the State magnified the trial court's unconstitutional invitation for a patchwork verdict[3] through duplicitous, forensic argument. Mr. Clark, who told the jury in opening that this case would be "about possessions and material things," remained true to this undertaking during closing statement:

> But ladies and gentlemen of the jury, to this defendant Joey Fulgham's life was worth $305,000, plus $1,000 in cash for a weekend at the Beau Rivage with her boyfriend. It was all about the money. (emphasis added)[4]
>
> (R. 991).
>
> You've heard the judge tell you already in your jury instructions – and again, you'll have them with you – that a capital murder is a murder in his case, that's committed during the commission of a robbery.
>
> Now robbery, you all use your common sense, you know what robbery is. It's the taking of someone property by violence to them or by threatening them with violence.

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[2] The State is correct. If D-48 was a "reasonable doubt" instruction, then the prosecution's correct statement of law would be germane. Unfortunately for the State, D-48 is a unanimity instruction and not a reasonable-doubt instruction. The law requires the jury to unanimously agree on the element of what Ms. Fulgham stole as a precondition to a guilty verdict. If the jury does not unanimously agree on what Ms. Fulgham stole, then the jury may not convict Ms. Fulgham of robbery. See case authority cited in the annotation of D-48 at CP. 1025. If the jury cannot agree on the underlying *actus reus*, the jury cannot convict on capital murder under Miss. Code Ann. 97-3-19(2)(e). See Claim 23, infra.

[3] A patchwork verdict is a verdict where jurors agree the accused has done something illegal but disagree upon *actus reus*. Stacey Neumann Vu, Corporate Criminal Liability: Patchwork Verdicts and the Problem of Locating a Guilty Agent, 104 Colum. L.R. 459, 460 n. 6 (2004) (citing authority); Vu, Corporate Criminal Liability, 104 Colum. L.R. at 481-82 (citing United States v. Gipson, 553 F.2d 453 (5th Cir. 1977) (1977)) (due process requires the fact-finder to come to a consensus on *actus reus*); Hayden J. Trubitt, Patchwork Verdict, Different-Jurors Verdicts and American Jury Theory: Whether Verdicts are Invalidated by Juror Disagreement on Issues, 36 Okla. L.Rev. 473, 474 n.1, 476-77 (1983) (citing Note, Right to Jury Unanimity on Material Fact Issues: United States v. Gipson, 91 Harv. L.Rev. 499 (1977)).

[4] To adopt the State's words, then, the underlying robbery at bar is "all about the $305,000 in suspected insurance proceeds and one-thousand dollars in cash."

In this case, ladies and gentlemen, Joey's property was stolen from him when he was killing – when he was killed.

How do we know Joey had property that was taken from him? Remember the testimony of Shannon Fulgham, Joey's brother? That he was with Joey that Friday at lunch when Joey cashed his paycheck? He put $1,000 in $100 bills in his wallet, plus a $20 bill and some change.

And he held up his big thick wallet that his brother said he always had with him, and he said, 'This is my savings account.'

So we knew he had at least $1,000 that Friday, and he had a wallet. Joey was found dead that Sunday. There was no wallet, there was no case, there was no checkbook, there were no credit cards, there was nothing.

There were some slips found, looked like they had been taken out of a wallet. We know Joey had a wallet. Whoever killed Joey stole that wallet and stole that cash. This is capital murder.[5]

(R. 992-93).

There's also a computer that was taken from that house. You heard Deputy Elmore tell you that it looked like there was a central processing unit, which is the big tower part of the computer on that floor. He said you can look at the carpet, and you can look at the picture for yourself, you can look at the carpet and still see the indention of where a computer had just been recently there.

How do we know that computer was recently there? Remember the two e-mails Kyle Harvey got from the home where this defendant and Tyler Edmonds were?

That computer was right there Friday night. It wasn't there Sunday afternoon. There was also a computer stolen.

This is capital murder.[6]

(R. 994)

Is it a coincidence that she's [Ms. Fulgham] talking about all the life insurance, that she's making phone calls about the life insurance, that she's already asked

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[5] Adopting the State's words, again, the underlying robbery at bar is "all about the wallet and the cash in the wallet."

[6] Adopting the State's words once again, the underlying robbery a bar is "all about the stolen computer." There is no evidence, however, that the computer tower was criminally appropriated, nor is there evidence that ***any*** email from ***any*** sender to ***any*** recipient emanated from a computer located at 2163 Buckner Street. This extraordinary and fatal deficiency in the State's case-in-chief is the subject matter of Claim 35, infra.

two people for a gun, told one of them she wanted to kill a dog, told another one she wanted to kill Joey, and then a week later Joey is found dead in his bed? Is is a coincidence? Or is it a little something more? Where there's smoke, is there really fire?

We could have rested right then and there and proven this defendant committed this capital murder.[7] (emphasis added).

(R. 998-99)

Assistant District Attorney Patricia Faver followed Mr. Clark's duplicitous line during her summation to Ms. Fulgham's jury. According to Ms. Faver:

Her [Ms. Fulgham's] greed got in the way because 300 [suspected insurance proceeds of $300,000] just wasn't enough. And Mr. Lappan's right, if it was just the money, if it was just the 300, but it wasn't. She had to take that $1,000. Couldn't leave it. She had to take it. (emphasis added). See Footnote 5, supra.

She planned on taking it, because how else was her and her lover, her boyfriend Kyle, going to pay for their weekend at the Beau Rivage? Can't stay at Days Inn. Oh, no. Let's just stay at the Beau Rivage in ocean front. Okay?

How else were they going to pay for it? She doesn't work. Mr. Lappan can stand up here all day long and say child support. There isn't any evidence – and he's correct, there's no evidence how much child support she got, when she got it, or even if she was getting it.

She had no way of paying for it, except for one way. Joey got paid every Friday, and Joey put money in his wallet in case every Friday. He didn't deposit it.

And when you go back and look at the bank records, you will see Joey never deposited his checks. The only check that was ever deposited in his account that he wrote checks on was his National Guard checks. He didn't have a choice. In the month of May it was deposited from the National Guard.

Those are direct deposits. If he'd had a choice, we suspect he probably would have cashed that one, too. But he never cashed his paycheck, and she knew it.

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[7] Adopting the State's words once again, the underlying robbery at bar is "all about insurance proceeds." Indeed, the State contends it could have rested its case and proven Mr. Fulgham guilty of the capital murder charged without any evidence of robbery other than the insurance proceeds. Perhaps a juror, or some jurors, agreed with this argument and voted guilty on that basis. This juror, or jurors, would have found, beyond a reasonable doubt, that Ms. Fulgham killed her husband for insurance proceeds. Perhaps a juror, or some jurors, rejected this argument but still voted guilty on one of the State's other theories. No resolution can be provided for these various possibilities because the trial court refused to instruct the jury on unanimous verdict and the State, subsequently, invited the jury to return a patchwork verdict. See Claim 23, supra.

> She knew on Thursday when she made her plans how she was going to pay for that.
>
> One-hundreds she waves at Kyle Harvey. There's the money. I got it.
>
> She left Joey Fulgham dead in his bed, drove to her lover's house, her boyfriend's house, with Joey's children, and went to the Beau Rivage on his money. The money he earned as a mechanic, doing what he enjoyed and what he loved. His hard-earned money, she took.[8]
>
> (R. 1042-44).
>
> It was about the life insurance. It started that way. Mr. Lappan's right. And then it just got progressively worse, because her greed got worse.[9]
>
> (R. 1046).
>
> Ladies and gentlemen, this is capital murder. She killed him for his life insurance that she thought she was going to get, and she killed him for the $1,000 that he did have at the time, and she's guilty.[10] (emphasis added)
>
> (R. 1047).

The State did not limit itself to blunderbuss theories of robbery to support a single-count of capital murder. During the first phase of this trial and over objection, the State also elicited evidence that Ms. Fulgham engaged in an incestuous, pedophiliac relationship with her half-brother. See Claim 24, infra. Then, after securing the patchwork verdict it ravenously pursued, the State introduced unauthenicated, irrelevant and inflammatory evidence of bad character during cross-examination of one of Ms. Fulgham's expert witnesses at the penalty phase. See Claim 3, infra. This wantonly unconstitutional elicitation of evidence preceded the State's

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[8] This argument tracks Mr. Clark's argument encompassed in Footnote 4, supra: the robbery "is all about the life insurance proceeds and the $1,000 in cash that Ms. Fulgham stole from her husband."

[9] Unfortunately for the State, robbery is a unitary offense. See Claim 23, infra. Killing without or without design while the accused suffered from greed does not constitute killing during robbery unless the jury unanimously and beyond-a-reasonable-doubt decides on the item or items that were forcibly taken from the decedent.

[10] As stated at page 3 supra: "Perhaps emboldened by Ms. Fulgham's failure to secure a lawful instruction at D-48, the State magnified the trial court's unconstitutional invitation for a patchwork verdict through duplicitous, forensic argument."

successful exclusion of Ms. Fulgham's other penalty-phase expert after it had acceded to the testimony of that witness. See Claim 1, infra.

Ms. Fulgham was convicted of capital murder on December 7, 2006. (CP. 1183). She was sentenced to death on December 9, 2006. Id. This appeal ensues. This Court has jurisdiction. Miss. Code Ann. 99-19-105.

SUMMARY OF THE ARGUMENT

In this direct appeal, Ms. Fulgham raises 38 claims for review. These errors, individually and cumulatively, deprived Ms. Fulgham of her rights under Mississippi statutory and case law, Article Three, Sections Fourteen, Twenty-Six and Twenty-Eight of the Mississippi Constitution, the Fourth, Fifth, Sixth and Eighth Amendments of the United States Constitution, and other authorities cited herein.

Claims 23 through 36 constitute Ms. Fulgham's argument supporting reversal of her capital-murder conviction. Ms. Fulgham maintains that it is impossible to discern whether she was convicted of a capital offense because the trial court refused her unanimous-verdict instruction as to *actus reus* and the State capitalized on this refusal by putting forth no less than four, separate theories of prosecution during first-phase, closing statement. See Claim 23, infra. Because one of the State's theories was not supported by legally sufficient evidence, the patchwork verdict that the State insisted upon and secured is necessarily against the overwhelming weight of the evidence. See Claim 35, infra.

In addition to other instructional errors – see Claims 27 through 34, infra – Ms. Fulgham's conviction must be reversed for trial errors concerning the introduction of evidence, including irrelevant and inflammatory evidence the Ms. Fulgham engaged in an incestuous, pedophiliac relationship with her half-brother. See Claim 24, infra; see also Claims 25 and 26, infra. Claim 35, infra, challenges the legality of transferring venue to Union County.

Claims 1 through 22 constitute Ms. Fulgham's argument supporting vacation of her death sentence, notwithstanding the unlawfulness of her capital conviction amassed in Claims 23 through 35.

As itemized in Ms. Fulgham's argument for vacatur under Furman v. Georgia, 408 U.S. 238 (1972) and Miss. Code Ann. 99-19-105(3)(A), the penalty-phase in this matter was marred with reversible error. A portion of Claim 21, infra, reads as follows:

> After exposure to inadmissible evidence of bad character [see Claims 3, 20, 23 and 24, infra], and to information from a custodial statement taken in derogation of her post-attachment right to counsel [see Claim 6, infra], which her lawyer was unable to discredit because her motion to withdraw had been wrongly denied, [see Claim 19, infra], Ms. Fulgham's jury was prohibited from hearing duly noticed Lockett evidence. [See Claim 1, infra]. The same jury returned a death sentence after being unconstitutionally charged [see Claims 4, 5 and 8 through 18, infra] and then exposed to the Holy Bible during jury deliberations at the specific request of a juror. [See Claim 2, infra.]

Claims 37 and 39 are the cumulative error claims in this brief. These claims apply to the first phase and to the second phase of this proceeding.

CLAIM 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

Where the State chooses to seek death, the State must permit the defendant an opportunity to present mitigation.

In this prosecution, the State did not object *in limine* to presentation of duly noticed mitigation through a duly-identified expert in the field of social work. The State offered no objection to this same testimony from this same expert when given the opportunity to *voir dire* the expert during the penalty phase. Minutes later, however, and after the trial court accepted the witness as an expert in the field of social work, the State reversed course and suddenly objected

on the absurd ground that Wiggins v. Smith, 539 U.S. 510 (2003), does not require a state court to permit introduction of duly-noticed mitigation through a duly-noticed expert in the field of social work. Put differently, the State objected to expert testimony only after the State did not object to very same testimony. Notwithstanding this utterly farcical and transparently underhanded contrivance, the trial court sustained the State's untimely objection. This judicial act foreclosed Ms. Fulgham's presentation of mitigating evidence in the trial for her life.

In this Claim, this Court will determine whether the State of Mississippi will be permitted to insult long-established Eighth Amendment principles in its quest for death. This Court will also determine whether a trial court's penalty-phase exclusion of expert testimony after the trial court accepted that expert testimony is constitutionally intolerable under Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny.

A. Introduction

On April 17, 2006 -- over seven months before trial -- Ms. Fulgham designated Adriane Dorsey-Kidd as an expert in the field of social work. (CP. 678, 680).[11] As required under URCCC 9.04(C)(3), Ms. Fulgham annexed a report from Ms. Dorsey-Kidd to this notice. (CP. 704-07). Ms. Fulgham also annexed a copy of Ms. Dorsey-Kidd's *curriculum vitae* to this notice. (CP. 702-03).

On November 27, 2006, Ms. Fulgham filed a document entitled "Supplemental Report of Previously Noticed Expert." (CP. 956). Annexed to that notice was a two-page report, dated and signed by Ms. Dorsey-Kidd on November 22, 2006. The entirety of that report follows:

[11] The notice in excess of seven months before commencement of jury trial is material to Part D of this Claim.

My name is Adriane Dorsey-Kidd. This constitutes a supplement to my interim report dated April 10, 2006.

Since my interim report, I have interviewed the following persons: (1) Mary Oswalt, (2) Raymond Wood, (3) Dawn Kinard, (4) Tyler Fulgham and (5) Darian Fulgham. I have also reviewed the April 10, 2006, report authored by Mark Webb, M.D., concerning an assessment of Kristi Fulgham.[12]

In light of the above, I am able to make the following observations:

1. I have reviewed my interim report dated April 10, 2006, and reaffirm that report in light of the investigation I have conducted since then.

2. In addition, and in light of the investigation I have conducted, I can now offer the observation that Kristi's children love her. Her children are well-adjusted and nurtured. Tyler, Kristi's son, and Darien, Kristi's daughter, live in Brandon, Mississippi, with Dawn Kinard, Kristi's sister. The children visit the family of Joey Fulgham every other weekend. According to Raymond Wood, when Joey Fulgham's family has Tyler and Darien for the weekend, they have permitted Darien to stay overnight at Mr. Wood's home (Mr. Wood has custody of Hailey, his daughter with Kristi Fulgham).

3. The children are responsive to Dawn as an authority figure. However, the children continue to acknowledge Kristi as their mother. The children have contact visitation with Kristi every month. On at least one occasion, the children have telephoned Carol Morgan, Kristi's mother, to remind Ms. Morgan of their scheduled visit with Kristi (Ms. Morgan picks the children up at Ms. Kinard's house and takes them to visit Kristi). The children asked me about their mother, and informed me that they miss being at home with their mother. They also shared that they enjoyed visits with their mother. The children occasionally send Kristi cards and letters and make sure she is aware of how they are progressing in school. It is obvious that even though Ms. Fulgham has been incarcerated for over three years, her children love her, remain a part of her life and wish to continue to do so.

CP. 958-59.

[12] This report is found at CP. 694-701.

The State did not object to any element of the reports offered by Ms. Dorsey-Kidd prior to trial.[13]

The State did not object to Ms. Dorsey-Kidd's qualifications prior to trial.

As defense counsel complied with disclosure procedures concerning notice of Ms. Dorsey-Kidd as a penalty-phase expert – providing the State a copy of each of her reports – and as the State neither uttered an objection to Ms. Dorsey-Kidd nor to the content of these reports, defense counsel relied on Ms. Dorsey-Kidd's anticipated expert testimony during opening statement at the penalty phase. While the State sat mute,[14] defense counsel fully committed to his duly-designated expert. During opening statement at the trial for Kristi Fulgham's life – a trial that the State, and the State ***alone*** pursued -- defense counsel informed Ms. Fulgham's jury:

> Finally, Adrienne [sic] Dorsey-Kidd. Adrienne Dorsey-Kidd is a licensed social worker. She's completed an intensive social history of Kristi. She's interviewed Kristi, Kristi's family, Kristi's children. She will testify as an expert, and she will present to you her observations.
>
> R. 1067.

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[13] To eliminate even the possibility that the State could claim Ms. Fulgham did not provide adequate notice as to either the identity of Ms. Dorsey-Kidd or her expert testimony, defense counsel specifically noted that each report was provided "in compliance with URCCC 9.04(C)(1) and URCCC 9.04(C)(3)." (CP. 679, 956).

[14] The State's decision not to object to this reference to Ms. Dorsey-Kidd and her duly noticed expert testimony is telling. Because the State repeatedly interrupted defense counsel during opening statement, see R. 666, 667, 669, 670, and 1065, the State cannot credibly maintain it elected not to object to the reference to Ms. Dorsey-Kidd as a matter of professional consideration. The State demonstrated throughout the trial of this matter that it would interrupt defense counsel's opening statement without compunction. Therefore, if the State's goal was merely to exclude the expert testimony of Ms. Dorsey-Kidd, and the State – for whatever reason – simply failed to object during the seven months preceding trial, an objection during Ms. Fulgham's opening statement to Ms. Fulgham's intent to adduce the duly-noticed expert testimony would have been sensible and, in this prosecution, clarly paradigmatic. Yet, the State did not make sound as Ms. Fulgham introduced Ms. Dorsey-Kidd and the upshot of her expert testimony to her jury. Could it be that the State sat silently because the only promise that can be broken is a promise that has been made? Could it be that the State strategized it could not damage the credibility of defense counsel unless and until defense counsel committed to Ms. Fulgham's jury that he would present Ms. Dorsey-Kidd's duly-noticed testimony? If successful in an untimely objection to the duly-noticed testimony of Ms. Dorsey-Kidd, the State unconstitutionally eliminates Lockett evidence ***and*** unilaterally savages the credibility of Ms. Fulgham's advocate in a judicial proceeding where Ms. Fulgham may well have paid the tab for any perceived deficit of integrity with her life. As discussed in Part E of this Claim, when defense counsel does not fulfill a promise to the penalty-phase jury, the defendant is prejudiced as this failure impinges on the credibility of defense counsel. Part E of this Claim requires consideration of the constitutional and ethical implications of a prosecutorial contrivance that, in and of itself, devastates the integrity of the capital-defense lawyer at the penalty phase.

After establishing the credentials of Ms. Dorsey-Kidd to qualify her as an expert in the field of social work in the presence of the jury, the following colloquy occurred:

> [BY MR. LAPPAN]: Your Honor, at this time I would tender Ms. Dorsey Kidd as an expert in the field of social work.
>
> [BY MS. FAVER]: Judge, just so I understand, it's strictly the [sic] in the area of social work, it's not in psychiatry or psychology; is that correct?
>
> [BY MR. LAPPAN]: *In the field of social work, yes.*
>
> [BY MS. FAVER]: *No objection to social work, Your Honor.*
>
> [THE COURT]: So admitted.
>
> R. 1163-64. (emphasis added)

After being accepted by the Court as an expert in the field of social work, Ms. Dorsey-Kidd then testified as follows:

1. She was hired to complete an intensive social history of Kristi Fulgham. (R. 1164).

2. "A social history is an assessment of a person that begins during conception up to the current status. It involves looking into their background, looking into their school history, medical history, employment history, looking into their relationships, looking into their family of procreation, the family of origin, extended family members. It's a vast array from the beginning to whatever current state that they're in at this time." (R. 1165).

3. In addition to documentation reviewed, Ms. Dorsey-Kidd and her business partner, Jackie Flemings, also a licensed certified social worker, (T. 1165), interviewed the following people: Dawn Kinard (Ms. Fulgham's step-sister); Carol Morgan (Ms. Fulgham's mother); Doris Edmonds (Ms. Fulgham's paternal grandmother); Mary Oswalt (a friend of Ms. Fulgham); Sonya Upchurch (a friend of Ms. Fulgham); Raymond Woods (the father of Hayley, Ms. Fulgham's youngest child); Lelia Bowman (Ms. Fulgham's maternal grandmother); Jennifer Edwards (Ms. Fulgham's first cousin); Tyler Fulgham (Ms. Fulgham's oldest child and only son, age 11 at the time of trial) and Darian Fulgham (Ms. Fulgham's older daughter, age 8 at the time of trial). (R. 1166-67).

4. Ms. Dorsey-Kidd also met with Ms. Fulgham three times for a total of eight hours. (R. 1167).

As Ms. Dorsey-Kidd had been accepted by the Court as an expert in the field of social work, defense counsel naturally proceeded to elicit the above-recited testimony as a foundation upon which the conclusions and observations contained in her reports disclosed prior to trial would be rendered admissible at trial. See, e.g, In Re Mitchell, 809 P.2d 582, 585 (Mont. 1991); In the Matter of J.R.B., 715 P.2d 1170, 1173-74 (Alaska 1986); In Re George, 537 N.E.2d 1251, 1258 (Mass. App. 1991).

At this point – after defense counsel fully committed to his expert and with that expert on the stand testifying in the field of social work without objection – the State reversed course.

The State objected to Ms. Dorsey-Kidd testifying as to the contents of her previously disclosed reports on the basis that "Ms. Dorsey-Kidd is not authorized to give any opinions in the areas that are set forth in her report. She is a social worker,[15] she is not a psychiatrist or a psychologist." (R. 1168.) The Court sustained the State's objection. Id. The jury was excused, and defense counsel responded to the State's suspicious and unseasonable objection as follows:

1. That Ms. Dorsey-Kidd has been accepted as an expert in the field of social work. R. 1168. The State acceded to this designation. R. 1164 ("No objection to social work, Your Honor").

2. In presenting this testimony of Ms. Dorsey-Kidd, Ms. Dorsey-Kidd would testify consistent with her reports, specifically "her observations about her findings in her investigation of Kristi's life and Kristi's family members." R. 1168.

3. More specifically, Ms. Dorsey-Kidd proffered that she would testify as to four different observations. R. 1170. Ms. Dorsey-Kidd would testify, first, regarding parental bonding. Id.; see page one of the April 17, 2006, report (CP. 704-05). ("Because of an absence of parental bonding and supervision, Kristi suffered from maternal and paternal deprivation. Before Kristi turned sixteen, she lived with her mother and various other people in more than a dozen locations in Mississippi, California, Texas and, for a very brief period, Florida. As a result, Kristi was forced to change schools frequently. During this same period, Kristi's mother lived with no less than six different men,

[15] Actually, for purposes of this trial, Ms. Dorsey-Kidd is an expert in the field of social work. The State explicitly assented to this designation. (R. 1164).

three of whom she never married and one of whom Kristi believed was her father for a period of several years. At times, the adults Kristi lived with were near destitution. This was a terribly frustrating, confusing and chaotic experience for Kristi, leaving her with a clear sense that no adult was in charge or, if an adult appeared to be in charge, that adult would not maintain that appearance for long. This fostered an acute feeling of being unsafe and unprotected, effecting Kristi's view of the world and how she believes she is viewed by the world"). As her second observation Ms. Dorsey-Kidd would testify that Ms. Fulgham's mother and at least two of her step-fathers abused substances. Id.; see page two of the April 17, 2006, report (CP. 705) ("There is also evidence of substance abuse in Kristi's childhood household. Kristi's mother admits to abusing medication and at least one of Kristi's step-fathers, with whom Kristi lived with for no less than five years, was alcoholic. Clearly, in her formative years, Kristi was influenced by adults engaged in immoral, illegal and illicit behavior. Children who are raised in these conditions typically develop feelings of anger, despair, depression, self-loathing and shame."). Further, Ms. Dorsey-Kidd testified during her offer of proof: "My third observation dealt with the lack of the biological father's input. And at the time – at the time that communications and relationships were developed, it is reported that her biological father sexually abused her." Id.; see pages two and three of the April 17, 2006, report (CP. 705-06) ("Kristi's biological father has a history of mental illness and was mostly absent from her life until Kristi reached 11 years of age. Kristi lived briefly with her father at least twice before reaching the age of majority. Kristi was molested by her father on more than one occasion. This pattern of abuse continued in Kristi's adult relationships with men, including a physically and emotionally abusive marriage which produced at least one conviction for domestic violence and more than one contact with law enforcement responding to a domestic call at Kristi's home."). Fourth and finally, Ms. Dorsey-Kidd proffered that she would testify as to her observations that "although she's been incarcerated for three years, [Ms. Fulgham] is still very much a part of her children's lives. They love her, and she loves them." Id.; see pages two and three of the November 27, 2006, report (CP. 958-59) ("[I]n light of the investigation I have conducted, I can now offer the observation that Kristi's children love her. Her children are well-adjusted and nurtured. Tyler, Kristi's son, and Darien, Kristi's daughter, live in Brandon, Mississippi, with Dawn Kinard, Kristi's sister. The children visit the family of Joey Fulgham every other weekend. According to Raymond Wood, when Joey Fulgham's family has Tyler and Darien for the weekend, they have permitted Darien to stay overnight at Mr. Wood's home (Mr. Wood has custody of Hailey, his daughter with Kristi Fulgham). The children are responsive to Dawn as an authority figure. However, the children continue to acknowledge Kristi as their mother. The children have contact visitation with Kristi every month. On at least one occasion, the children have telephoned Carol Morgan. Kristi's mother, to remind Ms. Morgan of their scheduled visit with Kristi (Ms. Morgan picks the children up at Ms. Kinard's house and takes them to visit Kristi). The children asked me about their mother, and informed me that

they miss being at home with their mother. They also shared that they enjoyed visits with their mother. The children occasionally send Kristi cards and letters and make sure she is aware of how they are progressing in school. It is obvious that even though Ms. Fulgham has been incarcerated for over three years, her children love her, remain a part of her life and wish to continue to do so").

4. This sworn testimony – proffered in open court and noticed months in advance of trial – was not cumulative. Prior to Ms. Dorsey-Kidd's appearance on the stand at the penalty-phase, there was no evidence to any of the following: (a) that two of Ms. Fulgham's children are being raised by Ms. Fulgham's sister, Dawn Kinard, in Brandon, Mississippi; (b) that Ms. Fulgham's remaining child is being raised by that child's father in Starkville, Mississippi; (c) that Ms. Fulgham's children are well-adjusted and nurtured; (d) that Ms. Fulgham's children visit Ms. Fulgham in prison every month; (e) that Ms. Fulgham's children continue to acknowledge her as their mother; (f) that on at least one occasion, the children phoned their grandmother to remind the grandmother to take them to the prison for their visit with their mother; (g) that Ms. Fulgham's sister, Dawn, has the children visit Joey Fulgham's family every other weekend; (h) that the children asked Ms. Dorsey-Kidd about their mother and told her that they miss being at home with their mother; (i) that the children continue to stay in touch with their mother through sending her cards and letters,[16](j) that Ms. Fulgham loves her children and remains a part of their life even though she is incarcerated in prison; (k) that Ms. Fulgham's children love her and want to stay in her life; (l) that Ms. Fulgham's mother was a substance abuser and abused substances while raising Ms. Fulgham; (m) that Ms. Fulgham's father had a history of mental illness; (n) that, based on Ms. Dorsey-Kidd's findings that appear in her report and based upon the preceding trial testimony of Mark Webb (R. 1069 to 1111) and Carol Morgan (R. 1112 to 1147) for which Ms. Dorsey-Kidd was present, Ms. Fulgham entered into physically and emotionally abusive romantic relationships.[17]

5. As Ms. Dorsey-Kidd was Ms. Fulgham's fourth and final witness (see R. 1067), when the trial court sustained the State's objection, Ms. Fulgham was suddenly and inexplicably deprived of the duly-noticed witness of her choice.

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[16] Many cards and letters were introduced through Ms. Dorsey-Kidd after the State succeeded in eliminating her as an expert witness. (R. 1187-92). These cards and letters, while evocative, were introduced by having Ms. Dorsey-Kidd authenticate them. The trial court disallowed Ms. Dorsey-Kidd from any testimonial function other than to authenticate the items and read their contents aloud. (R. 1185-86). Ms. Dorsey-Kidd was prohibited from providing background as to these exhibits (i.e., when they were sent, why they were sent, what event or story in the life and the child author and his or her mother was the basis for this card or letter, *et cetera*). Indeed, the State made sure that Ms. Dorsey-Kidd's role would be limited to merely authenticating items (R. 1181-86) – an ironic twist on the State's wholesale abandonment of authentication requirements discussed in Claim 3, infra.

[17] This inventory does not exhaust what would have been Ms. Dorsey-Kidd's testimony had the trial court not erred in excluding her testimony. This inventory merely chronicles the mitigation that was included in Ms. Dorsey-Kidd's report and provided in advance of trial. This inventory, therefore, is what the State was noticed it was ***excluding*** from consideration by Ms. Fulgham's jury when it barred Ms. Dorsey-Kidd from testifying. See Footnote 26, infra.

At the same time, and by the same action, Ms. Fulgham had no substitute for this duly-noticed testimony. Fully committed to the testimony Ms. Dorsey-Kidd, Ms. Fulgham was fully prejudiced by the unforeseen and lawless expropriation of that testimony.

6. Returning to the argument made before the trial court, defense counsel contended that the duly-noticed testimony from a licensed social worker is necessary and relevant in the penalty-phase, citing Wiggins v. Smith, 539 U.S. 510 (2003). (R. 1168, 1177, 1178). As stated by defense counsel: "We hired Ms. Kidd to assist us in this function. She is a licensed social worker. It is her job to speak to people and, using her experience in social work, render observations about what she saw *and what it means to her as a person trained in the field.* That's all we are asking her to so. We hired her for that purpose, and *we respectfully submit that her testimony is relevant for mitigating purposes in this case.* It would seem to me, Judge, if I may, [the] United States Supreme Court would not require me to do this if I couldn't present it. And I'm asking to present it in court." (R. 1178). (emphasis added)

The State objection to Ms. Dorsey-Kidd's testimony after first acceding to her qualifications as an expert in the field of social work was not the last of the State's peculiar applications. The State's bizarre conduct continued in the State's refusal to relent in its precipitous objection to Ms. Dorsey-Kidd's duly-noticed testimony while, at the same time, agreeing with defense counsel that Wiggins v. Smith, 539 U.S. 510 (2003) – at minimum – ***permitted*** Ms. Dorsey-Kidd's testimony. Invited by the trial court to elaborate, the State offered the following:

> BY MR. CLARK: Your Honor, the way we understand Wiggins, Wiggins is, as you've said, a federal habeas case which deals with ineffective assistance of counsel, and it says that counsel has a duty to conduct an intensive social history to search for possible mitigators, *and if there are mitigators that may be relevant found, they should be presented to the jury.* (R. 1176) (emphasis added).

Although the State conceded that Wiggins held that mitigation discovered in an intensive social history should be presented to the jury, the State nonetheless urged the trial court to bar the very same, duly-noticed testimony of Ms. Dorsey-Kidd as Wiggins did not hold that individual states

are required to admit the testimony of a licensed social worker to establish mitigation at a penalty phase.[18] Again quoting the State:

> BY MR. CLARK: The State's contention is if she's [Ms. Dorsey-Kidd] going to render a conclusion such as parental bonding, based on her observations, we can call it whatever we want, it is an opinion, and she – *a social worker can render opinions of that nature.* And nowhere in this Wiggins case does it state where the states are required to accept testimony of that nature. (T. at 1176) (emphasis added).

In light of the above, notwithstanding the pre-trial designation of Ms. Dorsey-Kidd as an expert in the field of social work, notwithstanding the pre-trial disclosure of the content and of the bases for Ms. Dorsey-Kidd's expert observations and conclusions, notwithstanding the State's explicit announcement at trial that the State had no objection to Ms. Dorsey-Kidd testifying ***as an expert in the field of social work***, and notwithstanding the State's subsequent admissions to the trial court that the noticed testimony of Ms. Dorsey-Kidd is ***precisely*** the type of mitigation that social workers provide and that defense counsel ***should*** present, the State convinced the trial court to exclude Ms. Dorsey-Kidd's testimony in the exact field for which Ms. Dorsey-Kidd had been tendered and accepted by the Court because Wiggins does not require a state court to admit Lockett evidence.[19]

As fully explained, infra, the trial court's ruling is constitutionally insupportable on numerous grounds.

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[18] The prosecution contends that the explicit holding of Wiggins, 539 U.S. at 516, 534-36 – that a competent attorney would introduce the testimony of a licensed social worker to establish mitigation as mandated by Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) – does not apply to the individual states is intellectually insulting. Wiggins is a 28 U.S.C. section 2254 disposition of proceedings emanating in Maryland state court. Wiggins, 539 U.S. at 514-15.

[19] Of course, Lockett v. Ohio, 438 U.S. 586 (1978) requires state courts to admit Lockett evidence. Lockett, 438 U.S. at 605, held the Eighth Amendment mandates all courts permit consideration of "factors which may call for a less severe penalty." The "degree of respect due the uniqueness of the individual" is the Eighth Amendment justification for mitigation. Id. Citing Lockett, the Wiggins Court wrote that the species of information marshaled by a social worker may amount to "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability." Wiggins, 539 U.S. 510, 535 (2003). The State's contention, therefore, that Wiggins does not require state courts to admit duly-noticed Lockett evidence is entirely vacuous.

B. The exclusion of expert testimony after Ms. Dorsey-Kidd had been accepted by the Court as an expert in the field of social work constituted error under *Lockett* and its progeny and requires a new sentencing hearing.

One of the most fundamental Eighth Amendment principles is that a capital defendant receive individualized consideration based on the circumstances of the crime and the character of the defendant before a sentence of death may be imposed. Zant v. Stephens, 462 U.S. 862, 879 (1983); Woodson v. North Carolina, 428 U.S. 280, 304 (1976).[20] Mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978).[21] As the Supreme Court stated in Woodson, 428 U.S. at 304: "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Thus, the Supreme Court, the Fifth Circuit, and this Court have unambiguously and consistently ruled that the capital defendant may not be precluded from presenting ***any*** relevant mitigating evidence. Roper v. Simmons, 543 U.S. 551, 568 (2005); Penry v. Lynaugh, 492 U.S. 302, 319 (1989); Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); see Nelson v. Quarterman, 472 F.3d 287, 306 (5th Cir. 2006) (en banc) cert. denied 127 S.Ct. 2974 (2007) ("As the Supreme Court observed in Penry I, a reasonable juror could have concluded that, while the murder was deliberate, Nelson

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[20] Nothing may preclude the sentencer from considering "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 380, 304 (1976). In this case, the State succeeded in precluding consideration of ***every*** item of mitigation cataloged in Part A of this Claim.

[21] Mitigation functions to protect against a death sentence which ignores "factors which may call for a less severe penalty[.]" Lockett v. Ohio, 438 U.S. 586, 605 (1978). Mitigation must be permitted as it manifests the "degree of respect due the uniqueness of the individual." Id. In foreclosing presentation of the mitigation cataloged in Part A of this Claim, the State foreclosed Ms. Fulgham's Eighth Amendment rights.

was less morally culpable as a result of his borderline personality disorder and abusive childhood than a murderer without such a mental illness and similar upbringing might have been"); Riley v. Cockrell, 339 F.3d 308, 316 (5th Cir. 2003) (citing Moore v. Johnson, 194 F.3d 586, 612 (5th Cir. 1999) ("[m]itigating evidence that illustrates a defendant's character or personal history embodies a constitutionally important role in the process of individualized sentencing, and in the ultimate determination of whether the death penalty is an appropriate punishment"); Muniz v. Johnson, 132 F.3d 214, 222 (5th Cir. 1998) cert. denied 523 U.S. 1113 (1998) ("[t]he well-settled rule is that the state may not prevent the defendant from introducing *any* mitigating evidence at the capital sentencing phase") (emphasis added); Bennett v. State, 933 So. 2d 930, 953 (Miss. 2006) cert. denied 127 S.Ct. 976 (2007); Simmons v. State, 805 So. 2d 452, 498 (Miss. 2001) cert. denied 537 U.S. 833 (2002) ("[t]hose responsible for sentencing the defendant should not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record"); Ladner v. State, 584 So. 2d 743, 762 (Miss. 1991) cert. denied 502 U.S. 1015 (1991) (citing Lockett, supra, the Eighth Amendment and the Fourteenth Amendment for the proposition repeated in Bennett, supra and Simmons, supra); Jordan v. State, 518 So. 2d 1186, 1188-89 (Miss. 1987) cert. denied 488 U.S. 818 (1988); see also Moore v. Johnson, 194 F.3d 586, 612-13 (5th Cir. 1999); Washington v. Watkins, 655 F.2d 1346, 1371-72 (5th Cir. 1981) cert. denied 456 U.S. 949 (1982); Willie v. State, 585 So. 2d 660, 677 (Miss. 1991) overruled on other grounds at King v. State, 784 So. 2d 884 (Miss. 2001) (capital defendant may not be limited in the introduction of mitigating evidence so long as the evidence offered is relevant). "[A] defendant has wide latitude to raise as a mitigating factor 'any aspect of [his or her] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (relying on Lockett, 438 U.S. at 604). Mitigation may not be coupled with the gravity of the capital offense because

mitigation is evidence that might serve as a basis for a sentence less than death. Tennard v. Dretke, 542 U.S. 2784, 286-87 (2004),[22] see Ayers v. Belmonte, 549 U.S. 7, 21 (2006) ("potentially infinite mitigators" serve as a basis for a sentence less than death). "Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." Payne v. Tennessee, 501 U.S. 808, 822 (1991) (relying on Eddings, 455 U.S. at 114).

Unsurprisingly, then, the State must provide a "meaningful opportunity for consideration" of all mitigating factors. Roberts v. Louisiana, 428 U.S. 325, 333 (1976). Failure to permit the introduction of such evidence is a violation of the Eighth Amendment and requires a new sentencing hearing. Lockett, 438 U.S. at 605; Skipper, 476 U.S. at 8; Ladner, supra. For instance, in Skipper, 476 U.S. at 3, evidence of the defendant's good behavior in jail while awaiting trial was erroneously excluded from the sentencer's consideration as it was an aspect of the defendant's character relevant to the sentencing determination. Id. at 7; see People v. Tenneson, 788 P.2d 786, 790-91 (Colo. 1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 316 (1989) quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)); see also People v. Malone, 47 Cal.3d 1, 40, 252 Cal.Rptr. 525, 548-59, 762 P.2d 1249, 1272 (1988) cert. denied 490 U.S. 195 (1989); Stano v. State, 473 So. 2d 1282, 1286 (Fla. 1985) cert. denied 474 U.S. 1093 (1986).

Similarly, in Hitchcock, 481 U.S. at 398-99, the sentencing court instructed the advisory jury to disregard non-statutory mitigating circumstances. The Supreme Court vacated petitioner's death sentence, holding Lockett and Skipper permit the introduction of all relevant mitigating evidence and the sentence must be permitted to consider that evidence. Id. at 399.

[22] Evidence is relevant at the penalty phase where "the sentencer could reasonably find that it warrants a sentence less than death." Tennard, 542 U.S. at 285 (citing case).

The emergent rule is entirely unconditioned: whenever a defendant faces the possibility of death, he must be permitted to introduce any and all relevant mitigating evidence at the sentencing hearing. "The source of the potential barrier" to a sentencer's ability to consider the mitigating evidence is irrelevant. Beard v. Banks, 542 U.S. 406, 414 (2004) (citing Mills v. Maryland, 486 U.S. 367, 375 (1988)). A court's exclusion of the evidence deprives the defendant of the individualized consideration required by the Eighth Amendment and renders the death sentence arbitrary and capricious. Zant, 462 U.S. at 879; Eddings, 455 U.S. at 112. Citing a lineage of constitutional commands extending almost thirty years,[23] the Court made clear in Wiggins, 539 U.S. at 516, 534-36, that constitutionally licit counsel shall present the mitigation found in an intensive social history unless counsel has a strategically defensible reason not to present this mitigation See Van Hook v. Anderson, 560 F.3d 523, 527-29 (6th Cir. 2009); Williams v. Allen, 542 F.3d 1326, 1339-40 (11th Cir. 2008); Kindler v. Horn, 542 F.3d 70, 85-87 (3rd Cir. 2008); Bond v. Beard, 539 F.3d 256, 288-89 (3rd Cir. 2008); Jells v. Mitchell, 538 F.3d 478, 492-96 (6th Cir. 2008); Gray v. Branker, 529 F.3d 220, 228-32 (4th Cir. 2008) cert. denied 129 S.Ct. 1579 (2009); Correll v. Ryan, 539 F.3d 938, 942-47 (9th Cir. 2008) cert. denied 129 S.Ct. 903 (2009); Morales v. Mitchell, 507 F.3d 916, 931-36 (6th Cir. 2007); Haliym v. Mitchell, 492 F.3d 680, 711-20 (6th Cir. 2007); Stevens v. McBride, 489 F.3d 883, 894-98 (7th Cir. 2007) cert. denied 128 S.Ct. 2433 (2008); Lambright v. Schriro, 490 F.3d 1103, 1116-18 (9th Cir. 2007) cert. denied 128 S.Ct. 882 (2008) (because the capital defendant has a right to present mitigation, counsel for the capital defendant has the duty to (i) investigate social background and family abuse; (ii) secure expert assistance concerning this investigation; and (iii) present mitigation

[23] A lineage of constitutional imperative that the prosecution denied existed. See Footnotes 18 and 19, supra, and accompanying text.

resulting from this investigation and expert assistance);[24] Skillicorn v. Luebbers, 475 F.3d 965, 974-75 (8th Cir. 2007) cert. denied 128 S.Ct. 297 (2007) (capital defense counsel, acting within professional norms, presents the expert testimony of a licensed social worker detailing traumatic childhood abuse or other similar experiences); Council v. State, 670 S.E.2d 356, 361-63 (S.C. 2008);[25] Glass v. State, 227 S.W.3d 463, 468-70 (Mo. 2007); see also Wilson v. Sirmons, 536 F.3d 1064, 1084-93 (10th Cir. 2008) (relying on Rompilla v. Beard, 545 U.S. 374 (2005) and Wiggins, supra) (capital defendant is entitled to counsel who investigates defendant's background and brings to the attention of mental-health expert the facts of defendant's background, even where those facts are not requested. In doing so, defense counsel carries out duty to supervise experts as necessitated by ABA guidelines that pertain to adequate preparation for penalty phase); Belmontes v. Ayres, 529 F.3d 834, 856-74 (9th Cir. 2008); Durr v. Mitchell, 487 F.3d 423, 437 (6th Cir. 2007) cert. denied 128 S.Ct. 1652 (2008) (ineffective-assistance claim premised on defense counsel's failure to retain a social worker recedes where collateral counsel fails to "discuss the potential effect such an expert would have had on the jury's decision to return a death sentence or not");[26] *ABA Standard for Criminal Justice 4.4-1* (defense counsel

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[24] Relying largely on Wiggins v. Smith, 539 U.S. 510 (2003); Strickland v. Washington, 466 U.S. 668 (1984); Summerlin v. Schriro, 437 F.3d 623 (9th Cir. 2005) cert. denied 126 S.Ct. 1880 (2006).

[25] "Furthermore, even though the funding was available, the trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However, neither of these individuals was qualified, in terms of social work experience, to evaluate the information and assess Respondent's background." Council, 670 S.E.2d at 363 (relying on Wiggins, supra).

[26] There are no similar uncertainties in the case at bar. Unlike Durr, the State in the case at bar had notice of Ms. Dorsey-Kidd's designation as an expert and the content of her expert testimony. See CP. 678, 680, 702-07, c. 956-59). Unlike Durr, before the trial court disallowed Ms. Dorsey-Kidd's expert testimony, the trial accepted Ms. Dorsey-Kidd as an expert in the field of social work with the explicit acquiescence of the State. (R. 1163-64). Unlike Durr, Ms. Dorsey-Kidd proffered her expert observations under oath and outside the presence of the jury. (R. 1169-71). In the trial for her life, Ms. Fulgham relied upon pre-trial disclosures during opening statement and, while the State sat silently, Ms. Fulgham advised her jury that Ms. Kidd would not only be her final witness, but would testify as an expert witness and provide the results of her intensive social history. See Parts C, D and E of this Claim. Unlike in Durr, because of CP 678, 680, 702-07, 956-59. there was no *pre-trial* uncertainty as to what would be the content of Ms. Dorsey-Kidd's testimony, and because of Ms. Kidd's sworn proffer outside the presence of the jury there was no uncertainty *during trial* as to what Ms. Fulgham's jury would not hear if the trial

has an obligation to client to conduct thorough investigation for mitigating evidence and present such evidence); *ABA Guideline for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)* (investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecution); *ABA Guideline 11.8.6* (among the topics counsel should consider presenting are medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural inferences).[27]

Ms. Dorsey-Kidd was prohibited from providing her noticed expert observations to the sentencer after she had been accepted for that purpose in violation of the case authority cited in this Part and in contravention the case authority cited above and to the affidavits annexed as "Exhibit B" and "Exhibit C" to Ms. Fulgham's "Motion for a New Trial; and if Motion for New Trial is Denied, then a Motion for a New Sentencing Hearing." (CP. 1260-65; R. 1316; 1318).

In "Exhibit B" of the aforementioned motion, Jill Miller, a licensed clinical social worker with thirty-five years of professional experience, including involvement in excess of one hundred fifteen capital cases testified as follows:

> After reviewing the notice, the reports and discussing the matter with trial counsel, including the nature and scope of the social history investigation that was conducted, I find that the proposed testimony of Adriane Dorsey-Kidd is consistent with the type of expert testimony that social workers provide in capital cases. Ms. Dorsey-Kidd's testimony would have explained the significance of the substance abuse and instability in Kristi Fulgham's childhood and how childhood experiences involving poverty, addiction, and violence adversely affected her as

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court silenced Ms. Kidd, and because of defense counsel's broken promise to Ms. Fulgham's jury to present the results of Ms. Kidd's intensive social history, there is no uncertainty that defense counsel's credibility was diminished prior to *summation* – defense counsel's final opportunity to plea for Ms. Fulgham's life. See Part E of this Claim.

[27] Wiggins, 539 U.S. at 524-25, recited these ABA Guildelines and this ABA Standard as a basis for its holding – a holding the State contends the trial court was free to disregard because Ms. Fulgham was being prosecuted in state court.

> an adult. In addition, Ms. Dorsey-Kidd would have addressed Kristi Fulgham's relationship with her father, her father's mental illness, and the abuse suffered by Kristi at the hands of her father. Ms. Dorsey-Kidd would have explained the connection between the abuse Kristi suffered as a child and Kristi's unhealthy and unreasonable relationships with men as an adult, particularly the unstable, abusive relationship Kristi had with her husband. Finally, Ms. Dorsey-Kidd interviewed Ms. Fulgham's minor children who were too young to testify. Ms. Dorsey-Kidd would have been able to tell the jury about the type of mother Kristi was to her children as several sources advised that Kristi was a loving mother to her children. Ms. Dorsey-Kidd would also have been able to tell the jury that even though the children were being raised by Kristi's sister, Kristi Fulgham's children continue to acknowledge Kristi as their mother. More, Ms. Dorsey-Kidd would have told the jury that the children informed her that they miss being at home with their mother but they do enjoy the visits they have with their mother in prison. Ms. Dorsey-Kidd could have testified as to how Kristi could continue to be a positive parental influence in her children's lives despite being incarcerated.
>
> (CP. 1285-86).

While Ms. Miller's affidavit speaks for itself, the portion of Ms. Miller's affidavit cited above – an affidavit provided to the trial court and the State more than five months before the trial court entertained post-trial motions in this matter on July 9, 2007 – most clearly recounts inventories the mitigation eliminated from jury consideration in one fell swoop when the Court sustained the State's puzzling and quixotic objection to expert testimony the State previously announced it did not find objectionable and the trial court properly accepted.

In "Exhibit C" of the aforementioned motion, (CP. 1287-92), David Bruck, a capital-defense attorney whose *bona fides* are presented in Paragraphs 1 and 2 of "Exhibit C," (CP. 1287-88), testifies as follows:

> After reviewing the reports and discussing the matter with trial counsel, I find that the proposed testimony of Adriane Dorsey-Kidd is consistent with the type of expert testimony that social workers customarily provide, and that courts customarily admit, in capital murder cases. In my own practice, I have generally requested and been granted such social work assistance in the capital cases that I have defended at the trial level since 1989. Under Ake v. Oklahoma, 470 U.S. 68, 84 (1985), Ms. Dorsey-Kidd is precisely the type of expert appointed to assist indigent defendants in capital prosecutions. See, e.g., Williams v. State, 619 N.E.2d 569, 572 (Ind. 1993) (social worker is properly appointed to provide expert assistance in a capital case where indigent defendant makes proper

showing). In addition to the discussion regarding Wiggins, supra, I note that the reports completed by Ms. Dorsey-Kidd, and her proposed testimony, advanced the individualized consideration that Ms. Fulgham was entitled to receive – consideration of the circumstances of the crime and of the record, background and character of the defendant. See Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny. *An especially clear example of this is Ms. Dorsey-Kidd's description and explanation of the long-term effects of childhood deprivation, neglect, and abuse---subjects that are the core concern of the social work profession and in which the specialized expertise of a qualified social worker would greatly assist the jury in understanding the mitigating significance of long-ago childhood experiences.* "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). (emphasis added)

(CP. 1291-92).

Mr. Bruck also testified concerning the import of Wiggins at Ms. Fulgham's penalty phase:

> In capital cases, there is often little question concerning the defendant's responsibility for the death of the victims. As a result, defense counsel must devote a considerable portion of their time developing evidence in mitigation. Of course, competent counsel may aggressively litigate suppression motions, present an affirmative defense, or argue forcefully in support of an instruction for a lesser included offense. Nevertheless, counsel should approach the trial as though the sole purpose is to convince the jury to spare their client's life. To that end, counsel in capital cases must thoroughly investigate a client's background to develop and be prepared to present evidence in mitigation of punishment. Only after conducting a thorough investigation can counsel begin developing a strategy for the penalty phase. In Wiggins v. Smith, 539 U.S. 510, 535 (2003), the United States Supreme Court ruled that a defendant's troubled history is relevant to assessing a defendant's culpability and is, in fact, the kind of evidence that an attorney performing within professional norms would thoroughly investigate with a view to introducing at sentencing. In Wiggins, the Court observed that it has long relied on the published standards of the American Bar Association (ABA) as "guides to determining what is reasonable." 539 U.S. at 524. The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases provide detailed information concerning the prevailing professional norms expected of defense counsel in preparing to defend a capital case. ABA Guideline 4.2(A)(2) specifies that "The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." Once capital defense counsel have investigated the case, they should present a mitigation case

to show that a sentence of less than death is a suitable punishment for their particular client. Guideline 10.11 – The Defense Case Concerning Penalty – lists among the witnesses counsel should consider presenting:

> "Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaption to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain the evidence presented by the prosecutor."

See Guideline 10.11(F)(2). The commentary to the Guideline further explains the importance of social workers as penalty-phase experts. According to the Commentary to Guideline 10.11:

> Since an understanding of the client's extended, multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations.

(CP. 1288-89).

As with Ms. Miller's affidavit, Mr. Bruck's affidavit speaks for itself. The portions of Mr. Bruck's affidavit cited above – an affidavit also provided to the trial court and to the State over five months before the Court entertained post-trial motions in this matter – makes clear the constitutional magnitude of the trial court's sudden and strange reversal in excluding expert testimony that was properly noticed and properly accepted.

A final oddity requires discussion in this Part of Claim 1.

In addition to the State's exceptionally offbeat strategy of pre-trial silence, followed by initial acquiescence to Ms. Dorsey-Kidd as an expert in the field of social work, followed by an objection to her expert testimony in the very same field notwithstanding subsequent admissions

to the trial court that Ms. Dorsey-Kidd (a) ***is*** qualified to testify as to her duly-noticed opinions and that (b) defense counsel ***should*** present Ms. Dorsey-Kidd's expert testimony, there is a line of case authority permitting the State to call social workers to testify for purposes similar to the purposes for which Ms. Dorsey-Kidd duly-noticed and called by Ms. Fulgham. Licensed social workers are permitted to testify whether a minor's behavior and demeanor were consistent with sexual abuse during the State's case-in-chief because the education, training and professional experience of licensed social workers provide these social workers specialized knowledge. Carter v. State, 996 So. 2d 112, 116-17 (Miss. App. 2008) cert. denied 999 So. 2d 374 (Miss. 2008); Williams v. State, 970 So. 2d 727, 735 (Miss. App. 2007); Elkins v. State, 918 So. 2d 828, 831 (Miss. App. 2005) cert. denied 921 So. 2d 1279 (Miss. 2006) cert. denied 126 S.Ct. 2865 (2006); see Bishop v. State, 982 So. 2d 371, 377, 380-81 (Miss. 2008); Hall v. State, 611 So. 2d 915, 918-19 (Miss. 1992). In the matter at bar, Ms. Dorsey-Kidd was noticed pre-trial and initially accepted at trial to provide her expert observations and conclusions generated by the specialized knowledge that she acquired in the field of social work through education, through training and through professional experience. The fact that she was initially accepted by the Court as an expert in the field of social work only then to be judicially divested of the ability to testify in the field of social work is nothing less than extraordinary.

Ms. Fulgham must have the benefit of a new sentencing hearing. Refusal to allow Ms. Dorsey-Kidd to testify as an expert in the field of social work after she had been accepted as an expert (a) prohibited Ms. Fulgham from presenting relevant mitigation and (b) necessarily prohibited Ms. Fulgham's jury from considering the excluded, relevant mitigation. Furthermore, the State's underhanded behavior is particularly prejudicial no reasonable attorney would anticipate the trial court an untimely and incoherent objection to the duly-noticed testimony of

Ms. Dorsey-Kidd during the penalty phase in light of Bishop, supra; Hall, supra; Carter,supra; Williams, supra and Elkins, supra.

On Eighth Amendment grounds, the death sentence must be vacated. As such, the death sentence must also be vacated on cruel or unusual punishment grounds at Article Three, Section Twenty-Eight of the Mississippi Constitution.

C. The exclusion of expert testimony after Ms. Dorsey-Kidd had been accepted by the Court as an expert in the field of social work amounted to a violation of Ms. Fulgham's constitutional rights to compulsory process and due process

The right to present witnesses to establish a defense is a fundamental element of due process of law. Washington v. Texas, 388 U.S. 14, 19 (1967); Peter Westen, The Compulsory Process Clause, 73 Mich. L.Rev. 71, 74 (1974) ("compulsory process constitutionalizes the entire presentation of the defendant's case"). For a violation of compulsory process to occur, the defendant must demonstrate that the excluded evidence was proper. See, e.g., Montana v. Egelhoff, 518 U.S. 37, 42 n.1 (1996). In the matter at bar, Ms. Fulgham (a) filed her notice of expert and reports of expert well in advance of trial; (b) advised Ms. Fulgham's jury of the identity of that expert and subject-matter of that expert's testimony during her penalty-phase opening statement and then (c) successfully qualified Ms. Dorsey-Kidd as an expert in the field of social work as required at Miss. R.Evid. 702 and with the explicit acquiescence of the State. Clearly then, the expert testimony of Ms. Dorsey-Kidd in the field of social work was deemed to be judicially proper before it was judicially excluded. As a necessary result then, Ms. Fulgham was deprived of her compulsory process and due process rights to present evidence when the Court excluded Ms. Dorsey-Kidd's expert testimony and must have a new sentencing hearing. See Rock v. Arkansas, 483 U.S. 44, 51-53, 62 (1987) (compulsory process and due process);

Chambers v. Missisippi, 410 U.S. 284, 302, 302-03 (1973) (due process); Washington v. Texas, 388 U.S. 14, 22 (1967) (compulsory process).[28]

D. The exclusion of expert testimony after Ms. Dorsey-Kidd had been accepted by the Court as an expert in the field of social work amounted to a violation of Ms. Fulgham's constitutional right to present a defense

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)); see also Cooke v. United States, 267 U.S. 517, 537 (1925); United States v. Melchor Moreno, 536 F.2d 1042, 1045-46 (5th Cir. 1976). In Holmes v. South Carolina, 547 U.S. 319, 325-27 (2006), a unanimous Court reaffirmed the criminal defendant's right to present a complete defense unless the State demonstrates that the evidence offered by the defendant is, at least in some manner, subject to exclusion. An aggravated variation of this error occurred in this prosecution when the trial court accepted the witness as an expert and then excluded the witness from providing expert testimony.

On the same factual basis as that stated in Part C of this Claim, Ms. Fulgham must receive a new sentencing hearing because the exclusion of Ms. Dorsey-Kidd's expert testimony in the field of social work after she had been qualified as an expert in the field of social work violated Ms. Fulgham's constitutional right to present a defense.

E. The prosecution's successful exclusion of Ms. Dorsey-Kidd after Ms. Dorsey-Kidd has been qualified as an expert in the field of social work rendered defense counsel ineffective in light of defense counsel's opening statement at the penalty phase

[28] Admittedly, a discussion of compulsory process and due process as "isolated points" rather than concepts aligned on "a rational continuum which ... includes a freedom from all substantial arbitrary impositions and purposeless restraints," see Washington, 388 U.S. at 24 (Harlan, J., concurring), is less than rewarding. Nonetheless, the concepts remain distinguishable. See, e.g., Pennsylvania v. Richie, 480 U.S. 39, 56 (1987) (declining to decide "whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment").

Undersigned counsel advised Ms. Fulgham's jury in the opening statement of the penalty phase that Ms. Fulgham would call Ms. Dorsey-Kidd as her last witness. Undersigned counsel advised the jury that Ms. Dorsey-Kidd completed an intensive social history and that Ms. Dorsey-Kidd would present the results of that intensive social history. (R. 1067).

The State did not object to this portion of undersigned counsel's opening statement.

As previously recited, the State was noticed in April 2006 (more than six months before commencement of jury trial), of Ms. Dorsey-Kidd as an expert, her field of expertise, her opinion and the material upon which she has based her opinion. (CP. 678, 680; 702-03).

The State offered no response to this notice.

Annexed to Notice 038 as an exhibit was a copy of Ms. Dorsey-Kidd's report dated April 10, 2006. (CP. 704-07).

The State offered no response to this April 10, 2006, report.

Annexed to Notice 043 as an exhibit was a copy of Ms. Dorsey-Kidd's supplemental report dated November 22, 2006. (CP. 958-59).

The State offered no response to this supplemental report.

As stated in Paragraph 19 of "Exhibit A" of Ms. Fulgham's January 2007 "Motion for New Trial; and, if Motion for New Trial is Denied, then a Motion for a New Sentencing Hearing," no prosecutor contacted Ms. Dorsey-Kidd at any time the concerning the reports she authored nor her impending testimony. (CP. 1272). The State did not respond to any post-trial motion filed by Ms. Fulgham, nor did the State, other than to stand on the record, contest any allegation put forth by Ms. Fulgham at the July 9, 2007, hearing on Ms. Fulgham's post-trial motions. (R. 1318).

After Ms. Dorsey-Kidd testified as to her predicate professional qualifications and had been accepted by the Court as an expert in the field of social work, the Court sustained the prosecution's objection to Ms. Dorsey-Kidd's expert testimony when Ms. Dorsey-Kidd was on the verge of providing her expert testimony. The net effect of the State's dilatory maneuvering was to sandbag defense counsel; that is, after defense counsel objectively and reasonably believed Ms. Dorsey-Kidd would be permitted to testify as an expert in the field of social work, defense counsel, objectively and reasonably, apprised Ms. Fulgham's jury of Ms. Dorsey-Kidd's anticipated expert testimony during opening statement at the penalty phase. As a result of the State's decision to sandbag defense counsel, counsel for Ms. Fulgham lost credibility with her jury; that is, defense counsel promised Ms. Fulgham's jury expert testimony and, after promising that testimony, failed to deliver on his promise. As the prosecutor's successful yet underhanded maneuver was sustained by the Court, defense counsel was rendered constitutionally ineffective. Anderson v. Butler, 858 F.2d 16, 19 (1st Cir. 1988) (failure of defense counsel to produce an expert witness promised in opening statement was prejudicial as a matter of law and counsel was, therefore, constitutionally ineffective); State v. Borchardt, 914 A.2d 1126, 1144-45 (Md. 2007) (noting that in Wiggins v. Smith, 539 U.S. 510, 526 (2003) capital defense counsel that was found to be ineffective promised jury it would hear about the difficulty in defendant's life and then failed to present a social history to the jury); State v. Zimmerman, 823 S.W.2d 220, 221-22 (Tenn. Crim. App. 1991);[29] People v. Briones, 816 N.E.2d 1120, 1122-23 (Ill. App.

[29] During opening statement, defense counsel promised (a) a psychiatrist and (b) the defendant and (c) other witnesses would testify that the defendant was a battered woman who killed in self-defense. Zimmerman, 823 S.W.2d at 221-22. Defense counsel then advised the defendant not to testify and produced none of the evidence he promised to produce. Id. at 222. The Court held the defendant suffered ineffective assistance of counsel. Id. at 228.

2004);[30] see United States ex rel. Hampton v. Leibach, 347 F.3d 219, 257 (7th Cir. 2003);[31] see also Ouber v. Guarino, 293 F.3d 19, 33-34 (1st Cir. 2002).

"A cardinal tenet of successful advocacy is that the advocate be unquestionably credible." State v. Moorman, 358 S.E.2d 502, 510 (N.C. 1987). Defense counsel's credibility was vitiated by the State's decision to successfully seek exclusion of Ms. Dorsey-Kidd's expert testimony only after undersigned counsel had promised Ms. Fulgham's jury that counsel would present Ms. Dorsey-Kidd's expert testimony.

A prosecutor must object at a time where the objection does not prejudice the defendant. See, e.g., Clopton v. State, 742 P.2d 586, 588 (Okla. Crim. App. 1987) ("[t]he general rule is that a party who may be prejudiced by the improper admission of evidence should object as soon as it becomes apparent the evidence would be relied upon by the opposing party").

Ms. Fulgham was prejudiced by this late objection and, it is respectfully submitted, the State's underhanded tactic is a separate and distinct basis for relief under Wiggins, Lockett, and their progeny. More particularly, Ms. Fulgham is entitled to a new sentencing hearing because, in addition to the error raised in Part B and Part C and Part D of this Claim, Ms. Fulgham suffered from ineffective assistance of counsel at the penalty phase entirely because of a prosecutorial tactic that succeeded in destroying the credibility of her lawyer in the trial for her life.

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[30] Defense counsel falsely advised the jury that the defendant would testify. Briones, 816 N.E.2d at 1122-23. The Court found that there was no showing that the defendant declined to testify nor that "because of unexpected events, sound trial strategy required [defense counsel] to break her promise that the defendant would testify." Id. at 1125. The court found defense counsel's performance constitutionally deficient Id.

[31] During opening statement, defense counsel told the jury (a) the defendant would testify and (b) that information would be presented that the defendant was not a gang member. Leibach, 347 F.3d at 257. Defense counsel then presented neither the defendant's testimony nor evidence that the defendant was not a gang member. Id. The Seventh Circuit court found that the defendant's broken promise "objectively unreasonable" and granted relief for ineffective assistance of counsel. Id. at 258.

E. Conclusion

Denying a jury the opportunity to consider relevant mitigating evidence, whether caused by counsel's ineffectiveness or by an improper application of constitutional law and evidentiary rules, demands a new penalty phase and sentencing hearing. See Williams v. Taylor, 529 U.S. 362, 393 (2000); Hitchcock v. Dugger, 481 U.S. 383, 398-99 (1987). In Williams, the Court held there is a constitutionally protected right to present mitigating evidence to a jury. Williams, 529 U.S. at 393. In Hitchcock, 481 U.S. at 399, the Court held that once a Skipper/Eddings violation occurs in sentencing, a new sentencing hearing must take place to remedy the error. As a result, the proceedings below did not comport with the requirements of Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), and the death sentence was vacated. Hitchcock, 481 U.S. at 399.

A refusal to hold a new penalty hearing in the face of Lockett error violates the "death is different" jurisprudence found in Eddings and Lockett and Gregg v. Georgia, 428 U.S. 153 (1976). In Eddings, 455 U.S. at 110-11, the Court explained that Lockett and its progeny rested on a long line of jurisprudence holding that sufficient information was essential to a constitutionally viable death penalty. A death sentence survives constitutional scrutiny only if it is based on an individualized assessment of the specific character of both the offense and the offender. Eddings v. Oklahoma, 455 U.S. at 112-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). Such an assessment must include a full accounting of any available mitigating evidence that might tend to tip the balance toward life. Eddings, 455 U.S. at 112-14; Lockett, 438 U.S. at 604-05. For these reasons, Ms. Fulgham must have a new sentencing hearing.

CLAIM 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

At *voir dire* (R. 294-95), and within the trial court's preliminary instruction to the jury prior to opening statements (R. 661), and within the jury charge at the conclusion of the first phase of this trial (CP. 992-94) and within the jury charge at the conclusion of the second phase of this trial (CP. 1085, 1111), the trial court instructed Ms. Fulgham's jury that they would and must decide the case only on the evidence presented and on the law as explained by the Court. As will be fully explained infra, it is respectfully submitted that these repeated admonishments were rendered nugatory when at least one deliberating juror sought and received from a court bailiff additional instruction from an extrinsic source. That extrinsic source – the Holy Bible – was inside the jury room at the juror's specific request for no less than fifteen minutes while jurors deliberated on whether Ms. Fulgham lives or dies.

Before the jury was returned to recommence deliberations on the morning of December 9, 2006, the State and Ms. Fulgham entered into a stipulation concerning the facts of this Claim. This stipulation[32] follows:

I. About 7 p.m. on Friday, December 8, 2006, the jury retired for the night.[33]

II. "After that occurred, and after the Court recessed for the evening, but before departure from the courthouse, one of the State's attorneys brought to the Court's attention that there might have been – or it came to her attention that there was a Bible left in the jury room at a juror's request."[34]

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[32] Facts judicially noticed by the trial court are included in the enumerated recitation of facts and are noted as such where appropriate.

[33] The trial court made this announcement from the bench. (R. 1288).

[34] The trial court made this announcement from the bench. (R. 1289).

III. The trial court instructed the State to inform Mr. Lappan of this discovery and the State did so. (R. 1289).

IV. The trial court advised the parties: "I would entertain anything that might need to be done tomorrow morning, when we reconvened, but I thought that both sides needed a chance to investigate the facts and to see what exactly happened." (R. 1289).

V. The trial court advised that the parties may enter into a stipulation of facts as to the aforementioned occurrence. (R. 1289).

VI. The trial court noted that Bailiff Austin[35] had pertinent information regarding the stipulation and that Bailiff Austin needs to be in Court when the stipulation is being entered. (R. 1289).

VII. When Bailiff Austin entered the Court, the proposed stipulation of facts began to be recited in open Court. (R. 1289-90).

VIII. That the jury initially retired to deliberate about 5:50 p.m. on Friday, December 8, 2006. (R. 1290).

IX. That Bailiff Austin was preparing a sermon in Jury Room B during the late afternoon/early evening hours on December 8, 2006. (R. 1290).

X. That Bailiff Austin is a full-time minister of the Gospel. (R. 1291).

XI. While Bailiff Austin was working on his sermon in Jury Room B, Ms. Fulgham's jury was deliberating in Jury Room A. (R. 1290).

XII. On or about 6:45 p.m., Ms. Fulgham's jury moved from Jury Room A to Jury Room B. (R. 1290).

XIII. When Ms. Fulgham's jury moved from Jury Room A to Jury Room B, Bailiff Austin was required to vacate Jury Room B. (R. 1290).

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[35] Bailiffs are officers of the court who are in charge of the jury. See, e.g. Pope v. State, 36 Miss. 121, 134 (Miss. Err. & App. 1858); see 21 C.J.S. Courts sec. 137 (citing State ex rel. Farley v. Spaulding, 507 S.E.2d 376, 383 (W.Va. 1998)); 75B Am.Jur.2d *Trial* section 1261 (2007) ("[d]uring a trial, the bailiff is the link between the judge and the jury and while it may be tempting for a bailiff to answer the jurors' requests directly, the efficient administration of justice demands that the bailiff not act on requests related to the case, except to communicate the juror's requests to the court") (citing State v. Merricks, 831 So. 2d 156, 160 (Fla. 2002). Miss. Code Ann. 13-5-73 specifically authorizes the appointment of bailiffs in capital cases and delineates the function of the bailiff: "Bailiffs may be specially sworn by the court, or under its direction, to attend on such jury *and perform such duties as the court may prescribe for them.*" (emphasis added). It is the sworn duty of the bailiff "to see that the jurors were not exposed to any improper communication or influence." Bickcom v. State, 286 So. 2d 823, 825 (Miss. 1973). In derogation of this duty, a bailiff introduced the "improper communication or influence" into the jury deliberations. See also Part (A)(1)(A) of this Claim discussing the impropriety of improper communication or influence permitted by the trial court.

XIV. Bailiff Austin did vacate Jury Room B. (R. 1290).

XV. After vacating Jury Room B, Bailiff Austin realized he left his Holy Bible in Jury Room B and returned to Jury Room B to retrieve his Holy Bible. (R. 1290).

XVI. By the time Bailiff Austin returned to Jury Room B, all jurors were seated in Jury Room B. (R. 1290).

XVII. When Bailiff Austin entered Jury Room B to retrieve his Holy Bible a juror asked the bailiff a question. According to Bailiff Austin: "She [the juror] asked: 'Could I see your Bible, Reverend?' And I said: 'Yes, ma'am.'" (R. 1290).

XVIII. The bailiff then left Jury Room B without removing his Holy Bible from Jury Room B. (R. 1291).

XIX. When the Bailiff Austin left Jury Room B, a juror shut the door behind him. (R. 1291).

XX. The bailiff's re-entry into Jury Room B and his decision to leave without removing his Holy Bible at the specific request of a juror took place about 6:45 p.m. on Friday, December 8, 2006. (R. 1291).

XXI. The jury was recessed for the night at 7:03 p.m. on December 8, 2006. (R. 1291).

XXII. Therefore, at the specific request of one of Ms. Fulgham's jurors, the jury in the matter at bar had a Holy Bible in Jury Room B during its closed-door deliberations for at least fifteen minutes. (R. 1291).

The State stipulated to the above recitation of facts. (R. 1291; 1293-94).

With this stipulation of facts before the trial court, Ms. Fulgham moved for mistrial as to her sentencing phase. (R. 1294-98). "Judge, I submit to you this jury's infected. There can be no reliable result at this stage, and I move for mistrial as to the sentencing phase." (R. 1298). The State opposed Ms. Fulgham's motion. (R. 1299-1301). The trial court overruled Ms. Fulgham's motion. (R. 1307). The jury was permitted to recommence deliberations following *en masse* questioning from the trial court. (R. 1304-06). The jury returned a death sentence at or after 10 a.m., Saturday, December 9, 2006.

In light of the above discussion, the argument made by the parties before the trial court on Saturday morning, December 9, 2006 (R. 1292-1303) and the argument made by undersigned

counsel in Ms. Fulgham's post-trial motion (CP. 1262; 1304-16; R.1316-18), Ms. Fulgham now proceeds with her discussion of law in support of this Claim.

A. Sixth Amendment grounds

> *[T]o allow distractions and outside influences to infect the jury's thoughts at this critical juncture of the proceedings [the penalty phase of a capital sentencing] is to devalue human life.*
>
> *Fuselier v. State, 468 So. 2d 45, 57 (Miss. 1985).*

A(1). A new sentencing hearing is required because improper and extrinsic information – specifically, the Holy Bible – was left in the jury room during jury deliberations at the specific and explicit request of a juror

A(1)[A]. The Holy Bible is improper and extrinsic during jury deliberations

It was constitutional error for a trial court to provide jurors the Holy Bible during capital-sentencing deliberations where jurors requested the Holy Bible. Jones v. Kemp, 706 F. Supp.1534, 1558, 1560 (N.D. Ga. 1989). The district court in Jones, 706 F.Supp. at 1559-60, found that the extrajudicial "law" of the Bible violated (a) the Eight Amendment's requirement that any decision to impose death must be the result of discretion which is carefully channeled and circumscribed by the law of the jurisdiction and (b) the Sixth Amendment right to a trial by an impartial jury and right to confront the witnesses. Id. at 1559-1560.[36] See Generally Glossip v. State, 29 P.3d 597, 605 (Okla. Crim. App. 2001),[37] State v. Harrington, 627 S.W.2d 345, 350

[36] "Extrinsic materials, whether they be dictionaries, law books, or Bibles, unless properly received in evidence, are not allowed in the jury room for use by a deliberating jury. The jury should have with it in the jury room *only* those documents received in evidence, or perhaps judicially noticed and a copy of the court's charge if reduced to writing – nothing else." Jones, 706 F.Supp. at 1560.

[37] "[W]e are compelled to caution trial courts to remind jurors they are to utilize *only* the jury instructions and consider *only* the evidence presented at trial in arriving at their determinations of guilt and sentence. Any outside reference material, including but not limited to Bibles or other religious documents, dictionaries, or any other reference book, should not be taken into or utilized during jury deliberations." Glossip, 29 P.3d at 605 (emphasis in original).

(Tenn. 1981) cert. denied 457 U.S. 1110 (1982).[38] Cf. People v. Harlan, 109 P.3d 616, 632 (Colo. 2005) cert. denied 546 U.S. 928 (2005). The Alabama Supreme Court vacated a rape conviction where one juror merely consulted with his brother, who was a Christian minister, during deliberations "for guidance and scripture references so as to enable me to make a proper and just decision" Ex Parte Troha, 462 So. 953, 954 (Ala. 1984). Of interest, the Court vacated the conviction even though there was no evidence that the tainted juror shared this extrinsic information with other jurors. Id. Cf. Romine v. Head, 253 F.3d 1349, 1366-68 (11th Cir. 2001) cert. denied 535 U.S. 1011 (2002).

In light of the stipulation entered into by the parties, there was no factual dispute before the trial court and, necessarily then, there can be no factual issue before this Court. The facts are settled. They are: at the request of a deliberating juror, a bailiff left the Holy Bible in the jury room for at least fifteen minutes. Based on the above discussion, it is indisputable that the Holy Bible as an improper, extrinsic influence. Under the Sixth Amendment right to trial by jury,[39] the Sixth Amendment right to a fair trial by an impartial jury,[40] the Sixth Amendment right to confront witnesses,[41] the Sixth Amendment right to counsel,[42] and the Sixth Amendment right to

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[38] "Appellant also has called our attention to the fact that during deliberations in the sentencing phase of the trial, the jury foreman buttressed his argument for imposition of the death penalty by reading to the jury selected biblical passages. His action, of course, was error which would have required a new sentencing hearing absent the error in excluding jurors for cause in violation of the Witherspoon standard." Harrington, 627 S.W.2d at 350.

[39] Turner v. Louisiana, 379 U.S. 466, 472-73 (1965) (Sixth Amendment right to trial by jury means that the defendant's jury will base its verdict solely on evidence presented at trial). Accord Lawson v. Borg, 60 F.3d 608, 612 (9th Cir. 1995) (where a jury is exposed to extrinsic evidence, the accused has been deprived of his Sixth Amendment right to confrontation, cross-examination and assistance of counsel).

[40] Parker v. Gladden, 385 U.S. 363, 364 (1963); United States v. Howard, 506 F.2d 865, 866 (5th Cir. 1975) ("Modern day trials are factually presented in open court before the iron curtain descends upon the jury room. We cannot tolerate prejudicial factual intrusion into that sanctum lest our courts return to darker days of our jurisprudential history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; and unless its piercing effect is only skin deep and without prejudice to the anatomy of the trial, we must apply a constitutional salve").

[41] Parker v. Gladden, 385 U.S. 363, 364 (1963); Raley v. Ylst, 470 F.3d 792, 803 (9th Cir. 2006) ("[a] jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance

be present when the jury is being instructed on the law,[43] Ms. Fulgham – from the moment it was revealed that a deliberating juror had brought extrinsic material into the jury room to the present moment – has absolutely no idea what her jury considered in making the life/death decision to her detriment.[44] Therefore, the death sentence must be vacated and Ms. Fulgham must benefit from a new sentencing hearing.

(A)(1)[B]. Extrinsic information must be kept from the jury. Prejudice is presumed when it is not.

The purpose of a jury instruction is to inform the jury of the applicable law. See McKlemurry v. State, 947 So. 2d 987, 991 (Miss. App. 2006) cert. denied 947 So. 2d 960 (Miss. 2007). The jury is then presumed to follow the Court's instructions as "to presume otherwise would be to render the jury system inoperable." Grayson v. State, 879 So. 2d 1008, 1020 (Miss. 2004) cert. denied 543 U.S. 1155 (2005).

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of counsel embodied in the Sixth Amendment"); Jeffries v. Wood, 114 F.3d 1484, 1490 (9th Cir. 1997) (en banc) cert. denied 522 U.S. 1008 (1997) ("Under the Sixth Amendment, a criminal defendant has the right to confront those who testify against him or her and the right to conduct cross-examination. When a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause. That the unsworn testimony comes from a juror rather than a court official does not diminish the scope of a defendant's rights under the Sixth Amendment").

[42] State v. Perrin, 897 So. 2d 749, 752 (La. App. 2005) (citing cases); see Lenz v. Warden, 593 S.E.2d 292, 297 (Va. 2004) (citing cases); Commonwealth v. Johnson, 828 A.2d 1009, 1014 (Pa. 2003) (citing cases); see also Gagliardo v. United States, 366 F.2d 720, 724 (9th Cir. 1966) (citing cases).

[43] Charging the jury constitutes a critical stage of the proceeding wherein the defendant must be present unless that constitutional right is waived. State v. Simino, 509 A.2d 1039, 1047 (Conn. 1986); see also United States v. Benevides, 549 F.2d 392, 393 (5th Cir. 1977); McClanahan v. United States, 272 F.2d 663, 666 (5th Cir. 1959); State v. Parisien, 703 N.W.2d 306, 310-11 (N.D. 2005) (defendant has the right to be present when the jury has sought additional guidance); Lenz v. Warden, 593 S.E.2d 292, 297 (Va. 2004) (citing cases); Vaughn v. State, 636 S.E.2d 163, 164-65 (Ga. App. 2006). See generally Andres v. United States, 333 U.S. 740, 765-66 (1948) (Frankfurter, J., concurring) ("Charging a jury is not a matter of abracadabra. No part of the conduct of a criminal trial lays a heavier task upon the presiding judge. The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors. It should guide their understanding after jurors have been subjected to confusion and deflection from the relevant by the stiff partisanship of counsel"). In the matter at bar, neither the Court nor the attorneys were present when at least one juror was permitted to self-instruct on Divine law.

[44] See, e.g., Troha, 462 So. 2d at 954. "In this case, the Court of Criminal Appeals determined that any outside influence exerted 'could only be beneficial to the accused.' We disagree. The defendant was convicted as charged. We do not know the extent of the conversation between the juror and his brother, the minister, nor the scripture references that were recommended to help him make his decision. As we all know, the Bible portrays God as vengeful, as well as merciful and forgiving. The minister may have recommended scriptures reflecting his own thoughts on the case." Id.

Mississippi law requires outside influences to be eliminated where possible and minimized where impossible. Fuselier v. State, 468 So. 2d 45, 57 (Miss. 1985); see also Dumas v. State, 806 So. 2d 1009, 1014 (Miss. 2000) (in dicta, "[a] law book sent to the jury room, without proper precautions taken to ensure that the jury did not read from any inappropriate portions which would conflict with Mississippi law, is an extraneous influence upon a jury"). Where outside influences are not eliminated or properly minimized, it follows that the verdict lacks integrity. Id. There is one proper remedy to a verdict rendered undignified by extrinsic influence – mistrial. Id. (citing Perkins v. State, 244 So. 2d 414, 414-15 (Miss. 1971)).[45]

Collins v. State, 701 So. 2d 791 (Miss. 1997) provides a compelling illustration of the issue at bar. In Collins, 701 So. 2d at 793, the jury asked the Court for a definition of "premeditation." In response, the trial court marked one page of Black's Law Dictionary and then sent the entire dictionary into the jury room. Collins, 701 So. 2d at 793. "No instructions, limiting or otherwise, or directions were given by the judge to the jury." Id. This Court, therefore, reversed the conviction in Collins. In the matter at bar, neither the trial court nor counsel were aware that a juror had asked for a Holy Bible nor of the fact that, following this request, a Holy Bible was then permitted in the jury room where the jury continued to deliberate for about fifteen minutes. Obviously then, at the very moment where the legitimacy and the reliability of jury deliberation was vitiated by the introduction of the Holy Bible at the specific request of one juror, the trial court had no opportunity to give any instruction to the jury whatsoever. Moreover, the Court was not able to instruct the jury until the following morning – more than twelve hours after jury deliberation was initially vitiated.

Where improper extrinsic evidence is introduced into the jury room, there is a presumption of prejudice. United States v. Gonzalez, 121 F.3d 928, 945 (5th Cir. 1997) cert.

[45] This, of course, is precisely the remedy Ms. Fulgham sought below. (R. 1294-98).

denied 522 U.S. 1063 (1998); Courtney Rachel Baron, An Eye for an Eye Leaves Everyone Blind: *Fields v. Brown* and the Case for Keeping the Bible out of Capital Sentencing Deliberations, 103 Nw. L.Rev. 369, 382 (2009). Once a defendant demonstrates jurors had contact with extrinsic evidence, the State bears the burden of rebutting the presumption by showing the exposure to the extrinsic evidence was harmless. McNair v. Campbell, 416 F.3d 1291, 1307 (11th Cir. 2005) cert. denied 547 U.S. 1073 (2006) (citing Remmer v. United States, 347 U.S. 227, 229 (1954); United States v. Martinez, 14 F.3d 543, 550 (11th Cir. 1994)); Collins, 701 So. 2d at 796 (citing Bates v. Preble, 151 U.S. 149, 158 (1894) and State v. Holmes, 522 P.2d 900, 905 (Or. 1974) ("[b]ecause the extraneous influence was introduced into the jury's deliberations by the court [see Footnote 35, supra] and not by accident of some outside party, we hold that a presumption is raised that prejudice flows from the injection of such an extraneous influence"). The defendant is therefore entitled to a new trial where improper extrinsic evidence is introduced into the jury room ***unless*** and ***until*** the prosecution establishes that there is no reasonable probability that the improper extrinsic evidence influenced the verdict. Oliver v. Quarterman, 541 F.3d 329, 334-35, 336-40 (5th Cir. 2008) (relying on Remmer, 347 U.S. at 229) (the Holy Bible is an external influence and prejudice is presumed); Gonzalez, supra; see Farese v. United States, 428 F.2d 178, 180-81 (5th Cir. 1970); see also Maddox v. United States, 146 U.S. 140, 147-51 (1892) ("[p]rivate communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear"); Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988) cert. denied 489 U.S. 1071 (1989) (after it has been established that "an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict, the prosecution "bears the burden of demonstrating the

absence of prejudice"),[46] State v. Boling, 127 P.3d 740, 742 (Wash. App. 2006) review denied 145 P.3d 1214 (Wash. 2006) (citing cases). See generally Ex Parte Troha, 462 So. 2d 953, 954 (Ala. 1984) (quoting Roan v. State, 143 So. 454, 460 (Ala. 1932)) (to vacate a jury verdict on grounds that the verdict was polluted by an extrinsic influence, the court must merely determine that the vitiating influence "'might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered'"); Ivory v. State, 351 So. 2d 26, 28 (Fla. 1977) ("[a]ny communication with the jury outside the presence of the prosecutor, the defendant, and defendant's counsel is so fraught with potential prejudice that it cannot be considered harmless"). Post trial – and notwithstanding the notice and case authority announcing that the State was required to rebut the presumption of prejudice that was provided more than five months before hearing on the post-trial motion (see CP. 1308-11, discussing the presumption of prejudice in Ms. Fulgham post-trial motion filed on January 16, 2007) -- the prosecution (1) responded to neither Ms. Fulgham's post-trial motion nor to its supplement (CP. 1347-50) and (2) elected to "simply rest on the record made during the course of [the] trial" at Ms. Fulgham's July 9, 2007, post-trial motion hearing. (R. 1318).[47]

In the matter at bar, not only was the Holy Bible wrongly introduced into the jury room (see Part (A)(1)[A] of this Claim), but the Holy Bible was wrongly introduced at the specific request of a juror. Under these facts, the improper extrinsic evidence at bar that is legally

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[46] Accord Remmer v. United States, 347 U.S. 227, 229 (1954); Mattox v. United States, 146 U.S. 140, 150 (1892).

[47] Ms. Fulgham advised the trial court and the State during the oral argument in support of her motion for mistrial that a presumption of prejudice arises where the jury is exposed to extrinsic stimuli and, as a result, the State bears a burden of demonstrating an absence of prejudice. (R. 1302). Subsequently, Ms. Fulgham fully briefed her contention that prejudice is presumed where extrinsic information infects jury deliberations. (CP. 1308-11). This argument was contained in Ms. Fulgham's post-trial motion (see CP. 1261-1331) that was filed and served on the District Attorney more than twenty-four weeks before the July 9, 2007, hearing on that motion. (CP. 1260, 1264). Yet, at the invitation of the trial court to respond after almost six months of notice, the entirety of the State's response to Ms. Fulgham's post-trial motion was provided by a student intern: "Your Honor, we feel that we made our record during the course of the trial, and we would simply rest on the record made during the course of that trial." (R. 1318; R. 1315, identifying the student intern). This is acquiescence. At minimum, it surely cannot be deemed to be rebuttal.

presumed to be prejudicial must be extraordinarily presumed to be prejudicial as the improper extrinsic evidence was specifically requested by at least one juror. In United States v. Luffred, 911 F.2d 1011, 1014-15, n.3 (5th Cir. 1991), the Fifth Circuit wrote:

> The chart boldly manifested that Diane Luffred had signed two checks and then connected her to six other distributions by listing her as an authorized signer or a co-holder of the account. This graphic depiction of the government's theory of the case deliberately blurred the distinction between Diane Luffred's actual involvement in the distribution of the funds and her power to distribute them because she could draw checks on the accounts. That the jury specifically called for the chart satisfies the requisite proof of prejudice. The jury deemed it of value in its deliberations. Moreover, the court's limiting instruction did more to exacerbate rather than alleviate the situation. Diane Luffred is entitled to a reversal and a new trial. *[Footnote 3]*
>
> *[Footnote 3 reads:]* In prior instances we have utilized a procedure of remanding the case to the district court for an evidentiary hearing to determine whether the extrinsic evidence prejudiced the deliberations. See Howard, 506 F.2d at 869; Paz, 462 F.2d at 746. In those cases, however, extrinsic evidence was *found* in the jury room, necessitating an inquiry into how it came to be there and whether the jurors had even seen it. The fact that the jurors in the instant case specifically *requested* the chart obviates the need for a remand. (emphasis in original).

Returning to Collins, 701 So. 2d at 794-97, after noting that the trial court sent Black's Law Dictionary into the jury room at the specific request of the jury, this Court examined precedent from the United States Supreme Court and two state appellate courts where jurors requested and received extraneous information from the trial court. In these dispositions, this Court noted that it was inconsequential that there was no showing whether (a) any juror actually read the extraneous materials and (b) if so, what portion of the extraneous material was read by the juror. Collins, 701 So. 2d at 796. In Collins, 701 So. 2d at 797, this Court held that "sending the entire Black's Law Dictionary into the jury room for the jurors' use in deliberations raises serious questions as to whether Collins received a fair trial."

In light of Collins, supra, and Fuselier, supra, it is unsurprising that over a century ago this Court held improper communication between a Court bailiff and the jury is presumed

prejudicial. Wilkerson v. State, 78 Miss. 356, 359, 29 So. 170, 170 (1901) ("[t]he statement of Bond [the offending bailiff] was erroneous and untrue in law and in fact, but the mischief is not the less on that account").

If it could be known, which it is now impossible to know, that the verdict when rendered, if no such statement had been made, would have been just as the one rendered, *that would not change the law of the case*")[48] (emphasis added); Durr v. State, 53 Miss. 425, 427 (Miss. 1876) (unilateral and improper conduct of bailiff vitiates guilty verdict unless the State rebuts this presumption and requires conviction to be vacated); see State v. Merricks, 831 So. 2d 156, 160 (Fla. 2002) ("[o]n the record before us, it was simply not possible to say with any certainty that the bailiff's answer to the jury's request had no effect whatsoever in the jury's verdict in this case"); see also Brown v. State, 69 Miss. 398, 399, 10 So. 579, 580 (1892) (vacating a conviction for bailiff misconduct which this Court refers to as "officious intermeddling").[49]

In the case at bar, a court bailiff introduced improper and extrinsic material into the jury room during jury deliberations at the specific request of a juror. Ms. Fulgham respectfully asserts that the prejudice she suffered based on the argument in Part (A)(1)[B] of this Claim must be presumed. Because the State was duly noticed that prejudice was presumed and elected not to respond, this matter is settled on the record before this Court. See Footnote 47, supra, and accompanying text. Ms. Fulgham's death sentence must be vacated.

B. A multitude of additional legal infirmities, mostly constitutional in nature, require a new sentencing hearing

> *It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the*

[48] The Wilkerson Court vacated the appellant's conviction.

[49] Brown was a Nineteenth Century death penalty prosecution where, unlike this case, the defendant was sentenced to life. It is momentous to note that this Court wrote in Brown, 69 Miss. at 399, 10 So. at 580: "one on trial for his life has rights which even a bailiff must respect."

saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'

Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

Part A of this Claim outlines the Sixth Amendment infirmities with Ms. Fulgham's death sentence. The constitutional difficulties created by the facts supporting this Claim do not find their end in the Sixth Amendment however. Introduction of the Holy Bible at the specific request of one juror during penalty-phase deliberations also violates Ms. Fulgham's Fourteenth Amendment right to due process;[50] her Eighth Amendment right to a reliable sentencing;[51] her Article Three, Section Twenty-Six right to counsel under the Mississippi constitution;[52] her Article Three, Section Twenty-Six right to confrontation under the Mississippi constitution;[53] her Article Three, Section Twenty-Six right to jury trial under the Mississippi constitution;[54] her

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[50] See, e.g., Smith v. Phillips, 455 U.S. 209, 217 (1982); Gall v. Parker, 231 F.3d 265, 334 (6th Cir. 2000) cert. denied 533 U.S. 941 (2001).

[51] The Eighth Amendment mandates a reliable determination in a capital sentencing procedure. Oregon v. Guzak, 126 S.Ct. 1226, 1232 (2006) (citing cases). The reliability of the procedure encompasses the entire sentencing process. Herrera v. Collins, 506 U.S. 390, 405 (1993). This reliability requirement is a stricter – or, heightened – requirement in criminal cases where the death penalty is not sought. See, e.g., Sumner v. Shuman, 483 U.S. 66, 72 (1987) (citing cases). As such, and in Mississippi, courts will review death sentences with heightened scrutiny, resolving all *bona fide* doubts in favor of the accused. Porter v. State, 732 So. 2d 899, 902 (Miss. 1999) (citing cases). Introduction of the Holy Bible into jury deliberations during the penalty phase and at the specific request of a juror as outlined in this Claim surely renders the death sentence in this matter the end result of an unreliable sentencing. See, e.g., Caldwell v. Mississippi, 472 U.S. 320, 332-33 (1985); see Baron, An Eye for an Eye, supra, at 394 ("Jurors' reliance on Biblical authority violated the Eighth Amendment's requirement of individualized capital sentencing because use of the Bible as a 'code of authority,' espousing principles that apply in all circumstances, prohibits individualized consideration. As such, the Bible 'threatens to supplant the individualized sentencing inquiry into the nature and consequences of the crime and the particular aggravating and mitigating circumstances brought forward in the evidence'") (quoting Robinson v. Polk, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkerson, J., concurring in denial of *en banc* rehearing) cert. denied 549 U.S. 1003 (2006)) (citing additional authority). See generally Johnson v. Mississippi, 486 U.S. 578, 585-87 (1988). As *bona fide* doubts must be balanced in favor of Ms. Fulgham, it is respectfully submitted that his Court has no choice but to grant a new sentencing hearing.

[52] See Triplett v. State, 666 So. 2d 1356, 1357 (Miss. 1995) (state constitutional right to counsel is co-extensive with the Sixth Amendment right to counsel).

[53] See Ratcliff v. State, 308 So. 2d 225, 227 (Miss. 1975).

[54] Johnson v. State, 476 So. 2d 1195, 1209 (Miss. 1985) (noting that the federal and state constitutional rights to "fair trial by an impartial jury" are "fundamental and essential to our form of government").

Article Three, Section Fourteen right to due process under the Mississippi constitution;[55] and her Article Three, Section Twenty-Eight right against cruel or unusual punishment. The decision of the bailiff to leave the Holy Bible in the jury room at the specific request of a deliberating juror also raises serious Establishment Clause issues.[56] For these reasons, Ms. Fulgham's death sentence must be vacated.

In addition to these constitutional contentions, the death sentence in this case violates Mississippi statutory law. In Mississippi, the jury may only consider enumerated aggravating circumstances and mitigating circumstances. Edwards v. State, 737 So. 2d 275, 289 (Miss. 1999); Balfour v. State, 598 So. 2d 731, 747-48 (Miss. 1992); see *Miss. Code Ann. 99-19-101(2)* (if the jury finds sufficient aggravation, the jury shall weigh aggravating and mitigation – no more and no less); see also Claims 4 and 5, infra. In the matter at bar, and at the specific request of a juror during penalty-phase deliberations, an improper extrinsic source of information was introduced into the jury room. Mississippi statutory law limiting the factors the jury shall consider was abrogated by this introduction of improper extrinsic source of information. Therefore, a new sentencing hearing is mandated.

C. Even if the above discussion, in itself, did not mandate a new sentencing hearing, a new sentencing hearing is required as the trial court's effort to cure the specifically solicited introduction of the Holy Bible into the jury room during penalty-phase deliberations was inoperative

[55] Butler v. State, 217 Miss. 40, 58, 63 So. 2d 779, 784 (Miss. 1953) ("[t]he due process clauses of the federal and state constitutions require that a trial be conducted according to established criminal procedures"); Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (Miss. 1950).

[56] See, e.g., North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145, 1152-1153 (4th Cir 1991) (Fourth Circuit Court of Appeals ruled that the judge's practice of beginning sessions with a prayer violated the establishment clause). See also Allegheny County v. ACLU, 492 U.S. 573, 592 (1989) (Establishment Clause violation arises if the "challenged government practice either has the purpose or the effect of 'endorsing' religion"); accord Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 395 (1993) (Establishment Clause violation arises when a "realistic danger [exists] that the community would think the [State] was endorsing religion"); Martinez v. State, 984 P.2d 813, 828-29 (Okla. Crim. App. 1999). See also Footnote 35, supra.

Ms. Fulgham – precisely as she argued to the trial court before the jury was returned to Court on the morning of December 9, 2006 – continues to maintain that the introduction of the Holy Bible into the jury room during jury deliberations and at the specific request of a juror cannot be remedied. (R. 1294-98; 1301-02). As Ms. Fulgham contended the morning her jury sentenced her to death, once the parties entered into the stipulation recited earlier in this Claim, there was simply nothing to be done in this matter other than to declare mistrial. (R. 1294-98; 1301-02; 1303). For reasons presented in Parts A and B of this Claim, Ms. Fulgham continues in this belief. However, assuming *arguendo* that the trial court could have salvaged the result in this matter, it is respectfully submitted that the trial court's questioning of the jurors in open Court and *en masse* prior to instructing the jury to recommence deliberations on December 9, 2006, was constitutionally valueless.[57]

As stated in Williamson v. State, 512 So. 2d 868, 882 (Miss. 1987) overruling on other grounds noted at Jasso v. State, 655 So. 2d 30, 35 (Miss. 1995): "whenever there is a question concerning outside influencing of a jury, the trial judge himself ought to examine the jury carefully to ensure that the jury's deliberations are based on the evidence produced at trial and not extrinsic matters." This mandate flows directly from the defendant's most fundamental and sacred right – trial before a fair and impartial jury. Id. (citing Johnson v. State, 476 So. 2d 1195, 1209 (Miss. 1985)); West v. State, 485 So. 2d 681, 689 (Miss. 1985) (where the trial court did not require an explicit, affirmative response from each juror that the juror could disregard "blatantly inflammatory" argument, but instead questioned the jury *en masse* and relied upon

[57] The trial court questioned the jury in open Court and *en masse*. The trial court asked: "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." (R. 1305). The trial court then asked: "I do not know whether there 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." (R. 1305-06). Following this, and over the objection of Ms. Fulgham. the trial court excused the jury to continue deliberations. (R. 1306).

juror silence as indicative of an affirmative response, the trial court's action amounted to "perfunctory treatment" of a highly prejudicial issue). See, e.g., People v. Mincey, 2 Cal.4th 408, 465-67, 6 Cal.Rptr.2d 822, 858-59, 827 P.2d 388, 424-25 (1992) cert. denied 506 U.S. 1014 (1992) (when trial court advised of extrinsic Biblical influence, trial questioned each juror, individually, in chambers and in the presence of counsel); see United States v. Bradshaw, 281 F.3d 278, 290-91 (1st Cir. 2002) cert. denied 537 U.S. 1049 (2002) (where jury is exposed to unredacted indictment which contained counts not before the jury – extrinsic information that gave "rise to a colorable claim of actual prejudice and posed a significant threat to the jurors' ability to render an impartial verdict" – the court "assembled the jurors, informed them of the need for an inquiry, and instructed them not to discuss the matter amongst themselves. The court then proceeded to interview the jurors one by one"); United States v. Sarkisian, 197 F.3d 966, 982 (9th Cir. 1999) cert. denied 530 U.S. 1220 (2000) (where extrinsic information is a phone call that could be construed to have threatened one juror, "the district court adequately dispelled any prejudice by telling the jurors in open court that the phone call was a prank, and by individually questioning the jurors to make sure that they could proceed impartially"); United States v. Savage, 701 F.2d 867, 870-71 (11th Cir. 1983) (where extrinsic source is a magazine in the jury room, trial court (a) showed the magazine to the entire jury; (b) asked the entire jury if any of them "had seen the magazine" in the jury room; (c) upon only "a couple of jurors answer[ing] that they had seen it[,]" the court then (d) "proceeded to question *each* juror individually about his knowledge of the magazine") (emphasis added); Commonwealth v. Tennison, 800 N.E.2d 285, 291-92 (Mass. 2003) (where exposure of jury to extrinsic material is established, "an individual voir dire is required to determine the extent of that exposure and its prejudicial effect"); State v. Williamson, 806 P.2d 593, 596 (Hawaii 1991)[58] (where extrinsic

[58] "Where the trial court does determine that such influence is of a nature which could substantially prejudice the

source is a dictionary, individual questioning of jurors is minimal threshold of inquiry); People v. Hawthorne, 291 N.W. 205, 207 (Mich. 1940) (where extrinsic source is a newspaper in the jury room, "the judge polled and interrogated each juror as to whether he had read the article about the case in the newspaper referred to, or whether he had read any articles published about the case. Each juror answered that not only had he not read the article in question, but further that he had not read any newspaper articles about the case. In this regard, there was no error"); see also Esmeyer v. State, 930 S.W.2d 302, 305, 306 (Ark. 1996) (following prejudicial statements of excused venireman which may have been overheard by remaining members of venire, trial court conducted individual, sequestered voir dire on every remaining member of venire concerning the prejudicial statements); State v. Beasley, 731 S.W.2d 255, 257 (Mo. App. 1987) (individual questioning of each juror performed following surprise discovery by jury of marijuana in an overnight bag admitted into evidence).

Therefore, even if the sentencing result could have been rehabilitated through a proper and individual examination of the jurors, it is respectfully submitted that the trial court's effort to assure a result meeting minimal constitutional and statutory standards was entirely inadequate. In addition to the bases for vacatur recited in Parts A and B of this Claim, Ms. Fulgham's death sentence must be vacated for reasons presented in this Part of Claim 2.

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defendant's right to a fair trial, a rebuttable presumption of prejudice is raised. The trial judge is then duty bound to further investigate the totality of circumstances surrounding the outside influence to determine its impact on jury impartiality. (cites deleted). The standard to be applied in overcoming such a presumption is that the outside influence on the jury must be proven harmless beyond a reasonable doubt. (cites deleted). The trial court, in its investigation of the totality of circumstances, should include individual examination of potentially tainted jurors, outside the presence of the other jurors, to determine the influence, if any, of the extrinsic matters." State v. Williamson, 807 P.2d at 596.

D. Conclusion

In light of the above, it is respectfully submitted that the Court's refusal to grant Ms. Fulgham's December 9, 2006, motion for mistrial as to the penalty phase was an abuse of discretion and a new sentencing hearing must be granted. See Bass v. State, 597 So. 2d 182, 191 (Miss. 1992) (citing cases).

For these reasons, Ms. Fulgham's death sentence must be vacated.

CLAIM 3

MS. FULGHAM MUST HAVE A NEW SENTENCING HEARING AS AN UNAUTHENTICATED, IRRELEVANT AND INFLAMMATORY DOCUMENT WAS ERRONEOUSLY ADMITTED INTO EVIDENCE OVER OBJECTION. FURTHER, THE UNAUTHENTICATED 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

In this Claim, this Court is required to decide whether evidence of bad character introduced without foundation may be combined with outside-the-record conjecture during the rebuttal portion of the prosecutor's summation as substantive evidence in support of the death penalty.

A. Admission of State's Exhibit 12 into evidence at the penalty phase was erroneous for want of authenticity

(A)(1). Background

Authentication of a document is a condition precedent to admission of that document into evidence. *Miss.R. Evid. 901(a).* "Before a document can be found relevant, the court must find that it has a foundation." United States v. Blaylock, 20 F.3d 1458, 1463 (9th Cir. 1994); United States v. Sutton, 426 F.2d 1202, 1207 n.32 (D.C. Cir. 1969) ("it is exclusively the jury's function to ascertain the sufficiency of the evidence to convict, and the judge's role to determine whether

proferred evidence has enough prima facie trustworthiness to warrant its consideration by the jury for that purpose").[59] According to Wigmore:

> The stage when the counsel desiring to introduce a document has accumulated sufficient evidence of its execution to be allowed to read it or hand it to the jury is dramatically marked and apparent; and thus the emphasis of the rule of evidence has come to be placed on the question whether the proof has reached that stage, *i.e.*, on the question of sufficiency.
>
> 7 Wigmore, Evidence, section 2128 (Chadbourne rev. 1978); see also Saltzburg, Martin & Capra, Federal Rules of Evidence Manual, pg. 69 (7th ed. 1998) ("[t]he Rule [104] preserves the force of exclusionary rules of evidence by assuring that inadmissible evidence will not generally be brought before the jury. At the same time, the Rule assures that the jury will be the factfinder to all substantive issues in this case").

Trial court admissibility determinations are afforded a high degree of deference so long as the determination stays within the parameters of the Mississippi Rules of Evidence. Pittman v. State, 987 So. 2d 1010, 1018 (Miss. App. 2007) cert. dismissed 981 So. 2d 298 (Miss. 2008); (citing McCoy v. State, 820 So. 2d 25, 30 (Miss. App. 2002); see also Hobgood v. State, 926 So. 2d 847, 856 (Miss. 2006).[60] Indeed, "[t]he issue under Rule [of Evidence] 104(a) is whether the proffered evidence conforms to the rules of evidence." Imwinkelried & Blinka, Criminal Evidentiary Foundations (2nd ed. 2007), sec. 1.06[3], pg. 15 (2007).[61] Trial-court "decisions regarding the admission of evidence involve preliminary questions of law such as whether a rule of evidence or statute precludes admissibility." People v. Layher, 631 N.W.2d 281, 284 (Mich.

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[59] "The determination of whether certain evidence should be admitted cannot be made until preliminary questions of fact are resolved." Saltzburg, Martin & Capra, Federal Rules of Evidence Manual, pg. 69 (7th ed. 1998).

[60] Put differently, trial judges who confine their rulings within the Mississippi Rules of Evidence do not abuse their discretion. Appellants are entitled to relief only when appellants can demonstrate an abuse of discretion. Hobgood, supra (relying on Hentz v. State, 542 So. 2d 914, 917 (Miss. 1989)).

[61] The admissibility of an item is preliminary and exclusively within the province of the trial court. Rule of Evidence 104(a). The relevance of that item is then subject to factual limitation. Rule of Evidence 104(b). See Weinstein's Federal Evidence (Second Edition 2003), sec. 104.10, pg. 104-12.

2001). Appellate review of these decisions is *de novo*. Layher, supra[62]; see United States v. Frabizio, 459 F.3d 80, 83 (1st Cir. 2006) ("[n]o deference is owed to the district court's resolution of this [Rule 104(a)] question. Indeed, this question, like the one arising in the context of a challenge to the sufficiency of the evidence supporting a jury verdict, is one of which we engage in *de novo* review"); People v. Claudio, 864 N.E.2d 954, 955-56 (Ill. App. 2007) (whether there is a foundation for an item offered into evidence answers a question of law and requires *de novo* review).

Due process concerns operate independently of these evidentiary restrictions. The erroneous admission of evidence at a criminal trial implicates Fourteenth Amendment, due process rights. Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988); Collins v. Scully, 755 F.2d 16, 18-19 (2nd Cir. 1985); Walker v. Engle, 703 F.2d 959, 962 (6th Cir. 1983); State v. Ray, 637 S.W.2d 708, 709-710 (Mo. 1982) overruled on other grounds at State v. Jones, 716 S.W.2d 799, 800 (Mo. 1986); see e.g., Collins v. Scully, 755 F.2d 16, 17 (2nd Cir. 1985) (erroneously admitted evidence violates the defendant's due process rights where the evidence was crucial, critical and highly significant); see also United States v. Curtin, 489 F.3d 935, 956-57 (9th Cir. 2007) (en

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[62] *De novo* review requires this Court give no weight whatsoever to the trial court's determination that State's Exhibit 12 was adequately authenticated. Salve Regina College v. Russell, 499 U.S. 225, 238 (1991); see also United States v. First City National Bank of Houston, 386 U.S. 361, 368-69 (1967). That stated, should this Court nonetheless limit its review of the determination at bar to an abuse-of-discretion standard, General Motors Corp. v. Myles, 905 So. 2d 535, 545 (Miss, 2005); Allstate Ins. Co. v. Green, 794 So. 2d 170, 174-75 (Miss. 2001), the result shall be the same because the trial court's error is manifest. See, e.g., Cooter & Gell v. Hartmarx Corp. 496 U.S. 384, 403 (1990) (where trail court provides an erroneous answer to a question of law, trial court abuses its discretion). The path selected to arrive at this inescapable destination should be *de novo* review if for no other reason than this Court's a duty to apply the correct standard of review. See, e.g., Briggs & Stratton Corp. v. Smith, 854 So. 2d 1045, 1048 (Miss. 2003) (correct standard of review must be determined); R.B. ex rel. V.D. v. State, 790 So. 2d 830, 832 (Miss. 2001) (standard of review is an "important procedural issue"); Mississippi Gaming Comm'n v. Treasured Arts, 699 So. 2d 936, 938 (Miss. 1997) ("it is necessary to delineate the appropriate standard of review"); Stowers v. Humphrey, 576 So. 2d 138, 140 (Miss. 1991) ("as in all cases coming before this Court, it is important to establish the standards of review").

banc); United States v. Cabrera, 222 F.3d 590, 596-97 (9th Cir. 2000). See generally Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994).[63]

Therefore, due process and clearly-established rules of evidence require appellate relief under either an abuse-of-discretion test or *de novo* review.

(A)(2). Facts

State's Exhibit 12 was marked for identification during the testimony of Kyle Harvey, a witness for the prosecution during the State's first-phase case-in-chief. (R. 796). The totality of the sworn colloquy between prosecutor and Mr. Harvey follows:

> [BY MR. CLARK]; Once again, Mr. Harvey, I'm going to hand you a document and ask you whose handwriting that document contains.
>
> [BY MR. HARVEY]: It's Kristi's
>
> [BY MR. CLARK]: May it be marked for identification?
>
> [BY THE COURT]: *ID only, court reporter.*
>
> (Document marked for identification purposes as State's Exhibit 12 may be found separate and apart from this record.)
>
> (R. 796) (emphasis added).

No description ***whatsoever*** of State's Exhibit 12 was provided by the witness. (R. 796). With the identifying witness present, sworn and on the stand, State's Exhibit 12 was referred to merely as "a document." (R. 796).[64] According to Mr. Harvey, handwriting contained on State's Exhibit 12, marked for identification only, belonged to Ms. Fulgham. (R. 796). Ms. Harvey did not, for example, testify that State's Exhibit 12 was (1) a letter (2) in the handwriting of Ms.

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[63] Furthermore, any time the prosecution is given an unfair advantage over the defendant, the due process clause is implicated. Wardius v. Oregon, 412 U.S. 470, 473-74 (1973); see also Izazaga v. Superior Court, 54 Cal.3d 356, 374, 285 Cal.Rptr. 231, 242-43, 815 P.2d 304, 315-16 (1991).

[64] Referring to a collection of papers as "a document" is only one step advanced from referring to any physical item as "a thing." In the most forgiving sense of the term, the sworn exchange between prosecutor and Mr. Harvey simply does not amount to authentication. See Part (A)(3) of this Claim.

Fulgham (3) to an identified addressee. More generally, Mr. Harvey did not testify what State's Exhibit 12 ***was*** nor ***what it appeared to be***. Nor did he testify when or where he experienced State's Exhibit 12 prior to his instant testimony.[65]

Over Ms. Fulgham's objection that State's Exhibit 12 was inadmissible as the State had failed to establish a foundation for the exhibit, State Exhibit 12 was admitted into evidence during the State's cross-examination of Mark Webb, a psychiatrist, at Ms. Fulgham's penalty phase. (R. 1102). In addition to Mr. Harvey's sworn testimony that Ms. Fulgham's handwriting was contained on State's Exhibit 12, the only other information concerning the exhibit is the unsworn musing of the prosecutor during cross-examination of Dr. Webb:

> [BY MS. FAVER]: 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.*[66]

State's Exhibit 12 is a document which appears to be a letter signed "Kristi" to an individual named "Chris."

The document is undated.

No address for "Chris" appears anywhere on the document.

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[65] See Footnote 70, infra, and Part (A)(3) of this Claim.

[66] This is no evidence whatsoever to support the emphasized language. Indeed, Mr. Harvery did not testify he had even seen State's Exhibit 12 prior to being shown the item during direct examination. State's Exhibit 12 was identified merely as a document containing the handwriting of Ms. Fulgham. (R. 796). All non-opinion evidence must emanate from personal knowledge. See Comment to Miss. R. Evid 602 (citing Perkins v. State, 290 So. 2d 597 (Miss. 1974); Dennis v. Prisock, 221 So. 2d 706 (Miss. 1969)). Also, all testimony must be under oath or affirmation. Miss. R. Evid. 603. Because of Rule 602 and 603, the attorney-witness doctrine applies in all cases. Miss. R. Prof. Conduct 3.7; see Loring v. Planning & Zoning Comm'n of North Haven, 950 A.2d 494, 521 (Conn. 2008) Indeed, this was a ground upon which co-counsel Stephanie Mallette unsuccessfully moved pre-trial to withdraw as counsel in the matter at bar. (CP. 800-02; R. 224-27). See Claim 19, infra. Therefore, the unsworn declarations of the prosecutor are simply not evidence and cannot serve as an evidentiary predicate. Wright & Miller, 28 Federal Procedure & Practice, sec. 6164, pgs. 354-56 (1993). Where an unsworn declaration of the prosecutor is prejudical, has no basis in fact and are uttered in the presence of the jury, the unsworn declaration amounts to prosecutorial misconduct. United States v. Elizondo, 920 F.2d 1308, 1312-13 (7th Cir. 1990) (relying on United States v. Harris, 542 F.2d 1238, 1307 (7th Cir. 1976) cert. denied 430 U.S. 934 (1977)); United States v. Silverstein, 737 F.2d 864, 867-68 (10th Cir. 1984); Elmer v. State, 724 A.2d 625, 630-31 (Md. 1999); ABA Standard for Criminal Justice 3-5.7(d) ("[a] prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking").

No return address for "Kristi" appears anywhere on the document.

State's Exhibit 12 was introduced into evidence without benefit of a sponsoring witness.[67] State's Exhibit 12 was introduced without testimony as to the circumstances surrounding its creation and without testimony concerning its transmission or receipt (assuming the item was transmitted or received). The only evidence which touches upon or concerns this document is the evidence offered by Mr. Harvey who merely offered his lay opinion that at least some of the handwriting on State's Exhibit 12 appears to be the handwriting of Ms. Fulgham.[68]

Assuming Ms. Fulgham wrote this document, when did she write it? There is not a scintilla of evidence responding to this question. Assuming Ms. Fulgham wrote this document, who is "Chris?" Does "Chris" even exist? There is not a scintilla of evidence responding to these questions.

Information material to the immediately preceding paragraph could have been developed had there been any evidence at all as to where Ms. Fulgham was located when this document was created? There is not a scintilla of evidence responding to this question.[69]

Assuming Ms. Fulgham wrote this document, where was this document found? Was State's Exhibit 12 found by authorities? Was State's Exhibit 12 sent to "Chris" and, if so, did

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[67] The prosecutor cannot serve as a sponsoring witness. See Footnote 66, supra.

[68] Mr. Harvey testified to neither the appearance of State's Exhibit 12 (*e.g.*, "This appears to be a letter written by Kristi Fulgham") nor did he offer any testimony as to the provenance of State's Exhibit 12 (*e.g.*, "I found this writing that appears to be in Kristi's handwriting on the kitchen table at my apartment"). The State did not refer Mr. Harvey to the substantive content of State's Exhibit 12; nor did Mr. Harvey ever address the content of State's Exhibit 12. See, e.g., Sutton, 426 F.2d at 1207. Indeed, Mr. Harvey did not testify that Ms. Fulgham ***wrote*** State's Exhibit 12. His testimony is confined to his opinion that Ms. Fulgham's handwriting ***appears*** on State's Exhibit 12. He was not asked, nor did he testify, if the entire document was in Ms. Fulgham's handwriting. He was not asked, and now did he testify, if only portions of the document were in Ms. Fulgham's handwriting.

[69] The prosecutor opined that Ms. Fulgham wrote this document in June 2003 while incarcerated. See Footnote 66, supra, and accompanying text. This was misconduct. See Paragraph 56, supra.

"Chris" turn the letter over to the authorities? There is not a scintilla of evidence responding to any of these questions.

In sum, at no point did the State offer any evidence that the document was what the State obviously purported it to be – a letter from the defendant to an individual named "Chris."[70]

(A)(3). Law

When the State successfully introduced the alleged letter into evidence over the objection of defense counsel, the State violated Miss. R. Evid. 901. See, e.g., Fortier v. Dona Anna Plaza Partners, 747 F.2d 1324, 1332-33 (10th Cir. 1984) ("[i]f there was an inadequate foundation for the admissibility of the letter, such defect was cured by plaintiffs' subsequent questioning of Peterson at trial. Both Peterson and his brother identified the letter, establishing its authenticity and the conditions surrounding its receipt"); In Re Fine Paper Antitrust Litigation, 751 F.2d 562, 597 (3rd Cir. 1984); United States v. Bagaric, 706 F.2d 42, 67 (2nd Cir. 1983) cert. denied 464 U.S. 840 (1984) (concluding its analysis with the following: "In sum, as Chief Judge Motley found, there was ample demonstration 'that the letter was in fact what the Government claimed, i.e., a letter from Miro Baresic to Vinko Logarusic'"); Putnam Resources v. Pateman, 757 F.Supp. 157, 165 (D.R.I. 1991) (letter offered under Rule 901 is inadmissible where "Sammartino's bookkeeper was able to verify Walter Sammartino's signature on the letter but stated unequivocally that she did not type the letter, had never seen the letter before, and was unfamiliar with its contents"); In Re Village Apartment Assoc. 9 B.R. 211, 214 (Bankr. N.D. Georgia 1981) (document, which appears to be an letter on law-firm letterhead to the Debtor, inadmissible as unauthenticated as "[n]either Mr. Batten nor Mr. Mears has personal knowledge

[70] Quite obviously, a letter is a written communication from at least one person to at least one other entity. Cf. Black's Law Dictionary (5th ed. 1979), pg. 813. Letters are necessarily transported in some sense from the creator of the letter to the receiver of the letter. Id. For the sake of argument, assuming (a) that Ms. Fulgham authored this document and assuming that (b) there is actually a person named "Chris," then additional evidence that State's Exhibit 12 was received by "Chris" or intercepted in transport to "Chris" or simply found by Person X at Location Y would have been *prima facie* evidence that State's Exhibit 12 is a letter.

that the letter dated February 16, 1978 was written by Mr. Rauber and sent to Debtor"); Hoffman v. Sterling Drug, Inc., 374 F.Supp. 850, 861-82 (M.D.Pa. 1974); Stardust, Inc. v. Weiss, 79 F.Supp. 274, 280 (S.D.N.Y. 1948) ("[t]he writer of the long hand notation was not produced. There was no evidence to show the store exists. There was no possible opportunity for the defendants to test the reasons for the writing of the note or the circumstances surrounding its being. Under such circumstances the letters are inadmissible"); J.C. Penney Co, Inc., v. Blush, 356 So. 2d 590, 592-94 (Miss. 1978) (trial court erred in permitting appellee to introduce into evidence a document which purports to be a letter from an inmate at Parchman to the appellee as the appellee failed to authenticate the letter she purportedly received); Continental Baking Co. v. Katz, 68 Cal.2d 512, 525, 67 Cal.Rptr. 761, 769, 439 P.2d 889, 897 (1968) ("[w]e understand that in some legal systems it is assumed that documents are what they purport to be, unless shown to be otherwise. With us it is the other way around. Generally speaking, documents must be authenticated in some fashion before they are admissible in evidence"); State v. Golden, 186 P.2d 485, 503-04 (Idaho 1947) ("No representative of the bank was called to identify the letter, its contents, or the writer. Headrick [the sheriff] testified he received it from one of his deputies, who, he said, received it from the bank. The court correctly held it was not properly identified"); see also Positive Black Talk, Inc. v. Cash Money Records, 394 F.3d 357, 375-76 (5th Cir. 2004) (proponent of exhibit claimed that exhibit was a promotional mailer for Big Easy and called a witness to testify that he received a copy of the exhibit by U.S. Mail, exhibit was properly excluded for failure to provide any evidence that Big Easy authorized the exhibit); Smith v. C.I.R., 800 F.2d 930, 934 n. 1 (9th Cir. 1986); Mayer v. Angelica, 790 F.2d 1315, 1339-41 (7th Cir. 1986) cert. denied 474 U.S. 1037 (1987); Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F.Supp.2d 756, 771-72 n. 8 (N.D.Tex. 2006); Hill v. Citibank Corp., 312 F.Supp.2d 464, 473-74 (S.D.N.Y. 2004) ("fax header" on purported fax indicating time and date

of fax transmission insufficient to authenticate purported fax); Bullock v. Widnall, 953 F.Supp. 1461, 1474 n. 21 (M.D.Ala. 1996) aff'd 149 F.3d 1196 (11th Cir. 1998); In Re Ladue Tate Mfg. Co., 135 F. 910, 911-12 (W.D.N.Y. 1905); P.A.M. Transport, Inc. v. Arkansas Blue Cross & Blue Shield, 868 S.W.2d 33, 40 (Ark. 1993); Levy v. Disharoon, 749 P.2d 84, 90 (N.M. 1988); State Bank of Finley v. Dronen, 197 N.W.150, 152 (N.D. 1924); Williamson v. Voedisch Jewelry Co., 152 N.W. 508, 508-09 (S.D. 1915) (reversal required where proponent of exhibits that proponent purported to be letters addressed to the defendant lacked foundation where the proponent offered "no evidence that the original letters had ever been properly enclosed, addressed, stamped, or deposited in a United States post office"); Bridgeport Hardware Mfg. Corp. v. Bouniol, 93 A. 674, 677 (Conn. 1915).

As recited above, the State produced no sponsoring testimony as to merely where or when this alleged letter was found; nor did the State offer any hint as to the identity of the person who found this alleged letter.[71] As such, State's Exhibit 12 was erroneously received into evidence as this document was never authenticated. Put differently, State's Exhibit 12 is not a letter written by Kristi Fulgham from the county jail in June 2003 simply because the State wants it to be. State's Exhibit 12 is only what the State has proven it to be – a document of unknown time and origin which, at least in part, contains the handwriting of Kristi Fulgham. This is not authentication; rather, it is a successful effort on the part of the prosecution to admit into evidence a document absent foundation and over the objection of Ms. Fulgham. For this reason, Ms. Fulgham's death sentence must be vacated.

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[71] While the Rule 901(a) hurdle of authenticity is hardly formidable, a hurdle does exist. See, e.g., Hayden v. State, 972 So. 2d 525, 532 (Miss. 2007) ("to authenticate the documents, the State had only to show that the documents were what the State claimed them to be, that is, that they were a purported certificate of title and bill of sale which had been produced by Hayden in discovery"). Rather than clear this modest hurdle, the Court permitted the State to obliterate it. The State offered absolutely nothing to authenticate State's Exhibit 12. See, e.g., United States v. Polk, 56 F.3d 613, 631 (5th Cir. 1995) (Rule 901(a) is satisfied where proponent of the evidence presents sufficient evidence to support reasonable juror's conclusion that exhibit is what it purports to be); United States v. Holmquist, 36 F.3d 154, 168 (1st Cir. 1994) (proponent must present a reasonable likelihood that the exhibit is what the proponent claims the exhibit to be).

B. Even if State's Exhibit 12 was authenticated, the item is inadmissible as inflammatory evidence of bad character. State's Exhibit 12 was inadmissible under Miss. R. Evid. 405(a) and because it was not introduced to rebut evidence of good character. The death sentence must be vacated because Ms. Fulgham suffered extreme, unfair prejudice as a result of this erroneous admission

Ms. Fulgham need not demonstrate that the erroneous admission of an unauthenticated document amounts to an admission of irrelevant information. An unauthenticated document ***is*** ungenuine and, therefore, incapable of probative value and necessarily irrelevant. See, e.g., United States v. Branch, 970 F.2d 1368, 1370 (4th Cir. 1992); United States v. Hernandez-Herrera, 952 F.2d 342, 343 (10th Cir. 1991); *Staton, Mississippi Evidence* (3rd Ed.) Section 901 (pg. 310) (if evidence is not authenticated, then it is not genuine and, necessarily, irrelevant).

In addition to the fact that State's Exhibit 12 was admitted into evidence without authentication, however, Ms. Fulgham suffered extreme, unfair prejudice at the penalty phase as a result of the unlawful admission of State's Exhibit 12 into evidence.

State's Exhibit 12, taken on its face, is a licentious writing.

State's Exhibit 12, according to the State's unsworn conjecture, was written by Kristi Fulgham from jail during June 2003.[72] The *verbatim* content of the unauthenticated document follows:

> *Chris,*
>
> *What did I say that got you all excited?*
>
> *I am glad you think I look cute walking around in my boxers. I have looked my absolute worst since i've [sic] been in jail. No make-up, ugly orange jumpsuit and not to mention all the weight i've [sic] gained. I don't know if you remember seeing me the first night I got here, but I was smaller than I am now.*
>
> *I can't stand not being able to touch you. I want you so bad. I wish you knew how much. Oh, the things I could do with you.*

[72] The fact that this conjecture does not constitute evidence does not detract from fact that Ms. Fulgham's jury heard it. This is precisely why the prosecutor's conjecture constituted misconduct. See Footnote 66, supra, and accompanying text.

You need to let me borrow a pair of your boxers to sleep in! So I could be sorta close to you.

I actually had a wet dream last night. About you and me of course. It was so hot and so real. I don't know what you have done to me. [Emphasis in original.] I'm silly now. You make me happy.

is [sic] it possible to love someone you've never talked face to face to?

I would be proud to be your girl.

And as for someone calling me a N _ _ _ _ _ lover [sic], I am not mean at all, and I rarely get mad, but that would piss me off royally. I do not like that word when it is used to hurt.

So, my answer is yes, I would be with you, on the outside, w/all of our kids, even if people talked. But only if you would be willing to have 6, cause you would have to have one more with me. We would make a beautiful baby, don't you think?

I better go finish cleaning.

Hope to hear from you again later tonight. Now you tell me how you feel about all i've [sic] said.

And yes, I would have my lips and tongue all over your dick. I love that. Hee Hee.

Love ya,
Kristi

I may not have the lips a black woman has, or the ass, but I know how to use what i've [sic] got!!

As the State offered State's Exhibit 12 into evidence prior to any evidence as to Ms. Fulgham's character (good or bad),[73] it strains credulity to contend that the State offered State's Exhibit 12 for any purpose other than to demonstrate that Ms. Fulgham has bad character. See, e.g., Barnett v. Commonwealth, 763 S.W.2d 119, 123-24 (Ky. 1988); see State v. Williams, 575 So. 2d 452, 454-55 (La. App. 1991) writ denied 578 So. 2d 130 (La. 1991);[74] see also State v.

[73] Ms. Fulgham's first witness at the penalty phase was Psychiatrist Mark Webb. He did not offer character evidence. See Footnote 75, infra. Thus, the State's admission into evidence of bad-character evidence was not in response to any evidence from Ms. Fulgham to the contrary.

Sparks, 296 S.E.2d 451, 455 (N.C. 1982) (as question concerning deviant sexuality could not have – and did not – go to credibility, question was improper evidence of bad character). See generally Crawford v. Burritt, 671 A.2d 689, 693 (Pa. Super. 1995) appeal denied 680 A.2d 1161 (Pa. 1996); Commonwealth v. Kozec, 487 N.E.2d 216, 222 (Mass. App. 1985); Coleman v. State, 285 So. 2d 177, 179 (Miss. 1973) ("[i]ncompetent evidence, inflammatory in character, when presented to a jury carries with it a presumption that it was harmful"). Cf. Staudinger v. Sooner Pipe & Supply Corp., 490 P.2d 619, 625-26 (Kan. 1971). Undoubtedly, evidence of a defendant's bad character is admissible to rebut evidence offered by the capital defendant to the contrary. Edwards v. State, 737 So. 2d 275, 289-90 (Miss. 1999); see Wiley v. State, 750 So. 2d 1193, 1202 (Miss. 1999) cert. denied 530 U.S. 1275 (2000); see also Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982). Assuming *arguendo* that Ms. Fulgham put good character evidence before her jury through her direct examination of Mark Webb,[75] the State would have been free to rebut the evidence of good character with ***competent*** evidence of bad character. Id.; see Footnote 75, supra. The inverse is equally true: "The prosecution has no right to introduce evidence of wrongs and bad acts to prove Hodges' character or to show he acted in conformity therewith, unless it is competent rebuttal evidence in the face of the showing of Hodges' good character made on direct examination of this witness." Hodges v. State, 912 So. 2d 730, 755

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[74] Among other things, the prosecutor repeatedly asked defendant if she used heroin. Williams, 575 So. 2d at 454. "The prosecutor's questions concerning the defendant's use of heroin and admission to the hospital appear to have been for the sole purpose of creating an image of bad character, that is, that the defendant was a serious drug addict. The reference was not fleeting or accidental. The state made a deliberate effort to inform the jury of this information. Such a use of other crimes or acts is not admissible in evidence." Id. at 455. See also Part C of this Claim.

[75] On direct examination, Dr. Webb was accepted by the Court as an expert in the field of psychiatry (R. 1074) and his direct examination was limited to his field of expertise. The successful and erroneous elicitation of unauthenticated, bad character evidence at issue in this Claim arose during the State's cross-examination of Dr. Webb. Furthermore, State's Exhibit 12 amounts to a specific instance of bad character – a purported, licentious letter. Because Dr. Webb offered no evidence of Ms. Fulgham's good character, State's Exhibit 12 – even if the document were properly authenticated – would remain nonetheless inadmissible as evidence of a specific instance of bad character under Miss. R. Evid. 405(a). See, e.g., United States v. West, 58 F.3d 133, 131 (5th Cir. 1995); United States v. Duhon, 565 F.2d 345, 353-43 (5th Cir. 1978) cert. denied 435 U.S. 952 (1978).

(Miss. 2005) cert. denied 126 S.Ct. 739 (2005) (citing cases); see United States v. Gilliland, 586 F.2d 1384, 1388-89 (10th Cir. 1978) (reversible error to permit cross examination of defense witness as to defendant's prior convictions where defense witness was not called as a character witness); see also State v. Porter, 391 S.E.2d 144, 157 (N.C. 1990). In addition, the specific argument of Part A of this Claim applies to this Part in its most general sense; that is, any evidence introduced by the State is either competent and relevant or it must be excluded. Miss. R.Evid. 101, 402, 901(a) and Comment to Rule 901(a) ("[t]he authentication and identification aspects of evidence are central to the concept of relevancy. Unless it be satisfactorily shown that an item of evidence is 'genuine,' the item is irrelevant and should be excluded").[76] These legal hallmarks are particularly true in the penalty phase of a capital sentencing where every *bona fide* doubt must be resolved in favor of Ms. Fulgham. Flowers v. State, 773 So. 2d 309, 317 (Miss. 2000) (citing cases).

Where the State chooses to introduce evidence, the State must establish a foundation for that evidence. See Part A of this Claim. After the State establishes a foundation, the State must introduce the evidence for an admissible purpose. In this matter, the State introduced an item without foundation and for the impermissible purpose of establishing Ms. Fulgham's bad character. Therefore, the death sentence the State secured must be vacated based on case authority cited in this Part and Miss. R. Evid. 405(a). See Footnote 75, supra.

C. In addition to the extreme, unfair prejudice suffered by Ms. Fulgham in the erroneous admission of State's Exhibit 12, the prosecution compounded the prejudice by referring to State's Exhibit 12 during penalty-phase summation, by then specifically inviting the jury to read State's Exhibit 12 during his penalty-phase summation, and,

[76] "The rationale for the authentication requirement is that the evidence is viewed as irrelevant unless the proponent of the evidence can show that the evidence is what the proponent claims." United States v. Hernandez-Herrera, 952 F.2d 342, 343 (10th Cir. 1991); see, e.g., United States v. Wadena, 152 F.3d 831, 854 (8th Cir. 1998) (party offering document into evidence must show a rational basis to support claim that document is what it purports to be); United States v. Holmquist, 36 F.3d 154, 166 (1st Cir. 1994) ("[i]t cannot be gainsaid that documentary evidence must be authentic").

thirdly, advising the jury, without any basis in the record, that State's Exhibit 12 was authored on the same date that Ms. Fulgham wrote the mother of Joey Fulgham

The discussion in Part A and Part B of this Claim addresses the extreme, unfair prejudice suffered by Ms. Fulgham simply because State's Exhibit 12 was introduced into evidence. As a result, the jury was presented with an apparent, licentious missive that the State alleged[77] to have been authored by Ms. Fulgham, to someone named "Chris."

The damage did not end here, however.

Nor did the prosecutorial misconduct.

During the State's penalty-phase summation, the following comments were made to Ms. Fulgham's jury:

> [BY MS. FAVER]: If he [Dr. Webb] had known that she [Ms. Fulgham] has manipulated people around her, if he had viewed the letter to her brother in the jail, the other letters written which she was in there – *and there are two more letters in evidence, ladies and gentlemen, that were not there yesterday, and you need to read them. I'm not going to read them to you, but you need to read them.*
>
> And he [Dr. Webb] sat on that stand, and he read them to himself, *and I didn't go into the gory details that are in them*, and still he said, wouldn't change my opinion. That's for you to decide.
>
> (R. 1265-66) (emphasis added).
>
> [BY MR. CLARK]: As Ms. Faver has said, your task now is an awesome task. I mean that in all seriousness. And I do hope you will look at the evidence. *I hope you'll read the letters that were put in.*
>
> Because on the same day that she writes a letter to Joey's mother saying Joey completed my soul, *read the other letter she's writing. And she dares ask you for mercy.*
>
> (R. 1283-84) (emphasis added).

[77] If Ms. Faver is not the foundational witness for State's Exhibit 12, then who is? See Footnotes 66 and 68, supra, and their accompanying text.

As made clear in the above extractions from the record, Mr. Clark mentioned State's Exhibit 12 in his closing argument at the penalty phase.[78] Mr. Clark invited the jury to review State's Exhibit 12 during its deliberations. Specifically, in argument to Ms. Fulgham's jury that she was procedurally unable to rebut, Mr. Clark (a) specifically implored the jury to read the letters that were introduced by the State during the penalty phase; (b) advised the jury that "on the same day she writes a letter to Joey's mother saying Joey completed my soul, read the other letter she's writing;" and (c) after reflecting upon the letters the State introduced during the penalty phase and the fact[79] that Ms. Fulgham wrote to her mother-in-law on the same day she authored State's Exhibit 12, to then consider the propriety of Ms. Fulgham asking the jury for mercy.[80] As State's Exhibit 12 was admitted over the objection of defense counsel and absent authentication, this argument during summation constituted misconduct. See, e.g., State v.

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[78] Ms. Faver gave the first summation for the State in this penalty phase and Mr. Clark gave the rebuttal. Therefore, Ms. Fulgham had no opportunity to respond to any of Mr. Clark's argument. Because Ms. Fulgham could not respond to Mr. Clark's argument, Ms. Fulgham had no opportunity to tell her jury that (1) there is no letter from Kristi Fulgham to her mother-in-law in evidence, see Footnote 79, infra, and (2) she is not asking for mercy and she has never asked for mercy. See Claim 11, infra, (Ms. Fulgham's Miss. Code Ann. 99-11-101(2)(d) instruction is refused); Claim 18, infra (Ms. Fulgham's mercy instruction is refused); and Footnote 80, infra.

[79] It is not a fact that Ms. Fulgham wrote her mother-in-law at anytime, let alone the same day the State claimed Ms. Fulgham authored State's Exhibit 12. There is no evidence that Ms. Fulgham ever wrote her mother-in-law. "A prosecutor is not permitted to comment on matters outside the record. By going beyond the record, the prosecutor becomes an unsworn witness, engages in extraneous and irrelevant argument, diverts the jury from its proper function and seriously threatens the defendant's right to a fair trial." Bennett L. Gershwin, Prosecutorial Misconduct, (Second Edition, 2001), Sec. 11:13, Page 11-66.

[80] Ms. Fulgham fails to locate any portion of her penalty-phase summation where she sought the jury's mercy. She did ask the trial court to include a mercy instruction in the jury charge. See Jury Instruction 91-A at CP. 1150. That instruction was refused. (R. 1231).

Montes, 21 P.3d 592, 597 (Kan. App. 2001);[81] see also State v. Liberatore, 433 N.E.2d 561, 589-90 (Ohio 1982).[82]

In addition to mentioning State's Exhibit 12 in his closing argument at the penalty phase, Mr. Clark specifically invited the jury to review the content of State's Exhibit 12 in making its life-or-death determination. As this offering to Ms. Fulgham's jury explicitly sought a life-or-death determination premised on unauthenticated bad character evidence, this argument constituted misconduct. See, e.g., Ruiz v. State, 743 So. 2d 1, 6 (Fla. 1999) (misconduct for prosecutor to seek verdict for a reason other than guilt of the crimes charged); State v. Porter, 526 N.W.2d 359, 363-64 (Minn. 1995); State v. Goldenstein, 505 N.W.2d 332, 346 (Minn. App. 1993); State v. Martin, 849 P.2d 1289, 1292 (Wash. App. 1993); People v. Jones, 832 P.2d 1036, 1039 (Colo. App. 1991) (misconduct to shift jury's focus away from evidence); see also Washington v. Hofbauer, 228 F.3d 689, 699 (6th Cir. 2000); United States v. Mastrangelo, 172 F.3d 288, 297-98 (3rd Cir. 1999); State v. Willard, 761 N.E.2d 688, 693 (Ohio App. 2001) ("[w]hile a prosecutor has wide latitude in summation, this latitude "does not 'encompass inviting the jury to reach its decision on matters outside the evidence adduced at trial'") (quoting case); ABA Standard for Criminal Justice 3-5.8(a) (argument misstating evidence or misleading jury in inferences it may draw); ABA Standard for Criminal Justice 3-5.8(c) (argument calculated to appeal to the prejudice of the jury); ABA Standard for Criminal Justice 3-5.8(d)

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[81] During the State's case-in-chief, a witness testified that the complainant was "easy." Montes, 21 P.3d at 597. The Court overruled the State's objection. Id. The Court also overruled the State's motion to strike the response. Id. After the close of evidence, however, the Court instructed defense counsel not to mention or to draw any inferences from this testimony during closing argument. Id. On appeal, this ruling was affirmed because defense counsel failed to demonstrate the relevance of this evidence after the Court permitted its introduction. Id.

[82] The State relied on out-of-court statements admitted for a limited purpose at trial as substantive evidence of guilt during summation. Liberatore, 433 N.E.2d at 489-90. The Court found this misappropriation of evidence to be misconduct. Id.; Id. at 589 n.7. In the matter at bar, State's Exhibit 12 was wrongly introduced as evidence of Ms. Fulgham's bad character. During summation, the State misappropriated this bad character evidence as substantive evidence to support the death sentence the State ultimately secured.

(argument diverting attention of jury from deciding case on evidence). Cf. United States v. Payne, 2 F.3d 706, 712 (6th Cir. 1993) (strong sympathetic passions against the defendant).

Finally, Mr. Clark advised Ms. Fulgham's jury that State's Exhibit 12 was written on the same date that Ms. Fulgham wrote a letter to the mother of Joey Fulgham.[83]

This baseless, forensic assertion from Mr. Clark during the State's penalty-phase rebuttal is at least as bizarre as Ms. Faver's unsworn conjecture that State's Exhibit 12 was authored by Ms. Fulgham from jail during June 2003.

State's Exhibit 12 is undated[84] and there is no letter in evidence which purports to be from Ms. Fulgham to the mother of Joey Fulgham. This also constituted misconduct. Cabello v. State, 471 So. 2d 332, 346 (Miss. 1985) cert. denied 476 U.S. 1164 (1986) (prosecutor may not put forth evidence outside of the record during summation); see, e.g., Hall v. United States, 419 F.2d 582, 583-85 (5th Cir. 1969); Coulter v. State, 734 P.2d 295, 302 (Okla. Crim. App. 1987); Commonwealth v. Katar, 447 N.E.2d 1190, 1199 (Mass. 1983) ("[c]omments, however, on what was not brought before the jury are not proper, particularly a comment that suggests that the prosecutor has particular knowledge of a fact not in evidence"); Reynolds v. State, 505 S.W.2d 265, 267 (Tex. Crim App. 1974); People v. O'Banner, 575 N.E.2d 1261, 1272 (Ill. App. 1991) (statement during summation regarding witness's character and that witness was incorrigible

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[83] There is no document in evidence which purports to be a letter from Ms. Fulgham to the mother of Joey Fulgham. What letter to the mother of Joey Fulgham is Mr. Clark referring to? Assuming there is a letter in evidence from Ms. Fulgham to the mother of Joey Fulgham, the unauthenticated document erroneously introduced into evidence as State's Exhibit 12 is undated. What date was the unknown letter from Ms. Fulgham to the mother of Joey Fulgham written and how can it be said that any undated letter was written on the same day as the unknown letter from Ms. Fulgham to the mother of Joey Fulgham? There are simply no answers to these questions. As Mr. Clark spoke in rebuttal, Ms. Fulgham had no opportunity to respond to the State's imprudence.

[84] Indeed, that is one of the difficulties with the authenticity of the letter. See Footnotes 66 and 68, supra, and accompanying test. In a circle of events approaching slapstick, the prosecution advises Ms. Fulgham's jury that Ms. Fulgham wrote State's Exhibit 12 (even though there is no evidence as to when State's Exhibit 12 was written) on the same day that Ms. Fulgham wrote a letter to the mother of Joey Fulgham (even though there is no evidence of any such letter at all)!

were not in record and constituted misconduct); People v. Ellison, 350 N.E.2d 812, 820 (Mich. App. 1984); ABA Standard for Criminal Justice 3-5.8(a) (argument misstating evidence or misleading jury in inferences it may draw); ABA Standard for Criminal Justice 3-5.8(c) (argument calculated to appeal to the prejudice of the jury); ABA Standard for Criminal Justice 3-5.8(d) (argument diverting attention of jury from deciding case on evidence); ABA Standard for Criminal Justice 3-5.9 (argument to facts outside the record); see also Commentary to ABA Standard for Criminal Justice 3-5.9 (noting that prosecutorial misstatement of evidence during closing statement is "particularly reprehensible"). Cf. People v. Broadus, 514 N.Y.S.2d 580, 581 (App. Div, 1987) leave denied 70 N.Y.2d 643 (1987) (when a prosecutor addresses the jury with information outside of the record, the prosecutor becomes a witness in the case).[85] In joining State's Exhibit 12 with outside-the-record conjecture and then asking the jury to consider whether Ms. Fulgham's non-existent exhortations for mercy are justified, the State combined inadmissible, unauthentic evidence of bad character with rank fantasy. Presenting this dishonorable concoction as substantive evidence for the death penalty during rebuttal made it unassailable as Ms. Fulgham had no opportunity to respond. Misconduct of this nature cannot stand.

D. In light of Parts A, B and C of this Claim, Ms. Fulgham's constitutional rights to a reliable sentencing were violated and Ms. Fulgham is entitled to a new sentencing hearing

As fully delineated in Claim 1 and Claim 2, Ms. Fulgham is constitutionally entitled to a reliable sentencing proceeding. Cabana v. Bullock, 474 U.S. 376, 391 (1986). Among other things, this reliable sentencing will rationally narrow the class of offenders and permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's

[85] See also Paxton v. Ward, 199 F.3d 1197, 1216-18 (10th Cir. 1999) for the proposition that misconduct during summation could lead to a deprivation of the right to confront accusers where the prosecution elects to argue outside of the record.

record, personal characteristics, and the circumstances of his crime. See Kansas v. Marsh, 548 U.S. 163, 173-74 (2006); Romano v. Oklahoma, 512 U.S. 1, 6-7 (1994); Zant v. Stephens, 462 U.S. 862, 878-79 (1983) ("[w]hat is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime") (emphasis in original). Because of the introduction of the wantonly prejudicial and unauthenticated State's Exhibit 12 without authentication and the subsequent explicit and forensic reliance on State's Exhibit 12 to secure the death penalty, it cannot be said that Ms. Fulgham benefited from a constitutionally licit sentencing phase. Ms. Fulgham's death sentence must be vacated.

CLAIM 4

INSTRUCTING THE JURY TO CONSIDER THE MISS. CODE ANN. 99-19-101(5)(F) AGGRAVATOR WAS ERROR

I. Introduction

During the penalty-phase charge conference, the State submitted jury instruction SSP-4-B (CP. 1096-1101)[86] and acknowledged that the Miss. Code Ann. 99-19-101(5)(f) aggravator is not allowed when the State also puts forth the robbery-murder aggravator at Miss. Code Ann. 99-19-101(5)(d). (R. 1200-01). Ms. Fulgham agreed with the prosecution, (R. 1201-02), and objected to the pecuniary-gain aggravator citing Willie v. State, 585 So. 2d 660, 680-81 (Miss. 1991) and Ladner v. State, 584 So. 2d 743, 762-63 (Miss. 1991) as authority. (R. 1201-02).

Had the trial court sustained Ms. Fulgham's objection, this Claim would not arise.[87]

But the matter did not end here.

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[86] The three aggravators that the State offered – the "avoiding arrest" aggravator at Miss. Code Ann. 99-19-101(5)(e), the pecuniary gain aggravator at Miss. Code Ann. 99-19-101(5)(f), and the duplicative felony murder aggravator at Miss. Code Ann. 99-19-101(5)(d) – are located at CP. 1097.

[87] The trial court did sustain Ms. Fulgham's objection to including the "avoiding arrest" aggravator at Miss. Code Ann. 99-19-101(5)(e) in the jury charge. R. 1205.

Instead, and notwithstanding the State's concession as to Willie, supra and Ladner, supra, the State nonetheless insisted that a "pecuniary gain" instruction should be given coactive with the robbery-murder instruction at Miss. Code Ann. 99-19-101(5)(d) because this prosecution is "a very unique case, and that the pecuniary gain was not necessarily the robbery." (R. 1200).[88]

Ms. Fulgham responded that "if Kristi Fulgham is sentenced to death, she's sentenced on this conviction. Not for any other conduct. She was convicted of capital murder."[89] (R. 1201-02).

The State replied that Byrom v. State, 863 So. 2d 836 (Miss. 2003), "stands for the proposition that having the victim murdered in order to collect insurance proceeds from his death is proof that can sustain the aggravating factor of pecuniary gain." (R. 1203).

Unlike the felony-murder prosecution at bar, Byrom v. State, 863 So. 2d 836, 880 (Miss. 2003) is a murder-for-hire prosecution under Miss. Code Ann. 97-3-19(2)(d). In that murder-for-hire prosecution, this Court permitted a Miss. Code Ann. 99-19-101(5)(f) instruction that the murder-for-hire was committed for pecuniary gain based on direct evidence[90] the defendant intended to compensate the murderer she hired with life insurance proceeds she would collect from the death of her victim. Byrom, 863 So. 2d at 881.

While the State chose not to elect the robbery with which it put Ms. Fulgham into jeopardy (see Part II(B) of Claim 23, infra), insisted upon elimination of lawful jury instruction requiring jurors to reach a unanimous verdict on the robbery which the State would not elect (see

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[88] As Ms. Fulgham would go on to argue, (R. 1250), the State could only seek her execution for the crime which the State proved – robbery where a killing took place. The State may not seek Ms. Fulgham's execution for the array of bad acts and evidence of bad character that the State adduced over her objection. See Claim 3, supra, and Claims 20 and 24, infra.

[89] Of course, the error and misconduct delineated in Claim 23, infra, renders the conduct for which Ms. Fulgham was convicted unknowable.

[90] The direct evidence of the pecuniary-gain aggravator was an admission from the defendant. Byrom, 863 So. 2d at 881. There is no such evidence in this matter. See Claims 8, 9, 25 and 27, infra.

Parts I and II(A) of Claim 23, infra), and then advocated for a patchwork verdict at summation (see Part III of Claim 23, infra), it cannot be denied that the State proceeded against Ms. Fulgham under Miss. Code Ann. 97-3-19(2)(e) rather that Miss. Code Ann. 97-3-19(2)(d). (CP. 30).[91] It also cannot be denied that, entirely ***unlike*** the facts in Byrom, no direct evidence was adduced that Joey Fulgham was killed for insurance proceeds (actual proceeds or imagined proceeds).[92]

Notwithstanding all of the above, Ms. Fulgham failed to prevail in her objection to the inclusion of the pecuniary gain aggravator in this robbery-murder prosecution. The record from the charge conference follows:

> [BY THE COURT]: Have you see this case [Byrom v. State], counsel?
>
> [BY MR. LAPPAN]: Judge, I have one page from the Byrom case, and my knowledge of it is it was a murder-for-hire prosecution; is that correct?[93]
>
> [BY THE COURT]: It was. Well, that – they were prosecuting her –
>
> [BY MR. LAPPAN]: Yes, sir.

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[91] Entirely unlike Byrom but entirely consistent with Willie and Ladner, the prosecution in this matter proceeded under the State's felony-murder provision of the capital murder statute – Miss. Code Ann. 97-3-19(2)(e).

[92] See Footnote 91, supra and Part II(B) and III of Claim 23, infra.

[93] Ms. Fulgham was correct. In a case where the State seeks death, why is defense counsel required to grapple with the legality of the Miss. Code Ann. 99-19-101(5)(f) aggravator without advance notice? The answer is: because the trial court overruled defense counsel's motion to require the State to disclose its aggravating circumstances in advance of trial. Ms. Fulgham argued she was entitled to pre-trial notice of the State's aggravating circumstances. (CP. 359). At a motion date, the State responded that Ms. Fulgham was not entitled to pre-trial notice of the State's aggravating circumstances. (R. 124-26). The trial court ordered there was no need to provide pretrial notice of aggravation. According to the trial court's order: "The Defendant seeks to preclude the State from introducing any non-statutory aggravating circumstances the prosecution will seek to prove at trial. The Court is unaware of what evidence may be elicited at trial on guilt or sentencing and finds that any rulings on the issue of statutory aggravating circumstances or non-statutory aggravating circumstances are to be made at the appropriate time during the course of the trial." (CP. 799). Ms. Fulgham cannot claim prejudice because defense counsel satisfactorily preserved this issue at the charge conference. Nonetheless, what is the harm of mandating pretrial disclosure of aggravation when to do so would only foster effective assistance of counsel at the charge conference? Had defense counsel been permitted to merely prepare argument in refutation of the State's invalid aggravator, Ms. Fulgham could have presented a more thorough objection that would have convinced the trial court to refuse this inapplicable aggravator.

> [BY THE COURT]: -- for hiring someone else, who was to be paid with insurance proceeds, and they said that the insurance proceeds would be pecuniary again [sic].
>
> [BY MR. LAPPAN]: Yes, sir, for Byrom.
>
> [BY THE COURT]: So it was an aggravating factor for her.
>
> [BY MR. LAPPAN]: Yes, sir. But in that – I believe in Byrom, she was indicted murder for hire. She was not indicted for robbery. In this case, Kristi was indicted for robbery, and they've proved that indictment, and I think that the pecuniary gain aggravator is simply duplicative. If they wanted to indict Kristi under the insurance, they could have indicted her for that. They indicted her for the robbery.
>
> [BY THE COURT]: Two good points, but I think Byrom is supportive of your [the prosecution's] argument, and I will allow it.
>
> R. 1250.

Contrary to Willie, supra and Ladner, supra, Ms. Fulgham's jury was instructed on the pecuniary-gain aggravator and the robbery-murder aggravator. The jury found both aggravators to exist. (R. 1182, 1183).

This Claim ensues.

II. Discussion

As a matter of federal constitutional law, when there is insufficient evidence to support an aggravating circumstance, the sentencing jury should not be instructed on that aggravating circumstance. Jackson v. Virginia, 443 U.S. 307, 314-15 (1979); Wingo v. Blackburn, 786 F.2d 645, 644 (5th Cir. 1986) (relying on Jackson, 443 U.S. at 313) ("[t]o satisfy the due process requirement of the Fourteenth Amendment, the evidence as viewed most favorably to the prosecution must warrant the conclusion that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); Mendoza v. United States, 365 F.2d 268, 272 (5th Cir. 1966) (relying on Thompson v. City of Louisville, 362 U.S. 199, 206 (1960); State v. Thompkins, 678 N.E.2d 541, 546 (Ohio. 1997) (relying on Tibbs v. Florida, 457 U.S.

31, 45 (1982)); State v. O'Brien, 857 S.W.2d 212, 215, 219-20 (Mo. 1993); Clark v. State, 443 So. 2d 973, 976 (Fla. 1983) cert. denied 467 U.S. 1210 (1984) (when the State has failed to meet its sufficiency burden, the trial court may not instruct the jury on an insufficient aggravator merely because the trial court draws a logical inference that the aggravator may exist). Statutory aggravating factors exist to direct and limit sentencing discretion and minimize the risk of arbitrary and capricious infliction of the death penalty. Zant v. Stephens, 462 U.S. 862, 878 (1983); Poland v. Stewart, 117 F.3d 1094, 1098 (9th Cir. 1997) cert. denied 523 U.S. 1082 (1998) (aggravators guide sentence); McKenzie v. Risley, 842 F.2d 1525, 1538-39 (9th Cir. 1988) (en banc) cert. denied 488 U.S. 901 (1988); Loden v. State, 971 So. 2d 548, 568 (Miss. 2007) cert. denied 129 S.Ct. 45 (2008) (quoting Stephens, 462 U.S. at 877); Blue v. State, 674 So. 2d 1184, 1218 (Miss. 1996) cert. denied 519 U.S. 1030 (1996) ("[t]he only purpose aggravating circumstances serve is to narrow the class of individuals most worthy of receiving the death penalty and to furnish guidance to the jury in determining whether to impose a sentence of death in a capital murder case"). Where a jury is forced to weigh invalid aggravation, the resulting death sentence cannot be executed as it violates the Eighth and Fourteenth Amendments to the federal constitution. Espinosa v. Florida, 505 U.S. 1079, 1080-83 (1992); Sochor v. Florida, 504 U.S. 527, 532 (1992); Stringer v. Black, 503 U.S. 222, 230 (1992); Clemons v. Mississippi, 494 U.S. 738, 752 (1990).

Ms. Fulgham objected to the inclusion of the Miss. Code Ann. 99-19-101(5)(f) aggravator on two separate occasions – R. 1201-02; 1250. Ms. Fulgham's objection was premised on clearly established law in the State of Mississippi prohibiting the inclusion of a Miss. Code Ann. 99-19-101(5)(f) aggravator in a robbery-murder prosecution where the State

also seeks to instruct on the Miss. Code Ann. 99-19-101(5)(d) aggravator.[94] Yet, based on an erroneous view of Byrom, supra, the trial court overruled Ms. Fulgham and instructed the jury on the (5)(f) aggravator. This decision preempted Ms. Fulgham's right to have her jury only consider valid statutory aggravation. Therefore, her death sentence must be vacated.

CLAIM 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

I. As the maximum punishment for capital murder is life without parole unless the jury finds a statutory aggravator, when the sole aggravator is a mere duplication of the offense punishable only by life without parole, death may not be inflicted

The State's final aggravating circumstance in Jury Instruction SSP-4-B (CP. 1097) is the Miss. Code Ann. 99-19-101(5)(d) aggravator which reads: "The Capital Murder was committed during the commission of the crime of robbery." (CP. 1097). Ms. Fulgham objected to the inclusion of this aggravating circumstance as follows:

> [BY MR. LAPPAN]: Judge, I would object to the capital murder being committed during the commission of the crime of robbery, and I'll explain why.
>
> Judge, it's my position, and I will tell you that the Supreme Court here does not agree with me, but it is my position that Kristi has been convicted of capital murder, the underlying offense being robbery.
>
> In order for there to be an aggravator that's valid, it has to be something in addition to the crime. Aggravating circumstances elevate the crime.

[94] Willie, supra; Ladner, supra; see Davis v. State, 660 So. 2d 1228, 1246-47 (Miss. 1995) cert. denied 517 U.S. 1192 (1996).

> And my position, Judge, is listing what Kristi was convicted of all over again only adds or stacks aggravation where the jury can say, well, we've got three aggravators and two mitigators. It adds nothing, Judge. I would cite Ring v. Arizona [and its] progeny, asking you to strike that aggravator.
>
> [BY THE COURT]: That would be overruled.
>
> R. 1204.

Under Miss. Code Ann. 97-3-19(1)(a) and (1)(b), individuals convicted of killing with "deliberate design" or by committing "an act eminently dangerous to others and evincing a depraved heart" are guilty of murder and not death eligible. Conversely, individuals who commit felony murder *simpliciter* are guilty of capital murder and eligible for the death penalty. See e.g., Jones v. State, 381 So. 2d 983, 989 (Miss. 1980) cert. denied 449 U.S. 1003 (1980) ("it is enough that that evidence shows the willing participation of the accused in a robbery in furtherance of which a death resulted"); see also Miss. Code Ann. § 97-3-19(2)(e). In addition, under Miss. Code Ann. 99-19-101(5)(d), where a defendant is convicted under Miss. Code Ann. 97-3-19(2)(e) and the State elects to proceed with a sentencing hearing, the underlying felony which secured conviction serves the duplicative purpose of a statutory aggravating circumstance.

Under Apprendi v. New Jersey, 530 U.S. 466, 492-95 (2000) and Ring v. Arizona, 536 U.S. 584, 604-05 (2002), murder *simpliciter* is a lesser offense of a death-eligible murder in that a death-eligible murder is defined as murder *simpliciter* plus at least one aggravating circumstance. To safeguard the constitutional rights to notice, jury trial and due process, any aggravating circumstance which makes the murder *simpliciter* a death-eligible offense constitutes an element of that death-eligible offense and must be found by a jury. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003); see Apprendi, 530 U.S. 466, 476 (2001) (relying on Jones v. United States, 526 U.S. 227, 243 n. 6 (1999)).

In Ring, 536 U.S. at 603-04, the Court concluded that the maximum punishment in Arizona for conviction of first-degree murder is life imprisonment.[95] A death sentence results from a guilty verdict on first-degree murder in Arizona only after at least one aggravating circumstance is proven. Ring, 536 U.S. at 604-05.[96] Similarly, unless a sentencing hearing is conducted pursuant to Miss. Code Ann. 99-19-101, the maximum penalty for a capital-murder conviction in Mississippi is life imprisonment. Pham v. State, 716 So. 2d. 1100, 1103-04 (Miss. 1998); Brown v. State, 682 So. 2d 340, 355 (Miss. 1996) cert. denied 520 U.S. 1127 (1997). If a sentencing hearing is conducted and the jury fails to find at least one aggravating factor and/or a *mens rea* element pursuant to Miss. Code Ann. 99-19-101(5) and Miss. Code Ann. 99-19-101(7), respectively, the statutory maximum in Mississippi is life imprisonment. See Berry v. State, 703 So. 2d 269, 284-85 (Miss. 1997); White v. State, 532 So. 2d 1207, 1219-20 (Miss. 1988); Gray v. State, 351 So. 2d 1342, 1349 (Miss. 1977); see also Blue v. State, 674 So. 2d 1184, 1218 (Miss. 1996) (if jury is unable to find an aggravating circumstance or determines that aggravation is outweighed by mitigation, death penalty is prohibited by statute). Applying these plain

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[95] Ring, 536 U.S. at 600-05, announced this momentous modification to the majority opinion in Apprendi. Apprendi concluded the Walton v. Arizona, 497 U.S. 639, 649 (1990), determination that a death sentence announced by a judge survives Sixth Amendment analysis as additional facts found by the judge to justify a death sentence were not elements of the capital offense and are not required to be found to exist, unanimously and beyond a reasonable doubt, by a jury. Apprendi, 530 U.S. at 497. In support of the position that Walton survived Apprendi, Apprendi decided that the maximum punishment for a conviction of first-degree murder in Arizona is death. Ring, 536 U.S. at 602; see Apprendi, 530 U.S. at 497. Ring, 536 U.S. at 603, noting the dissent in Apprendi found Apprendi's argument in support of Walton's continued vitality "baffling[,]" discarded Apprendi's finding that death was the maximum punishment for a conviction of first-degree murder in Arizona and overruled Walton. Ring, 536 U.S. at 609. The legal fact that the maximum penalty for first-degree murder in Arizona is life imprisonment is crucial to this claim as this legal fact has been determined by this Court to apply in Mississippi; that is, the maximum punishment for capital murder is life imprisonment. Pham v. State, 716 So. 2d 1100, 1103-04 (Miss. 1998); Brown v. State, 682 So. 2d 340, 355 (Miss. 1996) cert. denied 520 U.S. 1127 (1997). In Mississippi and in Arizona, an individual convicted of capital murder and first-degree murder, respectively, cannot be sentenced to death unless the sentencer finds an aggravating circumstance at a proceeding held subsequent to the criminal conviction. If no separate subsequent proceeding is conducted, a death sentence cannot be constitutionally sustained. See Ring, supra.

[96] "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' Apprendi, 530 U.S. at 494, n.19, the Sixth Amendment requires that they be found by a jury." Ring, 536 U.S. at 609.

principles of Mississippi law to the federal constitutional mandates of Apprendi and Ring, the existence of the Miss. Code Ann. 99-19-101(5)(d) aggravator simply serves to reconstruct Miss. Code Ann. 97-3-19(2)(e) from a murder *simpliciter* to a death-eligible offense. This Miss. Code Ann. 99-19-101(5)(d) and Miss. Code Ann. 97-3-19(2)(e) duplication implicates the Due Process Clause of the Fifth Amendment, the notice and jury trial guarantees of the Sixth Amendment, and the corresponding provisions of our state constitution.[97] Apprendi, 530 U.S. at 476; see Ring, supra; Jones v. United States, 526 U.S. 227, 231 (1999) (relying on United States v. Gaudin, 515 U.S. 506, 509-10 (1995); McMillan v. Pennsylvania, 477 U.S. 79, 85-86 (1986); Hamling v. United States, 418 U.S. 87, 117 (1974)) ("much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt").

The delineation of the eligibility process and the selection process in Tuilaepa v. California, 512 U.S. 967, 973-74, (1994), anticipates the dispositive nature of "function" declared in Apprendi/Ring. After Ring, and in light of Pham, supra and Brown, 682 So. 2d. at 355, the Lowenfield v. Phelps, 484 U.S. 231, 243-46 (1988) approval of a single aggravator serving to narrow at the culpability phase and then, without a finding of additional aggravation, weighing the same aggravator against mitigation at the penalty phase to fulfill the selection requirement[98] is no longer tolerable. Where the State prosecutes under Miss. Code Ann. 97-3-

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[97] Hudson v. Taleff, 546 So. 2d 359, 362-63 (Miss. 1989) (right to jury trial is secured by Article Three, Sections Fourteen, Twenty-Six and Thirty-One of the Mississippi Constitution); Murray v. State, 266 So. 2d 139, 140 (Miss. 1972) cert. denied 411 U.S. 907 (1973) (Article Three, Section Twenty-Six); Butler v. State, 217 Miss. 40, 54-58, 63 So. 2d 779, 782-85 (1953) (Article Three, Section Fourteen); Brooks v. State, 209 Miss. 150, 154-56, 46 So. 2d 94, 96-97 (1950) (Article Three, Section Fourteen); Cooksey v. State, 175 Miss. 82, 88, 166 So. 388, 390 (1936) (Article Three, Section Twenty-Six); see Wilcher v. State, 635 So. 2d 789, 791 (Miss. 1993) (Article Three, Sections Fourteen and Twenty-Six).

[98] Tuilaepa v. California, 512 U.S. 967, 979-80 (1994); Robert F. Schoop, The Nebraska Death Penalty Statute, 81 Neb. L.Rev. 805, 829 (2002) (noting that Lowenfield, 484 U.S. at 244-26, determined "the capital sentencing

19(2)(e) and the jury convicts as charged, while Miss. Code Ann. 99-19-101(5)(d) may continue to serve as a required narrowing component, the Miss. Code Ann. 99-19-105(5)(d) aggravator ***must not*** serve as the sole remaining aggravator in the selection process because Miss. Code Ann. 99-19-105(5)(d) only duplicates Miss. Code Ann. 97-3-19(2)(e) and the maximum penalty for a unanimous and beyond-a-reasonable-doubt finding of Miss. Code Ann. 97-3-19(2)(e) is life imprisonment.[99] In light of Claim 4, supra, as no aggravation exists other than the duplicative aggravator, no aggravation exists to outweigh mitigation. Put differently, after Ring, it is clear that in the same way that the State of Arizona can no longer contend that the maximum punishment for a first-degree murder conviction is death,[100] the State of Mississippi can no longer contend Lowenfield insulates a duplicative aggravator from constitutional challenge in a weighing state.

Because the only aggravation remaining at Ms. Fulgham's penalty phase is a regurgitation of the offense itself, and because Mississippi is a weighing state, Ms. Fulgham's

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process includes a narrowing function, which narrows the class of offenders who are eligible for CP [capital punishment], and a selection function, during which the sentencer exercises discretion in selecting or rejecting CP as the appropriate sentence for each of those offenders who are eligible for CP"); Penny White, A Response and Retort, 33 Conn. L.Rev. 899, 906 (2001); James Liebman, The Overproduction of Death, 100 Colum. L.Rev. 2030, 2097-98, n. 166 (2000), Jordan Steiker, The Limits of Legal Language: Decisionmaking in Capital Cases, 94 Mich. L.Rev. 2590, 2599 n. 39 (1996); Scott Howe, Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation, 26 Ga. L.Rev. 323, 401 (1992).

[99] Where a defendant is found guilty of Miss. Code Ann. 97-3-19(2)(e) and the State proceeds with a penalty phase, it would be absurd to contend the same jury will decline to find the Miss. Code Ann. 99-19-101(5)(d) aggravator exists. Indeed, the State concedes this in its penalty-phase summation. (R. 1741). Dissenting in Lowenfield, 484 U.S. at 258, Justice Marshall wrote that under Lowenfield "the State will have an even easier time arguing for the imposition of the death penalty, because it can remind the jury at the sentencing phase, as it did in this case, that the necessary aggravating circumstances already have been established beyond a reasonable doubt. The State thus enters the sentencing hearing with the jury already across the threshold of death eligibility, without any awareness on the jury's part that it had crossed that line. By permitting such proceedings in a capital case, the Court ignores our early pronouncement that 'a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.' Witherspoon v. Illinois, 391 U.S. [510,] 521 [1968]."

[100] Tr. of Oral Arg. 44-45, Timothy Stuart Ring v. Arizona, No. 01-488, April 22, 2002 (Alderson Reporting Co.).

death sentence is the result of a completely standardless penalty phase.[101] The execution of Ms. Fulgham shall thwart the legislative will to punish Miss. Code Ann. 97-3-19(2)(e) offenders with life imprisonment unless a penalty-phase jury selects death for the defendant under Miss. Code Ann. 99-19-101 *et seq.* Arave v. Creech, 507 U.S. 463, 474 (1993) (relying on Lewis v. Jeffers, 497 U.S. 764, 776 (1990) ("[w]hen the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so"); California v. Brown, 479 U.S. 538, 541 (1987) (death sentencing statutes must "be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion"); Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("fact finding procedures [in death sentencing proceedings] aspire to a heightened standard of reliability" and this aspiration "is a natural consequence of the knowledge that execution is the most irremediable or penalties; that death is different"); Spaziano v. Florida, 468 U.S. 447, 460 (1984) (where "a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not"); California v. Ramos, 463 U.S. 992, 999 (1983) ("[i]n ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty") (emphasis

[101] It is noteworthy that the State opposed Jury Instruction D-74: "Aggravating circumstances are those circumstances which may tend to warrant a sentence of death. The fact that the defendant stands convicted of capital murder is not an aggravating circumstance." (CP. 1135). The State alleged D-74 had been given. (R. 1215). The trial court refused to give D-74. (R. 1215). Notwithstanding the State's allegation, at no point in the jury charge was the jury advised that Ms. Fulgham's status as a capital murderer may not be used in aggravation. To the contrary, the jury was permitted, over the objection of Ms. Fulgham, to consider the Miss. Code Ann. 99-19-101(5)(d) aggravator. Therein lies the noteworthiness of the State's opposition to D-74. Instruction D-74 could have mooted this Claim. The State's false contention that D-74 had been included in the jury charge permits this Claim to continue.

in original); Godfrey, 446 U.S. at 433 (the process of capital sentencing must present a "principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not"). Cf. Proffitt v. Florida, 428 U.S. 242, 258 (1976).[102]

Finally, under Apprendi/Ring, Ms. Fulgham has a constitutional right to notice of the aggravating circumstances advanced by the State in the trial for her life.[103]

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[102] "[T]he Florida statute has a provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases." Proffitt, 428 U.S. at 258.

[103] The indictment at bar contains no notice of an alleged aggravating circumstance. (CP 21-22) . Ms. Fulgham received no pre-trial notice of aggravation. The prosecution must include in the indictment any aggravating factors which it intends to prove at the sentencing phase of the trial, where those factors are related to the commission of the crime and are not judicially noticed facts. Apprendi, 530 U.S. at 488; United States v. Purkey, 428 F.3d 738, 749-50 (8th Cir. 2005) cert. denied 127 S.Ct. 433 (2006) (("[t]he indictment must charge at least one of the statutory aggravating factors that is ultimately found by the petit jury because 'that is what is required to elevate the available statutory maximum sentence from life imprisonment to death.' [cite deleted]. In other words, including that factor in the indictment is required to make the defendant *eligible* for the death penalty"); United States v. Bourgeois, 423 F.3d 501, 507 (5th Cir. 2005) cert. denied 547 U.S. 1032 (2006); United States v. Allen, 406 F.3d 940, 943 (8th Cir. 2005) (en banc) cert. denied 127 S.Ct. 826 (2006); United States v. Robinson, 367 F.3d 278, 284 (5th Cir. 2004) cert. denied 543 U.S. 1005 (2004) (Ring's Sixth Amendment holding applies with equal force in the context of a Fifth Amendment Indictment Clause challenge, even though the Supreme Court has yet to hold as much in a capital case. [footnote deleted]. As a result, the government is required to charge, by indictment, the statutory aggravating factors it intends to prove to render a defendant eligible for the death penalty, and its failure to do so is constitutional error"); United States v. Higgs, 353 F.3d 281, 295-298 (4th Cir. 2003); United States v. Quinones, 313 F.3d 49, 53 n.1 (2nd Cir. 2002) cert. denied 540 U.S.1051 (2003); United States v. Rodriguez, 380 F.Supp.2d 1041, 1046 (D.N.D. 2005); United States v. Mayhew, 380 F.Supp.2d 936, 942-43 (S.D.Ohio 2005); United States v. Green, 372 F.Supp.2d 168, 180-81 (D.Mass. 2005); United States v. Johnson, 362 F.Supp.2d 1043, 1103 (N.D.Iowa 2005) ("*the court agrees with the government* that what the Supreme Court's Apprendi line of cases requires, to satisfy constitutional standards, is that any aggravating factor, without which the death penalty cannot be imposed, must be charged in an indictment and proved to a jury beyond a reasonable doubt") (emphasis added); United States v. Gomez-Olmeda, 296 F.Supp.2d 71, 85 (D.P.R. 2003); United States v. Haynes, 269 F. Supp.2d 970, 977-78 (W.D.Tenn. 2003); United States v. Lentz, 225 F.Supp.2d 672, 680 (E.D.Va. 2002) (in light of the Jones requirement that any fact increasing the maximum penalty for a crime must be charged in an indictment, "it appears to be a foregone conclusion that aggravating factors that are essential to the imposition of the death penalty must appear in the indictment.") (citations omitted) ("[B]ecause the *mens rea* requirements of § 3591(a)(2) and the statutory aggravating factors of § 3592(c) must be found before a defendant may be determined death penalty eligible, such facts are the functional equivalent of elements and must appear in the indictment"); see United States v. Barnette, 390 F.3d 775, 784 (4th Cir. 2004) vacated on other grounds at 546 U.S. 803 (2005) ("[a]lthough Ring itself does not address the requirements of an indictment, the Ring Court made clear that when a statute requires the finding of an aggravating factor as a condition to imposition of the death penalty, the aggravating factor requirement functions as an element of the offense"); United States v. Lee, 374 F.3d 637, 650 (8th Cir. 2004) cert. denied 545 U.S. 1141 (2004) (relying on Jones v. United States, 526 U.S. 227, 243 n. 6 (1999)); see also United States v. Nava-Sotelo, 354 F.3d 1202, 1206 n.9 (10th Cir. 2003) cert. denied 541 U.S. 1035 (2004); United States v. Swan, 327 F.Supp.2d 1068, 1073-74 (D.Neb. 2004). Ms. Fulgham respectfully submits that as she has a State right to trial by Grand Jury indictment, State v. Berryhill, 703 So. 2d 250, 252 (Miss. 1997), she has a right to such notice under Burchfield v. State, 277 U.S. 623, 625 (Miss. 1973). Ms. Fulgham also respectfully submits that the holding of Williams v. State, 445 So. 2d 798, 804 (Miss. 1984) cannot be reconciled with the federal mandates of Ring, and

As she advised the trial court, (R. 1204), Ms. Fulgham is aware of case authority in Mississippi contrary to the argument advanced in this Claim. See, e.g. Thorson v. State, 895 So. 2d 85 (Miss. 2004) cert. denied 546 U.S. 831 (2005); Branch v. State, 882 So. 2d 36 (Miss. 2004) cert. denied 544 U.S. 907 (2005). Ms. Fulgham respectfully notes that the issues presented in this claim remain unresolved in federal court and, to the extent that this Court has ruled contrary to the argument in this Claim, these holdings should be overruled.

"We require close appellate scrutiny of the import and effect of invalid aggravating factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." Stringer, 503 U.S. at 230. In this proceeding, an invalid aggravator serves as the prelude to the duplicative, felony-murder aggravator. There is simply no aggravation that remains upon which to affirm this death sentence.

For these reasons, the trial court erred by including the Miss. Code Ann. 99-19-101(5)(d) aggravator in the jury charge over the objection of Ms. Fulgham. Because the only aggravator remaining in light of Claim 4, supra, is the duplicative "felony murder" aggravator, and because this remaining aggravator does not serve to elevate the offense as it is nothing more than a restatement of the elements of an offense punishable by no more than life without parole, Ms. Fulgham's death sentence must be vacated.

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therefore must now fall. Ms. Fulgham has a State right to a proceeding under Grand Jury indictment, that proceeding must comply with Fourteenth Amendment concerns. Rose v. Mitchell, 433 U.S. 545, 557 n. 7 (1979).

CLAIM 6

THE TRIAL COURT ERRED IN DENYING MS. FULGHAM'S MOTION TO SUPPRESS 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

In this Claim this Court is called to address the right to assistance of counsel at the critical stage of post-attachment interrogation. The United States Supreme Court has held that an attorney's ability to consult with his client after the Sixth Amendment right to counsel has attached may not be vitiated by the State. The facts in this case are not in dispute: the police refused to permit court-appointed, post-attachment counsel from meeting with her client entirely because police were interrogating her client. Ms. Fulgham's constitutional argument requiring suppression concerned the actions of her attorney and the police – the only relevant actors in a claim under Footnote 35 of Miranda v. Arizona and the due-process clauses. However, the trial court and the State declined to take into account the actions of Ms. Fulgham's attorney and police officers. Instead, the trial court and the State focused on the actions of Ms. Fulgham – an inconsequential actor under Footnote 35 of Miranda and the due-process clauses.

I. Background

The State may not use evidence gathered unlawfully. Wong Sun v. United States, 371 U.S. 471, 484-85 (1963); Walder v. United States, 347 U.S. 62, 64-65 (1954). Unlawful evidence is tainted and no use at trial – direct or derivative – is permissible unless the State proves the evidence is attenuated[104] or the State proves an independent source[105] for the evidence.

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[104] Wong Sun, 371 U.S. at 487-88 (citing Nardone v. United States, 308 U.S. 338, 341 (1939). The State has the burden of proving attenuation. United States v. Reed, 349 F.3d 457, 463 (7th Cir. 2003); United States v. Perez-Esparza, 609 F.2d 1284, 1290 (9th Cir. 1980).

During penalty-phase cross-examination of Mark Webb, an expert psychiatrist for Ms. Fulgham, the State placed into issue a custodial statement extracted from Ms. Fulgham on June 2, 2003. (R. 1099). Because the trial court erred in denying her pre-trial motion to suppress this statement, the State's decision to use this custodial statement unconstitutionally prejudiced her.

II. Facts

(II)(A.) Pre-trial

(II)(A)[1]: The trial court overrules Ms. Fulgham's motion to suppress

The State made Ms. Fulgham aware of at least two custodial statements: a custodial statement taken on May 12, 2003, and a custodial statement taken on June 2, 2003. (CP. 405). The custodial statement taken on June 2, 2003, is the gravamen of this Claim.

A suppression hearing concerning the June 2, 2003, custodial statement was held on March 28, 2006. (R. 23; 137-211).

On April 25, 2006, Ms. Fulgham filed a "Memorandum of Law in Support of Motion 037: Motion to suppress the portion of the custodial statement alleged to have been given at 2:45 p.m. and thereafter on June 2, 2003, as violative of Ms. Fulgham's federal and state constitutional rights." (CP. 715-38). Throughout this memorandum, Ms. Fulgham tracks the page and line references of a stenographic transcription of the March 28, 2006, suppression hearing that has been included in this record at CP. 825 through 898. To reduce the length of this brief, Ms. Fulgham now respectfully incorporates into this Claim the entirety of her memorandum of law filed on April 25 and located at CP. 715-38 and, where possible, Ms. Fulgham shall simply refer in this Claim to the factual support and case authority provided to the trial court in this incorporated memorandum of law. The incorporated memo at CP. 715-38 cites

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[105] Wong Sun, 371 U.S. at 484-85 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920)). The State has the burden of proving an independent source exists. United States v. Forbes, 528 F.3d 1273, 1278-79 (10th Cir. 2008) cert. denied 129 S.Ct. 477 (2008) (citing cases); United States v. Leake, 95 F.3d 409, 417 (6th Cir. 1996).

to the transcript provided to the attorneys and filed with the Circuit Clerk; Ms. Fulgham also respectfully incorporates that transcription, at CP. 825 through 928, into this Claim.[106]

On August 8, 2006, the State responded to Ms. Fulgham's April 25, 2006, memorandum of law. That August 8 response appears at CP. 899-901.

On October 11, 2006, the trial court denied Ms. Fulgham's motion to suppress her June 2, 2003, custodial statement. The trial court's order denying this motion to suppress is found at CP. 902-05.

The trial court's October 11 Order, while a dispositive adjudication as to the constitutional admissibility of Ms. Fulgham's June 2 custodial statement, did not conclude pre-trial litigation concerning the June 2 statement.

(II)(A)[2]: The trial court overruled Ms. Fulgham's subsequent, *in limine* motion to exclude her June 2 statement as irrelevant

On November 1, 2006, Ms. Fulgham filed a motion *in limine* to exclude her June 2 custodial statement on the ground that the custodial statement is irrelevant. (CP. 915-18). The full title of this motion (filed as Motion 041) is: "Motion to Reconsider Order Denying Motion of Stephanie Mallette to Withdraw; If Denied, Then a Motion to Exclude the Custodial Statement Provided by the Defendant at and after 2:45 p.m., Monday, June 2, 2003, as Irrelevant." (CP. 909-920). The *limine* motion to exclude the June 2 statement as irrelevant found its genesis in findings made by the trial court during an October 30, 2006, disposition of Stephanie Mallette's motion to withdraw as Ms. Fulgham's co-counsel.[107] Specifically, Ms. Fulgham sought an *in limine* order excluding the June 2 statement from trial as irrelevant for the following reasons:

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[106] A duplicate of the March 28 suppression hearing also appears in the record on appeal at R. 137-211.

[107] This determination by the trial court is the subject matter of Claim 19, infra. See Footnote 109, infra.

A. The trial court's determination that "Ms. Fulgham's custodial statement on June 2, 2003, did not inculpate Ms. Fulgham in the offense charged herein." (CP. 915; see also R. 230) wherein the trial court issued the following finding: "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 inculpatory statements. She might have been a witness is the only inculpatory 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.") (R. 230).

B. The trial court's determination that Ms. Fulgham's "custodial statement on June 2, 2003, by and large, reiterated the content of a custodial statement provided by Ms. Fulgham before June 2, 2003." Id.

C. Because of A through C, supra, "if the Court overrules Ms. Fulgham's motion to reconsider yesterday's ruling on Ms. Mallette's motion to withdraw, Ms. Fulgham now seeks an *in limine* Order from this Court excluding Ms. Fulgham's custodial statement at and after 2:45 p.m., on June 2, 2003, as irrelevant in that the custodial statement at and after 2:45 p.m. is not inculpatory and, as such, has no tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable." (CP. 915) Ms. Fulgham cited Miss. R. Evid. 401 and nine cases as authority for this proposition. (CP. 915-16).

D. "Conversely, if the Court finds that Ms. Fulgham's custodial statement at and after 2:45 p.m. on June 2, 2003, is relevant under Miss. R. Evid. 401, then it necessarily follows that Ms. Fulgham must be permitted to demonstrate to her jury that the same item of evidence that this Court deems to be relevant is an item of evidence tainted by coercion and, therefore, unreliable." (CP. 916; 912-14). Ms. Fulgham cited no less than twenty cases for this proposition (see case authority cited in Paragraphs 12 and 16 of Motion 041 at CP. 912-14 and CP. 916).

To avoid needless repetition, Ms. Fulgham's *in limine* motion which contains the full argument and citation to case authority that is inventoried above and appears at CP. 915-18 is respectfully incorporated into this Claim.

On November 6, 2006, the trial court entered an Order that "the Defendant's conditional request for a *Motion in Limine* is improper under the law since this would require the Court

basically to suppress a statement that the Court has already ruled should not be suppressed." (CP. 921).[108] The *in limine* motion was overruled. (CP. 921).

In the same Order, and without "oral argument regarding this motion since under Mississippi law there is no provision for a motion to reconsider" (CP. 921), the trial court overruled Ms. Fulgham's motion to reconsider the trial court's order denying the motion of Ms. Mallette to withdraw as co-counsel.[109]

As a result of the above, Ms. Fulgham's pre-trial efforts to exclude her June 2 custodial statement as a violation of her constitutional rights (CP. 715-38) and, subsequently, as irrelevant to the offense (CP. 915-18), failed.

Ms. Fulgham did not testify at trial or at the penalty phase.

The State neither introduced nor mentioned any of Ms. Fulgham's custodial statements during the first phase of this matter.

(II)(B). Penalty Phase

As stated in Part I of this Claim, unlawfully seized evidence may not be used against the defendant. Wong Sun, supra; United States v. Sweets, 526 F.3d 122, 128-29 (4th Cir. 2007) cert.

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[108] This is plainly incorrect. As stated in Ms. Fulgham's motion *in limine*: "In overruling Ms. Mallette's motion to withdraw yesterday, the Court also determined that Ms. Fulgham's custodial statement on June 2, 2003, did not inculpate Ms. Fulgham in the offense charged herein. The Court determined that the custodial statement on June 2, 2003, by and large, reiterated the content of a custodial statement provided by Ms. Fulgham's before June 2, 2003. *Based entirely on the above*, if the Court overrules Ms. Fulgham's motion to reconsider yesterday's ruling on Ms. Mallette's motion to withdraw, Ms. Fulgham now seeks an in limine Order from this Court excluding Ms. Fulgham's custodial statement at and after 2:45 p.m., on June 2, 2003, as irrelevant in that the custodial statement at and after 2:45 p.m. is not inculpatory and, as such, has no tendency to make the existence of any fact that is of consequence to the determination of this action more probable or less probable." (CP. 915) (emphasis added). Ms. Fulgham's November 1 motion *in limine* was not a motion to reconsider the October 11 ruling denying suppression. Ms. Fulgham's motion in *limine* adopted facts found by the trial court to support the trial court's decision to deny Ms. Mallette's motion to withdraw to support Ms. Fulgham's motion to exclude her June 2 statement as irrelevant. If the June 2 statement is inconsequential enough to permit the trial court to overrule Ms. Mallette's motion to withdraw, then how is the June 2 statement relevant? Rather than solicit further review of the trial court's Order denying suppression, Ms. Fulgham's November 1 motion sought an *in limine* ruling ***entirely consonant*** with the trial court's on-the-record finding that Ms. Fulgham's June 2 custodial statement was non-inculpatory and, therefore, Ms. Mallette's basis to withdraw is without merit. See Claim 19, infra.

[109] The trial court's October 30, 2006, decision from the bench to overrule Ms. Mallette's motion to withdraw (R. 224-30) and the trial court's November 6, 2006, Order overruling Ms. Fulgham's Motion 041 (R. 921) are the subject matter of Claim 19, infra.

denied 128 S.Ct. 548 (2007); McGinnis v. United States, 227 F.2d 598, 603 (1st Cir. 1955); Acuna v. State, 54 So. 2d 256, 258, 259 (Miss. 1951) (testimony concerning items unlawfully seized must be excluded as well as the items themselves); Lancaster v. State, 118 Miss. 374, 381, 195 So. 320, 321 (1940),[110] Quan v. State, 185 Miss. 513, 519-20, 188 So. 568, 569 (Miss. 1939); see, e.g., State v. Hunt, 280 S.W.2d 37, 40-41 (Mo. 1955) (relying on Quan, supra); Alfred v. Commonwealth, 272 S.W.2d 44, 46 (Ky. 1954) ("[i]f he [a police officer] has no right to make the search, he will not be permitted to testify as to what he found"); see also Imwinkelreid, Giannelli, Gilligan & Lederer, Courtroom Criminal Evidence (4th ed. 2005), sec. 2701, pgs. 1275-76.

Also as stated in Part I of this Claim, Ms. Fulgham called Mark Webb, a psychiatrist, as an expert witness during her penalty phase. (R. 1069). On cross-examination, the State confronted Dr. Webb with the fact that, as part of his evaluation of Ms. Fulgham, he reviewed her June 2 custodial statement. (R. 1099). The State then went further in its use of the June 2 custodial statement, characterizing it as a statement wherein Ms. Fulgham "completely blames everything on her 13-year-old brother[.]" The portion of the State's cross-examination of Dr. Webb that is the basis for this Claim is emphasized below:

> [BY MS. FAVER]: I believe there's two separate statements. May 12th, and then again on June 2nd. May I approach the witness, Your Honor?
>
> [BY THE COURT]: You may.
>
> [BY DR. WEBB]: Okay.

[110] "While the search was being made, Miss Moore, whose home was only a short distance from the Lancaster home and on an adjoining lot, stood on her premises and saw the search made by the sheriff and the axe drawn out of the well. Over appellant's objection, she was permitted to testify to those facts. We are of the opinion that the court erred in admitted her testimony. It is true that it was not based on any search that she made, but on one made by the sheriff, which was illegal. Her incompetency is upon the same ground as that of the sheriff. To hold otherwise would mean that bystanders off of the premises being illegally searched would be competent to testify to what the search revealed, although the officer making the search would be incompetent." Lancaster, supra.

[BY MS. FAVER]: Those are the other statements that you reviewed after the two-year period back in 2006, when you gave your update; is that correct?

[BY DR. WEBB]: That's correct.[111]

[BY MS. FAVER]: 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*, that would still not change your diagnostic impression of this defendant?

[BY DR. WEBB]: It would not change my actual diagnosis of her PTSD and panic disorder, no.

(R. 1099-1100) (emphasis added).

Because the State insisted on (a) directly and explicitly referring to the June 2 custodial statement and (b) insisted on characterizing that custodial statement as a statement wherein Ms. Fulgham "completely blames everything on her 13-year-old brother, and says he did it, he did it," the State used Ms. Fulgham's June 2 custodial statement in this capital prosecution. As such, the trial court's October 11, 2006, decision to deny Ms. Fulgham's motion to suppress her June 3 custodial statement is now properly before this Court.

III. Discussion

Ms. Fulgham remained in pretrial detention following her May 12, 2003, arrest. (CP. 716, 717). She was appointed Ms. Mallette as counsel on May 16, 2003. (CP. 716). Ms. Mallette met with Ms. Fulgham for about ninety minutes at the Oktibbeha County Jail on May 22, 2003. (CP. 717).

About 2:15 p.m. or 2:30 p.m on Monday, June 3, 2003, Deputy Sheriff Tommy Whitfield phoned Ms. Mallette at her law office. (CP. 717). Deputy Whitfield phoned Ms. Mallette

[111] Dr. Webb's April 10, 2006, update was provided by Ms. Fulgham in her April 17, 2006, notice of expert witnesses. (CP. 678, 680, 694). Dr. Webb listed "Kristi's Statement to... George Carrithers" as a record he reviewed. (CP. 694). Dr. Webb offered no characterization or description of any custodial statement extracted from Ms. Fulgham in his reports. Dr. Webb offered no characterization or description of any custodial statement extracted from Ms. Fulgham during his direct examination.

because Ms. Mallette was Ms. Fulgham's lawyer and because Ms. Fulgham had advised she wanted to undergo polygraphy. (CP. 717). Ms. Mallette declined permission for the polygraph of her client, advising Deputy Whitfield: "Don't do anything. I'll be right there." (CP. 718).

Police witnesses established that a polygraph is procedure wherein an examiner asks the participant questions and the participant must provide answers to the questions. (CP. 718). Police testified that if the person undergoing polygraphy remains silent, the polygraph is of no value. (CP. 718).

Ms. Mallette testified that following up on her telephonic promise to Deputy Whitfield, she arrived at the Oktibbeha County Jail at 2:45 p.m. on June 3, 2003. (CP. 718). At the State's invitation, Ms. Mallette was permitted to corroborate this testimony with a memo she authored on June 3, 2003. (CP. 718). The content of this contemporaneous memo was admitted into evidence and appears at CP. 719.

Ms. Mallette met Deputy Whitfield outside the doorway to the jail. (CP. 719). Ms. Mallette advised Deputy Whitfield that she was present to visit Ms. Fulgham. (CP. 719). Deputy Whitfield would not permit Ms. Mallette to enter the jail to visit Ms. Fulgham. (CP. 719). Deputy Whitfield testified that once he informed Ms. Mallette she could not enter the jail to visit with Ms. Fulgham, it would have been unlawful for Ms. Mallette to have entered the jail for that purpose. (CP. 719). "Notwithstanding her personal appearance at 2:45 p.m. on a business day, Ms. Mallette was never permitted an attorney-client visit with Ms. Fulgham." (CP. 719).

By memorandum of law, Ms. Fulgham asserted her June 2, 2003, custodial statement must be suppressed for the following reasons:

A. Her right to counsel attached prior to June 2, 2003. (CP. 720-23).

B. Because her right to counsel attached prior to June 2, 2003, the custodial statement given on and after 2:45 p.m. on June 2, 2003, must be suppressed under the Sixth Amendment to the federal constitution and Article Three, Section Twenty-Six of the Mississippi Constitution. (CP. 723-26).

C. Additionally, the police misconduct recited above amounted to a free-standing violation of the due process clause under the federal and state constitution. (CP. 726-31).

D. Furthermore, three miscellaneous issues surround the facts at bar that should be disposed of by Ms. Fulgham to assist the trial court. They are:

(D)(1.) Police would not have been required to interrupt a polygraph of Ms. Fulgham had they permitted Ms. Mallette to visit with her client because the polygraph of Ms. Fulgham did not begin until after Ms. Mallette arrived at the jail. (CP. 731-34).

(D)(2.) Moran v. Burbine, 475 U.S. 412, 417-18, 425-26 (1986) is a Fifth Amendment right-to-counsel disposition. It is inapposite to the facts and to the bases upon which Ms. Fulgham sought suppression.[112] Where Burbine addresses the Sixth Amendment right-to-counsel, it notes that the conduct at bar is prohibited by the Sixth Amendment. (CP. 734-35).

(D)(3.) It is inconsequential whether Ms. Fulgham waived her Sixth Amendment right to counsel on June 2, 2003, as her Sixth Amendment right to counsel and her Article Three, Section Twenty-Six right to counsel are bilateral. Even if the trial court were to find that Ms. Fulgham waived her Sixth Amendment and Article Three, Section Twenty-Six right to counsel, Ms. Mallette asserted them. (CP. 735-36).

More than three months after Ms. Fulgham presented the entirety of the above, the State responded. (CP. 899-901). In response to the discussion and case authority found at CP. 720-26, the State put forth that the Sixth Amendment right to counsel is not bilateral and, as such, Sixth Amendment rights are not invalidated "when questioning resumes at the request of the Defendant." (CP. 899).[113] The State offers no authority for its contention that the Sixth

[112] The State either failed to comprehend or refused to recognize this preemptive point. See Footnote 114, infra.

[113] If the State was correct, this Claim would be meritless. Fortunately for Ms. Fulgham, the State is incorrect.

Amendment right to counsel is not bilateral.[114] The fact that Ms. Fulgham initiated contact with the police is utterly irrelevant as Ms. Fulgham based her Sixth Amendment and Article Three, Section twenty-Six right to counsel claim on police refusal to permit her attorney to consult with her entirely because police were interrogating her.

At CP. 726-31, Ms. Fulgham presented discussion and case authority for the following free-standing claim for suppression of her June 2, 2003, custodial statement at and after 2:45 p.m.: "Over and above the right to counsel violations under the Sixth Amendment and Article Three, Section 26, does the police misconduct in the matter at bar amount to a free-standing violation of the due process clause under the Fourteenth Amendment and Article Three, Section 14 of the Mississippi Constitution." (CP. 726-27).

The State offered no response to this due-process claim.

The trial court also did not address Ms. Fulgham's due-process claim in its Order denying Ms. Fulgham's motion. (CP. 902-05).

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[114] The most likely explanation for this misconception is that it is untrue. Indeed, the State's response to Ms. Fulgham's memorandum of law and the trial court's findings of fact and conclusions of law denying Ms. Fulgham's motion to suppress refuse to confront Ms. Fulgham's uncomplicated argument. At CP. 723-26, Ms. Fulgham presented the case authority for the bilateral nature of the Sixth Amendment right to counsel, including Footnote 35 from Miranda v. Arizona, which reads: "The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." Miranda, 384 U.S. 436, 465 n. 35 (1966). Later, Ms. Fulgham cites to another disposition from the United States Supreme Court – Moran v. Burbine, 475 U.S. 412 (1986). CP. 734-35. Under the painfully plain subheading "Why isn't the relief sought in this memorandum defeated by Moran v. Burbine?," Ms. Fulgham quoted from Burbine, 475 U.S. at 428: "[W]e readily agree that once the [Sixth Amendment] right [to counsel] has attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium between [the suspect] and the State' during the interrogation." (citing cases). See CP. 735. Ms. Fulgham's citation to Burbine in support of her motion to suppress is disregarded by the State and the trial court. Burbine, a Fifth Amendment, pre-attachment disposition, had no application to a Sixth Amendment, post-attachment deprivation of the bilateral right to counsel. The State ignores this and responds: "[I]t is the State's contention that the United States Supreme Court case of Moran v. Burbine, 475 U.S. 412 (1986) stands for the proposition that an attorney's desire to invoke her client's Constitutional rights does not affect the Defendant's ability to waive her right to an attorney and make a voluntary statement to law enforcement officers. The facts in Moran are very similar to the ones in the case at bar[.]" (CP. 901). In actuality, however, one fact – *the* dispositive fact, *the* fact the State and the trial court simply refuse to acknowledge – is that Ms. Fulgham's post-attachment right to counsel was obliterated by the government when police prohibited her lawyer from meeting with her precisely because police were interrogating her. This issue was clearly framed by Ms. Fulgham. It was fully briefed. And then it was entirely ignored.

As to Ms. Fulgham's Sixth Amendment and Article Three, Section Twenty-Six right to counsel claims,[115] the trial court summarized Ms. Fulgham's argument as follows: "Defense counsel argues that even though the Defendant initiated the interview and both in writing and orally, as proved by her signed, witnessed waiver of rights form and the produced audio tape of the interview session, waived her right to have counsel present during the interview; the arrival of her attorney, and the Sheriff's Office refusal to let the interview be interrupted once it had started, constitutes a violation of the Defendant's constitutional rights and causes the June 2, 2003 statement to be involuntary, and therefore inadmissable [sic] at trial."[116]

IV. Standard of Review

The appropriate standard of appellate review on the trial court's order overruling a challenge to the constitutional admissibility of a custodial statement is found in Baldwin v. State, 757 So. 2d 227, 231 (Miss. 2005):

> 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

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[115] Hereinafter, Ms. Fulgham shall refer to her "Sixth Amendment and Article Three, Section Twenty-Six right to counsel claim" as her "post-attachment claim."

[116] This synopsis of Ms. Fulgham's argument is so close to accurate that it warrants modification to further advance Ms. Fulgham's point. The trial court's finding is now repeated with necessary additions: "Defense counsel argued that even though the Defendant initiated the interview and both in writing and orally, as proved by her signed, witnessed waiver of rights form and the produced audio tape of the interview sessions, waived her right to have counsel during the interview; the arrival of her attorney at the jail *after being called by a deputy sheriff and after telling the deputy sheriff that she did not give permission for a polygraph and after saying to the deputy sheriff "don't do anything, I'll be right there"*, and the Sheriff's Office refusal to let the interview be interrupted *by permitting counsel for the accused to speak with her client* once it had started constituted a violation of the Defendant's *Sixth Amendment right to counsel, Article Three, SectionTwenty-Six right to counsel, federal due process and state due process* constitutional rights and causes the statement to be [inadmissible]." It is respectfully submitted that had the trial court accurately summarized Ms. Fulgham's argument as amended above, the post-attachment claim would have been decided correctly. So long as the trial court and the State insisted upon consideration of Ms. Fulgham's conduct on June 2, 2003, the State and the trial court were bound to err. Ms. Fulgham's words and actions on June 2, 2003, are completely irrelevant. Because Ms. Mallette was post-attachment counsel who was forbidden access to her client because police were interrogating her client, the June 2 statement must be suppressed.

> disturbed unless the trial judge applies 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. App. 1999).

Although neither the State nor the trial court acknowledged Ms. Fulgham's claim that the police abrogated her bilateral, post-attachment right to counsel when police (a) phoned appointed counsel; (b) was told by appointed counsel "don't do anything;" (c) was told by appointed counsel "I'll be right there;" and then (d) refused to permit appointed counsel to consult with Ms. Fulgham immediately thereafter as police were interrogating Ms. Fulgham, it is abundantly clear from the trial court's Order (CP. 902-05) and the State's response to Ms. Fulgham's memo (CP. 899-901) that the trial court and the State rejected it citing pre-attachment, right-to-counsel cases. Therefore, the trial court's refusal to suppress on post-attachment grounds is reviewed under the Baldwin, supra standard.

Neither the prosecution nor the State addressed Ms. Fulgham's free-standing ground for suppression under the due-process provisions of the federal and state constitution. As there are no findings of fact nor conclusions of law as to the due process claims, appellate review of the trial court's ruling is less constrained. Carley v. State, 739 So. 2d 1046, 1050, 1054 (Miss. App. 1999) (citing Abram v. State. 606 So. 2d 1015, 1033 (Miss. 1992)). "We may not credit unspoken findings not fairly inferable from the trial court's action." Riddle v. State. 580 So. 2d 1195, 1200 (Miss. 1991) (citations deleted).[117]

V. Analysis

V(A.) The trial court applied the incorrect legal standard in overruling Ms. Fulgham's Sixth Amendment and Article Three, Section Twenty-Six, claim that the police abrogated her right to counsel

[117] The only thing fairly inferable from a refusal to address a free-standing claim consuming six pages of Ms. Fulgham's memo of law (CP. 726-31) is that the claim was ignored.

Ms. Fulgham announced her post-attachment bilateral right to counsel was violated and cited case authority for the proposition. (CP. 720-26). Police telephoned Ms. Mallette because Ms. Fulgham initiated contact with police. (CP. 717). Ms. Mallette advised police during this police-initiated telephone call not to interrogate her client and advised that she would come to the jail. (CP. 718). Police then vitiated Ms. Fulgham's post-attachment right to counsel when police refused to permit Ms. Mallette to meet with Ms. Fulgham because police were conducting a post-attachment interrogation of Ms. Fulgham. (CP. 720-26).

Responding that Ms. Fulgham was not entitled to the relief she sought, the State cited cases having nothing to do with the attorney for an incarcerated client showing up at the jail to consult with her client only to be told that she may not consult with her client because her client is undergoing post-attachment, police interrogation, *to wit*: Wilcher v. State, 697 So. 2d 1087, 1096-97 (Miss. 1997) (inapposite even though defendant initiated and waived his Sixth Amendment right to counsel because his counsel did not personally appear at the jail only to be told by police that counsel may not consult with the defendant because the police are currently interrogating the defendant at the defendant's request) (CP. 899); Hunter v. State, 684 So. 2d 625, 632-33 (Miss. 1996) (same); Mettetal v. State, 602 So. 2d 864, 868-69 (Miss. 1992) (same). Incomprehensibly, the State also cited Fifth Amendment right-to-counsel dispositions[118] to rebut Ms. Fulgham's post-attachment claim. Moran v. Burbine, 475 U.S. 412, 417-18, 425-26 (1986); Wyrick v. Fields, 459 U.S. 42, 49 (1982). Finally, the State cites to Hunt v. State, 687 So. 2d 1154, 1160 n. 3 (Miss. 1996). Hunt is interestingly inapposite as it is irrelevant to Ms. Fulgham's memo of law ***and*** to the State's response. Hunt is not a right-to-counsel case. In Hunt, this Court held Ms. Hunt was not in custody at the time she made her statement.

[118] These dispositions are pre-attachment. Once again, the State's failure to comprehend or refusal to recognize the different constitutional protections of pre- and post-attachment counsel dooms the State's refutation. See Footnotes 112 and 114, supra, and their accompanying text.

The trial court relied on the same authority as the State, *to wit*: Burbine, supra (CP. 905); Fields, supra (CP. 904); Mettetal, supra (CP. 902, 904); Wilcher, supra (CP. 904); Hunter, supra (CP. 904).

In choosing to follow the same fallacious path, the State and the trial court never arrive at the correct location. Ms. Fulgham's post-attachment argument has nothing to do with her initiation and her waiver. The trial court's findings of fact and conclusions of law have nothing to do with the unconstitutionality of police interference in the post-attachment, bilateral, attorney-client relationship. This failure to address Footnote 35 of Miranda is fatal. The trial court undeniably applied the incorrect legal standard and must be reversed under Baldwin, supra.

V(B.) In overruling Ms. Fulgham's Sixth Amendment and Article Three, Section Twenty-Six, claim that the police abrogated her right to counsel the trial court committed manifest error

Appellate courts in Mississippi have treated "manifest error" and "clear error" synonymously. See, e.g., Matter of Last Will and Testament of Redditt v. Redditt, 820 So. 2d 782, 786 (Miss. App. 2002). A trial court makes a "clearly erroneous" finding when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." United States v. Suarez, 225 F.3d 777, 779 (7th Cir. 2000) (citing cases).

At times "clear error" is conflated with "abuse of discretion." See, e.g., Scott v. State, No. 2005-CT-915-SCT, 2008 WL 5089815, *1, Para. 4 (Miss. Dec. 4, 2008) (determining trial court "did not commit manifest error or abuse its discretion when it denied Scott's motion to suppress his written confession"); Sills v. State, 624 So. 2d 124, 124, 126 (Miss. 1994) (trial court did not abuse its discretion as there is "nothing in the record to convince us that the credibility choice made by the circuit judge was manifestly wrong"). Other times, the standard of review for suppression claims is an abuse of discretion. Chamberlin v. State, 989 So. 2d 320, 336 (Miss. 2008) cert. denied 129 S.Ct. 908 (2009). A trial court abuses its discretion when the

trial court's ruling is based on an erroneous view of law or is based on a clearly erroneous assessment of the evidence. Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 584 (5th Cir. 2003); Kirk v. Pope, 973 So. 2d 981, 986 (Miss. 2007) (trial court abuses its discretion when trial court makes an error of law); see Nelson v. Apfel, 210 F.3d 372, 391 (7th Cir. 2000) (trial court abuses its discretion when no reasonable person would agree with the actions of the trial court); Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (trial court abuses its discretion when trial court's ruling is so clearly wrong as to fall "outside the zone of reasonable disagreement"); see also United States v. Pennington, 30 F.3d 593, 600 (5th Cir. 1994) (citing United States v. Taylor, 487 U.S. 326, 336 (1988)) ("[d]iscretion, though, cannot be based simply upon a court's inclination, but rather must be made with reference to sound legal principles"). In United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992), the First Circuit wrote that an abuse of discretion in the determination of the admissibility of evidence occurs:

> when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales.

In light of the above, the trial court's determination that police did not annul Ms. Fulgham's post-attachment right to counsel was manifest error and an abuse of discretion. The trial court (a) assessed the irrelevant evidence concerning Ms. Fulgham's initiation of police contact and waiver rather than the relevant and dispositive evidence of Ms. Mallette's conduct and the conduct of the police; (b) cited irrelevant case authority concerning a defendant's post-attachment initiation and waiver rather the address the case authority cited by Ms. Fulgham concerning the bilateral nature of the post-attachment right to counsel and government intrusion into that bilateral right; and (c) as a direct result of limiting its findings of facts and conclusion of

law to irrelevant facts and inapplicable case law, the trial court's Order overruling Ms. Fulgham's post-attachment claim was clearly erroneous and must be reversed under Baldwin, supra.

V(C.) As a result of Parts V(A.) and V(B.), the trial court's decision to overrule Ms. Fulgham's Sixth Amendment and Article Three, Section Twenty-Six, claim was contrary to the overwhelming weight of the evidence

The evidence in support of suppression was founded in the actions of Ms. Fulgham's attorney, the actions of police officers, and case authority cited by Ms. Fulgham championing the bilateral nature of the post-attachment right to counsel. See CP. 716-20. The trial court did not address these facts or this law as detailed in Parts V(A.) and V(B.) of this Claim. As a result, the trial court's determination was contrary to the overwhelming weight of the evidence.

V(D.) The trial court erred in not addressing Ms. Fulgham's free-standing, due-process claim. As this claim is meritorious, this Court must reverse

At CP. 726-31, Ms. Fulgham advised the State and the trial court that police officers violated her due process rights under the federal and state constitution when police deprived Ms. Fulgham of her post-attachment right to counsel at and after 2:45 p.m. on June 2, 2003. (CP. 727). Because police were aware of an ongoing, post-attachment, attorney-client relationship, the due-process clauses prohibited police from deliberately intruding upon that relationship. (CP. 728-29). At the suppression hearing, Ms. Mallette testified:

> I was honestly in shock that I had come to the jail, the Oktibbeha County Jail, of all the places I deal with and all the places that I go to, as accommodating as they usually are with regard to allowing me to see my clients, I was thoroughly shocked that they were denying me the right to see my client.
>
> (CP. 729).

Neither the State nor the trial court addressed Ms. Fulgham's due-process claim. As stated in Part IV of this Claim, this Court takes a less constrained review of a decision to overrule suppression that is not supported by findings of fact or conclusions of law. As stated by

Ms. Fulgham at CP. 730: "It is respectfully submitted that the only explanation for Deputy Whitfield's refusal to permit the attorney-client visit at bar, particularly after Deputy Whitfield has been advised by Ms. Mallette that she disapproved of any police contact with Ms. Fulgham and had been advised by Ms. Mallette that she was coming to the jail as a result of his phone call to her office is that the refusal was a deliberate intrusion into the attorney-client relationship." This assertion, supported by argument and case authority, (see CP. 726-31), was met only with silence from the State and then from the trial court. The Order denying Ms. Fulgham's motion to suppress was a denial on all grounds. Therefore, the trial court must be reversed for refusing to grant suppression on the due-process grounds asserted by Ms. Fulgham.

VI. Conclusion

It is respectfully submitted that the trial court abused its discretion, applied an incorrect legal standard, and committed manifest error in overruling Ms. Fulgham's motion to suppress on post-attachment right to counsel grounds and on due-process grounds. As to the due-process grounds, the standard of review is more generous as the trial court issued no findings of fact nor conclusions of law concerning them. As to both grounds, the trial court's decision is contrary to the overwhelming weight of the evidence.

Police must honor the right to counsel. Due process prohibits governmental agents from interfering with the right to counsel. On June 2, 2003, police violated Ms. Fulgham's due-process rights and her post-attachment rights to counsel. For these reasons, and because this statement was used by the State during the penalty-phase of this matter, Ms. Fulgham's death sentence must be vacated.

CLAIM 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 OF MISS. CODE ANN. 99-19-105(3)(c), THE DUE PROCESS CLAUSE OF THE FEDERAL AND STATE CONSTITUTION AND THE EQUAL PROTECTION CLAUSE

> You're told that we didn't present anything new today. My God, was what we heard yesterday and the day before awful enough? You're told is – is this the kind of capital murder that could justify the death penalty? What type could be worse?[119]

There are two components to the State's contention. First, what evidence of awful things did the State present to the jury?[120] Second, is there a capital murder that could be worse than the capital murder at bar?

This Claim stands alone. In this Claim, Ms. Fulgham's seeks vacatur of her death sentence on grounds that it is excessive and disproportionate as a matter of Mississippi law. Because Mississippi law requires this Court to undertake cross-case disproportionate analysis, Ms. Fulgham has a due-process[121] and an equal-protection[122] right under the Fourteenth

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[119] Penalty-phase rebuttal summation of Assistant District Attorney Frank Clark. (R. 1280).

[120] See Claim 3, supra, and see Claims 20 and 24, infra. What compelling mitigation did the State conceal from the jury? See Claim 1, supra.

[121] A state may not adopt a valid statute and then decline to carry it out. Esparza v. Williams, 310 F.3d 414, 421 (6th Cir. 2002). "[T]he arbitrary denial of a state right rises to a violation of the due process clause of the Fourteenth Amendment." Stewart v. State, 662 So. 2d 552, 557 (Miss. 1995) (citing Hicks v. Ohio, 447 U.S. 343, 346 (1980)); Brown v. Mahoney, 267 F.3d 36, 44 (1st Cir. 2001); see also Eaglin v. Welborn. 57 F.3d 496, 501 (7th Cir. 1995) cert. denied 516 U.S. 965 (1995); People v. Shaw, 713 N.E.2d 1161, 1182 (Ill. 1998). If there is a due process violation under the Fourteenth Amendment, there is also a free-standing, due-process violation under Article Three, Section Fourteen, of the Mississippi Constitution. Butler v. State, 217 Miss. 40, 55, 63 So. 2d 779, 784 (1953); Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950).

[122] The right to equal protection does not speak to classes. An individual claiming an equal-protection violation may claim to comprise a class of one person. Indiana State Teachers Assoc. v. Board of School Commissioners, 101 F.3d 1179, 1181 (7th Cir. 1996); Esmail v. Macrane, 53 F.3d 176, 179-80 (7th Cir. 1995) (if the singled-out individual is similarly situated to others who have not been targeted, the government must present a legitimate state objective); Buckey v. County of Los Angeles, 938 F.2d 791, 795 (9th Cir. 1992); Falls v. Town of Dyer, 875 F.2d 146, 148 (7th Cir. 1989); see Village of Willowbrook v. Olech, 528 U.S. 562, 564-65 (2000). The equal-protection claimant must prove arbitrary and irrational discrimination. Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 83 (1988); see Romer v. Evans, 517 U.S. 620, 631 (1996). The source of the discrimination must be the government – through

Amendment to have this analysis conducted in a rational and non-arbitrary manner. The Eighth Amendment does not require this Court to undertake cross-case, proportionality review. Pulley v. Harris, 465 U.S. 37, 44 (1984). Because Miss. Code Ann. 99-19-105(3)(c) does require cross-case proportionality, however, this Court's Miss. Code Ann. 99-19-105(3)(c) review must survive constitutional scrutiny. See Footnotes 121 & 122, supra; see also Middleton v. Roper, 498 F.3d 812, 821-22 (8th Cir. 2007) cert. denied 128 S.Ct.1260 (2008).

Stephen Hayne, appearing as the State's pathologist, testified that "Mr. Fulgham died from a gunshot wound to the back of the head. Underlying cause of death was cranial cerebral trauma. That is injury to the brain and to the skull." (R. 913). This brain injury was sufficiently traumatic to have eliminated Mr. Fulgham's ability to move. (R. 907, 912-13). Dr. Hayne testified the single gunshot wound to Mr. Fulgham was the only injury to Mr. Fulgham detected at autopsy. (R. 896). Mr. Fulgham's body was found in his bedroom, face down in his bed. (R. 821-25; State's Exhibits 21-24). This testimony and photographs, along with the testimony of Dr. Hayne, clearly depict a single injury to the back of the head while Mr. Fulgham was lying prone in his bed. The State capitalized on this during its first-phase, closing statement. (R. 1006) ("This isn't an accident, ladies and gentlemen. Hit him [Joey Fulgham] right in the center of the head. He never moved.").

Every murder could be characterized as horrible and inhuman. See, e.g., Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980). One operative question this Court answers under Miss. Code Ann. 99-19-105(3)(c) is whether the facts and circumstances of the murder at bar – a

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legislative enactment or some other governmental activity. Harris v. McRae, 448 U.S. 297, 322 (1980); see Jones v. Helms, 452 U.S. 412, 423-24 (1981) ("[t]he Equal Protection Clause provides a basis for challenging legislative classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way"). Here, Ms. Fulgham most assuredly does not claim Miss. Code Ann. 99-19-105(3)(c) violates her right to equal protection. Rather, Ms. Fulgham claims that a failure to find her death sentence disproportionate under Miss. Code Ann. 99-19-105(3)(c) would amount to an arbitrary and irrational application of that statute.

murder the State elected to capitalize and a murder which the State selected to seek the most extreme sanction – factually falls in to a class of murders for which death is a proportionate sentence. See, e.g. Gregg v. Georgia, 428 U.S. 153, 198 (1976).

In conducting the mandatory Miss. Code Ann. 99-19-105(3)(c) review, this Court considers whether the death penalty is excessive in light of the offense itself and the characteristics of the offender. Wilcher v. State, 697 So. 2d 1087, 1113 (Miss. 1997) cert. denied 522 U.S. 1053 (1998). This Court has compared the facts of a case at bar with the facts of other cases wherein the death penalty was rendered and affirmed in making the proportionality determination. Coleman v. State, 378 So. 2d 640, 650 (Miss. 1979); see Wilcher, 697 So. 2d at 1113 ("[h]aving given individualized consideration to the defendant and the crime *sub judice*, this Court concludes that there is nothing about *this defendant* or *this crime* that would make the death penalty excessive or disproportionate in this case") (emphasis added); see also Reddix v. State, 547 So. 2d 792, 794-95 (Miss. 1989); Bullock v. State, 525 So. 2d 764, 770 (Miss. 1987).

It is respectfully submitted that there is a great deal about the crime at bar that makes the execution of the death sentence excessive and disproportionate; namely, the evidence adduced by the State and outlined earlier in this Claim demonstrates that the violent death of Mr. Fulgham was unusually unaggravated.

It is also respectfully submitted that there is a great deal about Ms. Fulgham that makes the execution of the death sentence excessive and disproportionate. This Court benefits from the Miss. Code Ann. 99-19-105(1) imperative to review the entire record in coming to the Miss. Code Ann. 99-19-105(3)(c) determination of whether the death sentence is disproportionate.[123] Had Ms. Fulgham's jury benefitted from hearing the duly-noticed evidence erroneously excluded

[123] "Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court." Miss. Code Ann. 99-19-105(1).

by the trial court, see Claim 1, supra, the jury would have been 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 notwithstanding Ms. Fulgham's continual incarceration since 2003. This evidence must be considered in the Miss. Code Ann. 99-19-105(3)(c) determination as this determination is a cross-case evaluation and this Court's review is controlled by the record on appeal and not by evidence wrongly excluded by the trial court.[124]

The facts of the murder and life story of the defendant – the portion the jury heard and the portion the trial court unconstitutionally excluded – when compared to other cases in Mississippi jurisprudence where death has been imposed, mandate a finding that Ms. Fulgham's death sentence is excessive or disproportionate. Miss. Code Ann. 99-19-105(3)(c) requires Ms. Fulgham to be resentenced to life without the possibility of parole. Because of this, resentencing to life without the possibility of parole is required as a matter of due process and equal protection. See Footnotes 121 & 122, supra.

CLAIM 8

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-77A IN THE JURY CHARGE

I. Background

Immediately after opening statements at the penalty phase, in the presence of the jury, the State and the trial court engaged in the following colloquy:

> [BY THE COURT]: State, you may proceed.
>
> [BY MR. CLARK]: Your Honor, at this time we would ask that the Court reintroduce, for the jury's consideration, all of the testimony and all of the evidence that was presented during the guilt phase of this trial, and we would ask that all of the items marked for identification also be transferred over to this phase of the trial.

[124] See Footnote 123, supra.

[BY THE COURT]: Very well. The evidence and testimony produced and introduced at the first or guilt phase of this trial has now been introduced in the sentencing phase. That applies both to the testimony of the witnesses and the exhibits offered and received. You may proceed.

[BY MR. CLARK]: Thank you. Your Honor, we would rest.

[BY THE COURT]: State has rested. Is the defendant ready to proceed?

[BY MR. LAPPAN]: We are, Your Honor.

[BY THE COURT]: Call your first witness, please.

(R. 1068).

At R. 1193, Ms. Fulgham rested her penalty-phase case-in-chief. The following then occurred:

[BY THE COURT]: State have rebuttal?

[BY MR. CLARK]: We rest, Your Honor.

[BY THE COURT]: State has finally rested.

(R. 1193).

As a result of the above discussion, the State introduced no evidence during the penalty phase other than the unauthenticated evidence of bad character. See Claim 3, supra; R. 1104. Because of this, Claim 8 is meritorious and it is respectfully submitted that this Court must vacate the death sentence.

II. Facts

At the charge conference for first phase, the State contended that Ms. Fulgham was not entitled to the trial court's instruction on circumstantial evidence nor to any of the instructions she submitted treating circumstantial evidence.

On Jury Instruction C-12, (CP. 996), the trial court's circumstantial instruction, the State objected contending that direct evidence of guilt was presented. (R. 945-50). The trial court disagreed with the State and gave its circumstantial instruction. (R. 950). Ms. Fulgham

submitted Jury Instruction D-9, a circumstantial evidence instruction, which the State opposed and the trial court gave as amended. (R. 962; CP. 1014). Ms. Fulgham submitted Jury Instruction D-13, a Sandstrom v. Montana, 442 U.S. 510, 524 (1979) instruction which the State opposed and the trial court refused. (R. 964; CP. 1017).[125] As a net result of the above, the following circumstantial-evidence instructions were given at the first phase:

> 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 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.
>
> (CP. 996 – Jury Instruction C-12).
>
> You are here to decide whether the prosecution has proved beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment neither are you to be concerned with the guilt of any other person not on trial as a defendant in this case.
>
> (CP. 1014 – Jury Instruction D-9A).

As presented in Part I of this Claim, the State introduced no evidence during the penalty phase other than inadmissible, unauthenticated evidence of bad character. Therefore, as the State necessarily maintains a burden on aggravation identical to its burden as to the elements of an offense,[126] jury instructions treating the quantum of proof required at Ms. Fulgham's penalty phase should be identical with first-phase instructions. Jury Instruction D-77A was submitted by

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[125] The trial court's refusal of Jury Instruction D-13 is the subject matter of Claim 30, infra.

[126] Williams v. State, 684 So. 2d 1189, 1196 (Miss. 1996); Nixon v. State, 533 So. 2d 1078, 1099 (Miss. 1987) cert. denied 490 U.S. 1102 (1989) overruled on other grounds at Wharton v. State, 734 So. 2d 985, 991 (Miss. 1998).

Ms. Fulgham at the penalty-phase charge conference. (R. 1216). D-77A appears at CP. 1138-39 and reads as follows:

> 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 circumstance 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 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 circumstance beyond a reasonable doubt.

The following colloquy occurred concerning Jury Instruction D-77A:

> [BY THE COURT]: 77-A.
>
> [BY MR. LAPPAN]: Your Honor, I would submit that 77-A is proper in light of the fact that the State is given – one of the aggravators is the robbery aggravator that I objected to, which you gave an instruction that was circumstantial in the first phase, so I would ask for this one to be given in this phase.
>
> [BY THE COURT]: What says – what says State? Is it circumstantial on – in the penalty phase? Since it was circumstantial, I ruled, and gave the circumstantial instruction in the guilt phase, does that now carry over to the sentencing phase?
>
> [BY MR. CLARK]: Your Honor, our – of course our position is this is a direct evidence case, and –
>
> [BY THE COURT]: State whether you object or not. Do you object to this?
>
> [BY MR. CLARK]: We object, even if this is a circumstantial –
>
> [BY THE COURT]: It's refused.
>
> [BY MR. CLARK]: Thank you, sir.
>
> [BY THE COURT]: Does not carry over to the sentencing phase, according to the current status of the law.
>
> (R. 1216-17).

III. Law

It is respectfully submitted that the State's objection to D-77A was not well taken and the trial court's decision to exclude D-77A from the jury charge was erroneous. Jury Instruction D-77A (CP. 1138-39) is annotated and presented the following case authority to the trial court to justify its inclusion in the jury charge: "United States v. Voss, 787 F.2d 393, 398 (8th Cir. 1986) cert. denied 479 U.S. 888 (1986); *California Jury Instruction 8.83 (West Publishing Co., Sixth Ed., 1996*; see *Mississippi Model Jury Instruction – Criminal – 1.16* (Mississippi Judicial College 2004) (relying on Alexander v. State, 749 So. 2d 1031 (Miss. 1999); Sheffield v. State, 749 So. 2d 123 (Miss. 1999); Manning v. State, 735 So. 2d 323 (Miss. 1999); Givens v. State, 618 So. 2d 1313 (Miss. 1993); Jones v. State, 517 So. 2d 1295 (Miss. 1987); Keys v. State, 478 So. 2d 266 (Miss. 1985)). See e.g., Ring v. Arizona, 536 U.S. 584, 588-89 (2002); Fiore v. White, 531 U.S. 225, 228-29 (2001) (citing cases); United States v. Gaudin, 515 U.S. 506, 514 (1995); Sullivan v. Louisiana, 508 U.S. 275, 278-81 (1993); Sandstrom v. Montana, 442 U.S. 510, 521-22 (1979); People v. Figueroa, 41 Cal.3d 714, 724-25, 225 Cal. Rptr. 719, 725-26, 715 P.2d 680, 686-87 (1986); Krucheck v. State, 671 P.2d 1222, 1224-25 (Wyo. 1983); Stephens v. State, 430 S.E.2d 29, 31 (Ga. App. 1993); see also Osborne v. Ohio, 495 U.S. 103, 122-26 (1990); Carella v. California, 491 U.S. 263, 265-66 (1989); Cabana v. Bullock, 474 U.S. 376, 384-86 (1986); In Re Winship, 397 U.S. 358, 361-62 (1970). See generally United States v. Wolfe, 611 F.2d 1152, 1155 n.5 (5th Cir. 1980). Cf. Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2363 (2000) and Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 1228 (1999) requiring full constitutional protection on any factual determination that raises the ceiling of the sentencing range available." Ms. Fulgham also included mention in the annotation that the second paragraph in D-77A was taken from Oklahoma Uniform Jury Instruction — Criminal 4-77 (1997).

Notwithstanding the State's contention to the contrary, Ms. Fulgham was entitled to a circumstantial instruction on the State's 99-19-101(5)(d) aggravator for the precise reason that she was entitled, and received, a circumstantial instruction on the State's 97-3-19(2)(e) allegation. See Annotation to D-77A at CP. 1138-39; see also Carroll J. Miller, Annotation, Modern Status and Rule regarding Necessity of Instruction on Circumstantial Evidence in Criminal Trials – State Cases, 36 A.L.R.4th 1046 (1985). For these reasons, the death sentence must be vacated.

CLAIM 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

In Claim 8, Ms. Fulgham argues she was entitled to have Jury Instruction D-77A included in her jury charge because of the trial court's correct determination that the State's case against Ms. Fulgham was circumstantial.[127] Based on the same rationale and facts, Ms. Fulgham contends in this Claim that the trial court erred in not including Instruction D-77B in the jury charge.

Jury Instruction D-77B appears at CP. 1140 and reads as follows:

> 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.

Ms. Fulgham's annotation for Instruction D-77B is lengthy. This annotation appears at CP. 1140 and reads as follows: "United States v. Voss, 787 F.2d 393, 398 (8th Cir. 1986) cert. denied 479

[127] Necessarily, the State's first-phase evidence is identical to the State's penalty-phase evidence. See Claim 8, supra.

U.S. 888 (1986); *California Jury Instruction 8.83 (West Publishing Co., Sixth Ed., 1996);* see *Mississippi Model Jury Instruction – Criminal – 1.17* (Mississippi Judicial College 2004) (relying on Petti v. State, 666 So. 2d 754 (Miss. 1985); Henderson v. State, 453 So. 2d 708 (Miss. 1984)[128]). *The practice note for MJI 1.17 reads: "This instruction is to be used whenever all of the evidence tending to prove the guilt of the defendant is circumstantial. It is to be given in addition to the basic circumstantial evidence instruction."* See, e.g., Ring v. Arizona, 536 U.S. 584, 588-89 (2002); Fiore v. White, 531 U.S. 225, 228-29 (2001) (citing cases); United States v. Gaudin, 515 U.S. 506, 514 (1995); Sullivan v. Louisiana, 508 U.S. 275, 278-81 (1993); Sandstrom v. Montana, 442 U.S. 510, 521-22 (1979); People v. Figueroa, 41 Cal.3d 714, 724-25, 225 Cal. Rptr. 719, 725-26, 715 P.2d 680, 686-87 (1986); Krucheck v. State, 671 P.2d 1222, 1224-25 (Wyo. 1983); Stephens v. State, 430 S.E.2d 29, 31 (Ga. App. 1993); see also Osborne v. Ohio, 495 U.S. 103, 122-26 (1990); Carella v. California, 491 U.S. 263, 265-66 (1989); Cabana v. Bullock, 474 U.S. 376, 384-86 (1986); In Re Winship, 397 U.S. 358, 361-62 (1970). See generally United States v. Wolfe, 611 F.2d 1152, 1155 n.5 (5th Cir. 1980); United States v. James, 576 F.2d 223, 227 n.3 (9th Cir. 1978)." (emphasis added).

The trial court acknowledged that D-77B was a two-theory instruction. (R. 1217). The State objected to D-77B for that same reason. (R. 1217). The following colloquy is relevant:

> [BY THE COURT]: 77-B?
>
> [BY MR. LAPPAN]: Your Honor, that is submitted. That is, I believe, a two-theory instruction.
>
> [BY THE COURT]: *It is a two-theory instruction.* What says the State?

[128] In Henderson v. State, 453 So. 2d 708, 710 (Miss. 1984), this Court held that in a circumstantial case an instruction that is the basis of Claim 8 must be given along with an instruction that is the basis of this Claim.

[BY MR. CLARK]: Object for the same reason, Your Honor.

[BY THE COURT]: It's refused. 78?

(R. 1217). (emphasis added)

I. Facts

This Claim embraces the necessity for proper, lawful instruction where the State presents a circumstantial case. Therefore, the factual predicate for this Claim is identical to that of Claim 8, supra. To avoid needless duplication, the discussion appearing in Part I and Part II of Claim 8, supra, is incorporated herein.

II. Law

In addition to the abundant case authority placed before the trial court requiring inclusion of D-77B in the jury charge based on the incorporated facts, see annotation at CP. 1140, additional case authority requires giving a two-theory instruction in a circumstantial case: Jones v. State, 797 So. 2d 922, 928-29 (Miss. 2001) (relying on Henderson v. State, 453 So. 2d 708, 710 (Miss. 1984))[129] ("[b]ecause the evidence in this case is purely circumstantial, the jury should have received the two required instructions regarding circumstantial evidence"); Parker v. State, 606 So. 2d 1132, 1140-41 (Miss. 1992); Nester v. State, 254 Miss. 25, 28-29, 179 So. 2d 565, 565-66 (1965).

III. Conclusion

Ms. Fulgham was entitled to a two-theory instruction because the trial court correctly determined the State presented a circumstantial case. The failure of the trial court to include Jury Instruction D-77B is reversible error. Ms. Fulgham's death sentence must be vacated.

[129] See Footnote 128, supra.

CLAIM 10

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE INSTRUCTION D-64 IN THE JURY CHARGE

Jury Instruction D-64 appears at CP. 1130 and 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 based on the evidence free from anger and prejudice.

Ms. Fulgham cited three cases in the annotation for D-64: "Woodson v. North Carolina, 428 U.S. 280 (1976) (death is qualitatively different sentence and requires greater reliability); Gilmore v. Taylor, 508 U.S. 333 (1993) (Eighth Amendment requires greater degree of accuracy and reliability); Flores v. Johnson, 210 F.3d 456 (5th Cir. 2000) (death is final, must not be imposed in arbitrary and capricious manner)." See CP. 1130. The State objected to D-64 claiming it was "improper" under Thorson v. State, 895 So. 2d 85, 109 (Miss. 2004) cert. denied 546 U.S. 831 (2005). (R. 1210).

Trial counsel in Thorson submitted instruction DS-6 which, for all material purposes, is identical to the final four sentences of Ms. Fulgham's D-64. See Thorson, 895 So. 2d at 109. The State in Thorson objected that the identical language was improper and the trial court in Thorson ruled "[t]he 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, 895 So. 2d at 109 (emphasis added). The Thorson opinion does not state if the "second paragraph" in DS-6 is the same language contained in the final four sentences of Ms. Fulgham's D-64. For the sake of

argument, and as the State relied on Thorson to defeat D-64 in the matter at bar, Ms. Fulgham must and shall assume that the "second paragraph" of DS-6 is identical with the final four sentences of D-64. Therefore, the State's reliance on Mr. Thorson's appeal defeats this Claim ***only*** if the final four paragraphs of D-64 -- like the "second paragraph" of DS-6 -- repeats a portion of the jury charge. However, the State did not contend that D-64 was repetitious in the matter at bar. Moreover, the State did not direct the trial court to any portion of the jury charge where D-64 was covered in the matter at bar. Instead, the State's objection to D-64 was limited to its alleged impropriety under Thorson. These omissions are detrimental. Because Ms. Fulgham's jury charge does not contain language analogous -- let alone identical -- to the final four sentences of D-64, Thorson is inapposite.

Additionally, the State's reliance on Thorson fails for substantive reasons. In dicta, Thorson offered that the cases cited by Ms. Fulgham in support of D-64[130] "do not stand for the proposition that the jury must receive an instruction stating that a death sentence proceeding is different from an ordinary criminal proceeding." Thorson, 895 So. 2d at 110. This Court noted that while "the general propositions [stated in Woodson, Gilmore and Flores] are true," none of these cases requires a jury to be instructed about these truthful general propositions. Thorson, 895 So. 2d at 110. Insofar as Woodson and Gilmore and Flores contain no explicit mandate for a trial court to instruct the penalty-phase jury on the truthful, general proposition they announce – that is, that infliction of a death sentence is different from any other sentence because a death sentence is final and irrevocable -- Thorson's dicta is correct. Insofar as Thorson relied on this absence of an explicit mandate, it is respectfully submitted that this portion of Thorson, albeit dicta, is nonetheless unsound. Precisely ***because*** the general proposition that death is final and

[130] Ms. Fulgham cited the same three cases in her annotation for D-64 that Mr. Thorson cited as authority in his claim. See Thorson, 895 So. 2d at 109-10.

qualitatively different was determined by this Court to be truthful in Thorson, the trial court erred in the matter at bar by refusing to include D-64 in the jury charge.[131]

In criminal prosecutions where the State does not seek death, the defendant is entitled to his jury instructions so long as they are (a) correct statements of law and (b) non-repetitious and (c) supported by a view of the evidence most favorable to the defendant. Green v. State, 884 So. 2d 733, 737 (Miss. 2004); Booze v. State, 964 So. 2d 1218, 1221 (Miss. App. 2007) (citing cases). The trial court shall err on the side of inclusion rather than exclusion.[132] Green, supra; Al-Fatah v. State, 916 So. 2d 584, 586-87 (Miss. 2005) (citing case). Furthermore, the Due Process clause mandates that the fundamental principles of procedural fairness "apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial." Esparza v. Williams, 310 F.3d 414, 421 (6th Cir. 2002) (relying on Gardner v. Florida, 430 U.S. 449 (1977)); see Monge v. California, 524 U.S. 721, 732 (1998); Bullington v. Missouri, 451 U.S. 430, 446 (1981); Dycus v. State, 440 So. 2d 246, 257-58 (Miss. 1983).

"Heightened scrutiny" is a noun phrase with value only where it is applied. Because a death penalty case is different from a non-capital prosecution, every death penalty case carries a corresponding difference in the need for reliability. Lankford v. Idaho, 500 U.S. 110, 125-26

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[131] Thorson relied on the curative effect of statements made by the trial court during *voir dire*. Thorson, 895 So. 2d at 110. While the State did not claim the trial court in the matter at bar "covered" D-64 during *voir dire*, it is respectfully submitted that Thorson cannot be read to hold that ***any*** aspect of *voir dire* rescues an infimity in the jury charge. See, e.g., Madison v. State, 816 So. 2d 503, 504-08 (Ala. Crim. App. 2000) cert. quashed 816 So. 2d 508 (Ala. 2001) (conviction reversed for failure to include presumption of innocence instruction in jury charge even though jury was advised about presumption of innocence during *voir dire* on previous day in a mere first-degree assault prosecution); People v. Crawford, 58 Cal.App.4th 815, 823, 68 Cal.Rptr. 546, 550-51 (Cal. App. 1997) (to same extend in a mere robbery prosecution); Bennett v. State, 789 S.W.2d 436, 438-39 (Ark. 1990) cert. denied 498 U.S. 851 (1990) (similar and, additionally, noting that reliance on pre-charge instructions to rescue infirmities in the jury charge requires court to then consider if the timing of any court instruction may be considered as a comment on the evidence); see also Commonwealth v. Howard, 645 A.2d 1300, 1307 (Pa. 1994).

[132] If the trial court must err on the side of inclusion rather than exclusion in a routine criminal matter, does not the heightened scrutiny of a death case render inclusion all the more indispensable? See discussion in this Claim, infra.

(1991); Johnson v. Mississippi, 486 U.S. 578, 584 (1988); Mills v. Maryland, 486 U.S. 367, 377 (1988); Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); California v. Ramos, 462 U.S. 992, 998-99 n. 9 (1983). The citations to Woodson, Gilmore and Flores are merely illustrative of this incomparable life-or-death concern. Id.; see Ford v. Wainwright, 477 U.S. 399, 411, 414 (1986) (death is "the most irremediable and unfathomable of penalties"); Gardner v. Florida, 430 U.S. 349, 357 n.7 (1979) (evolving standards of decency require heightened reliability); Edelbacher v. Calderon, 160 F.3d 582, 585 (9th Cir. 1998) ("the severity of the death sentence mandates heightened scrutiny in the review of any colorable claim").

Because this ***is*** a case where the State sought and secured death, it ***is*** different from cases where the State either does not seek death or is unsuccessful in its quest.

Ms. Fulgham sought to include D-64 in her jury charge. Because D-64 was not covered in her jury charge, the trial court committed reversible error in refusing it. Ms. Fulgham's death sentence must be vacated.

CLAIM 11

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-71 IN THE JURY CHARGE

Jury Instruction D-71 appears at CP. 1134 and reads as follows:

> 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.
>
> (CP. 1134).

The annotation for D-71 appears at CP. 1134 and reads as follows: "Foster v. State, 687 So. 2d 1124, 1139 (Miss. 1996) (citing Leatherwood v. State, 435 So. 2d 645, 650 (Miss. 1983) (as defendant has no burden of production or proof, sentence less than death always may be imposed regardless of mitigation); see Evans v. Thigpen, 631 F.Supp. 277, 286-87 (S.D. Miss. 1986) aff'd 809 F.2d 239 (5th Cir. 1987) cert. denied 482 U.S. 1033 (1987); see also Gray v. Lucas, 677 F.2d

1086, 1105 (5th Cir. 1982); Thorson v. State, 653 So. 2d 876, 894 (Miss. 1994); Coleman v. State, 378 So. 2d 640, 646 (Miss. 1979)."

The State objected to D-71, claiming D-71 was "simply a mercy instruction[.]" (R. 1214).[133] The trial court refused to give D-71. (R. 1214).

Miss. Code Ann. 99-19-101(2)(d) is Mississippi's statutory announcement that the penalty-phase jury always maintains the discretion to sentence the capital defendant to a sentence other than death regardless of the findings made by the jury.

There is no federal constitutional right to a state law that permits discretion once requisite jury findings are unanimous and beyond a reasonable doubt. In Blystone v. Pennsylvania, 494 U.S. 299, 305 (1990), the Court held that a Pennsylvania statute that required a death sentence is constitutionally tolerable so long as the jury made requisite findings. The Mississippi legislature did not enact a Blystone statute requiring death selection so long as all death eligibility factors had been met. Instead, the Mississippi legislature enacted Miss. Code. Ann. 99-19-101(2)(d). The mere fact that the Mississippi legislature chose not to enact a Blystone statute does not render a Miss. Code Ann. 99-19-101(2)(d) instruction a "mercy instruction." To the contrary, an instruction which announces the law to the jury cannot constitute a mercy instruction as a mercy instruction permits the jury to forbear and to grant leniency in spite of legal dictate.[134]

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[133] Ms. Fulgham announced to the trial court and to the State its mercy instruction – D-91A. (R. 1231). See Claim 18, infra. D-71 has nothing to do with mercy. D-71 is an instruction that tracks the statutory discretion given to a capital jury in the State of Mississippi. See Miss. Code Ann. 99-19-101(2)(d) ("whether the defendant ***should*** be sentenced..."). While Ms. Fulgham unsuccessfully sought to have a mercy instruction included in her jury charge, when the trial court erroneously declined to include Jury Instruction D-91A, Ms. Fulgham did not argue mercy during her penalty-phase summation. This, of course, pours light on prosecutor's dishonest contention that Ms. Fulgham "dares to ask you for mercy" during penalty phase rebuttal. See Part C of Claim 3, supra. The State successfully convinced the trial court to exclude any mention of mercy in the jury charge and heard no mention of mercy in Ms. Fulgham's summation.

[134] See Footnote 133, supra, and Claim 18, infra.

Thus, an instruction which merely informs the jury that a death sentence is never required is no more a "mercy instruction" than an instruction that merely informs that jury that aggravation must be proved beyond a reasonable doubt. Each instruction states the law of Mississippi. Nothing more and nothing less. The State's contention that D-71 is a mercy instruction is spurious.

At least prior to Marsh v. Kansas, 548 U.S. 163, 176 n.3 (2006), no capital defendant in Mississippi court was entitled to a mercy instruction. Goodin v. State, 787 So. 2d 639, 657 (Miss. 2001) (citing numerous cases).[135]

However, as criminal defendants are entitled to accurate instructions and, as a matter of Mississippi law, every capital defendant is entitled to an instruction advising the jury that the jury is never required to sentence the defendant to death regardless of its findings -- see, e.g, Foster v. State, 687 So. 2d 1124, 1139 (Miss. 1996) (citing Leatherwood v. State, 435 So. 2d 645, 650 (Miss. 1983)) -- it was error for the trial court to refuse D-71.

There is simply no justification for refusing to give an instruction that will clarify the jury's task at sentencing. See Spivey v. Zant, 661 F.2d 464, 470-71 (5th Cir. 1981) ("this Circuit has read Lockett and Bell to require clear instructions on mitigation and the option to recommend against death"). The jury must be instructed on any ground of law on which it may rest its decision. See, e.g., Sheppard v. State, 777 So. 2d 659, 663 (Miss. 2000) (noting the issue as plain error). The permissive mandate of Miss. Code Ann. 99-19-101(2)(d) is obviously a ground upon which a juror may rest his decision not to kill in that it is always lawfully permissible to sentence a defendant to life.[136] For reasons made abundantly clear in this Claim, the State's

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[135] See Claim 18 infra, for further discussion on the effect of Marsh, supra on state law not requiring a mercy instruction at a capital sentencing.

[136] It is not merciful to forebear. Rather, forbearance is explicitly permitted by law. Refusing to include D-71 in the jury charge was a refusal to instruct the jury on the law.

assertion D-71 is a "mercy instruction" is false. The failure of the trial court to instruct on the ultimate issue at the death-selection stage as required by Miss. Code Ann. 99-19-101(2)(d) mandates vacatur of Ms. Fulgham's death sentence.

CLAIM 12

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-89 OR D-91 IN THE JURY CHARGE

In Claim 11, supra, Ms. Fulgham contends the trial court erred in refusing to instruct the jury under Miss. Code Ann. 99-19-101(2)(d). This Claim is similar. In this Claim, Ms. Fulgham seeks vacatur of her death sentence for the failure to instruct the jury that the sentencing process is never mere counting of aggravation against mitigation and, because of this, the jury may always sentence Ms. Fulgham to life without possibility of parole.

Jury Instruction D-89 appears at CP. 1147 and reads as follows:

> 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.

Ms. Fulgham cited the following cases at CP. 1147 as authority specifically for the first paragraph of D-89: "Commonwealth v. Speight, 854 A.2d 450, 461 n. 10 (Pa. 2004). See generally Foster v. State, 778 So. 2d 906, 919 (Fla. 2000); People v. Smith, 680 N.E.2d 291, 314 (Ill. 1997) cert. denied 522 U.S. 920 (1997)." As authority for the entirety of D-89, Ms. Fulgham cited the following in the annotation for D-89 at CP. 1147: "Watts v. State, 733 So. 2d 214, 239 (Miss. 1999); see Ortiz v. State, 869 A.2d 285, 309 (Del. 2005); Commonwealth v. Speight, 854 A.2d 450, 461 (Pa. 2004); People v. Pollock, 32 Cal.4th 1113, 1196, 13 Cal.Rptr.3d 34, 67, 89 P.3d 353, 380 (Cal. 2004) cert. denied 125 S.Ct. 911 (2001) ('the weighing of aggravating and

mitigating circumstances does not mean a mere mechanical act of counting the number of factors on each side of an imaginary scale or the arbitrary assigning of weight to any particular factor'); State v. Dunster, 631 N.W.2d 879, 908-09 (Neb. 2001) cert. denied 535 U.S. 908 (2002); State v. Hopkins, 14 P.2d 997, 1024 (Ariz. 2000) cert. denied 534 U.S. 970 (2001); Beasley v. State, 774 So. 2d 649, 674-75 (Fla. 2000); Leonard v. State, 969 P.2d 268, 300-01 (Nev. 1998) cert. denied 528 U.S. 828 (1998); Curry v. State, 336 S.E.2d 762, 769 (Ga. 1985) cert. denied 475 U.S. 1090 (1986); State v. Goodman, 257 S.E.2d 569, 590 (N.C. 1979); see also Joubert v. Hopkins, 75 F.3d 1232, 1246 (8th Cir. 1996) cert. denied 518 U.S. 1019 (1996)."

Ms. Fulgham submitted D-89. (R. 1228). The State objected, claiming the instruction was repetitious of Instruction SSP-5[137] and that the final sentence of D-89 is not appropriate under Thorson, supra.[138]

Jury Instruction D-91 appears CP. 1149 and reads as follows:

> 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 circumstance 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.

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[137] Instruction SSP-5 appears at CP. 1087. Ms Fulgham did not object to SSP-5 because SSP-5, as far as it goes, correctly states the law. (R. 1208). SSP-5, however, does ***not*** (1) instruct that each individual juror is free to weigh mitigation as he/she seeks fit and does ***not*** (2) instruct that each individual juror must also apply his/her reasoned moral judgment as to whether Ms. Fulgham should be sentenced to life or death. While SSP-5 lurks within the framework of D-89, it is hardly repetitive in, at minimum, these two aspects.

[138] The State did not relate the portion of Thorson, supra to which it was citing. The State merely advised the trial court: "Also, the last sentence, where it tells them whether death is the appropriate punishment is not the finding that this jury must make. That's the Thorson case again." (R. 1228-29). Was the State relying on the same portion of Thorson, supra it implemented in Claim 10, supra? The record is silent.

The annotation for D-91 appears at CP. 1149 and reads as follows: "Walker v. State, 671 So. 2d 581, 613 (Miss. 1995); Thorson v. State, 653 So. 2d 876, 894 (Miss. 1994); see Graham v. Collins, 506 U.S. 461, 468 (relying on Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976)); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Pruett v. Thigpen, 665 F.Supp. 1254, 1277-78 (N.D. Miss. 1986); People v. Tenneson, 788 P.2d 786, 796-97 (Colo. 1990) ("[t]o the extent that an instruction embodying a presumption of life imprisonment expresses no more than that before a death sentence can be imposed the jury must be convinced beyond a reasonable doubt that the sentence should be imposed, it correctly expresses the law"); Miss. Code Ann. 99-19-101(2)(d); see also People v. Hayes, 52 Cal.3d 577, 642, 276 Cal.Rptr. 874, 915, 802 P.2d 376, 417 (1990) cert. denied 502 U.S. 958 (1991); People v. McDowell, 46 Cal.3d 551, 576, 250 Cal.Rptr.530, 544 (1988) cert. denied 490 U.S. 1059 (1989).

Ms. Fulgham submitted D-91. (R. 1230). The State objected to D-91 on the grounds that it was a mercy instruction and because "it's also improper to tell them that they don't have to find the mitigating circumstances. It's a way to short-circuit the weighing process." (R. 1230-31). The trial court stated D-91 was confusing and refused it. (R. 1231; CP. 1149 [noting refusal]).

Based on the same legal discussion presented in support of Claim 11, supra, either jury instruction D-89 or D-91 should have been included in the jury charge. D-89 was not repetitious[139] and D-91 was not a mercy instruction.[140] Because the trial court refused to include either of these instructions in the jury charge, Ms. Fulgham's death sentence must be vacated.

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[139] See supra Footnote 137 and accompanying text.

[140] See Claim 11, supra, and Claim 18, infra, for a discussion on the permissive, death-selection mandate of Miss. Code Ann. 99-19-101(2)(d) and the distinction of merely advising the jury on this permissive mandate from instructing a juror that mercy permits him to vote for life even though that juror has otherwise selected death.

CLAIM 13

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-112 OR D-113 IN THE JURY CHARGE

In all criminal cases, the deadlocked jury resulting in a mistrial is a constitutionally acceptable result. Arizona v. Washington, 434 U.S. 497, 510 n. 27 (1978). As the ultimate goal in a civilized society is a fair judgment, there are occasions where deadlock simply is the just result. United States v. Mendoza-Navarro, 486 F.Supp.2d 592, 594 (W.D. Tex. 2006).

Under Miss. Code Ann. 99-19-103, the failure of the capital sentencing jury to reach a unanimous verdict in Mississippi is statutorily enacted as a legally acceptable result. Smith v. State, 729 So. 2d 1191, 1221 (Miss. 1998) (the trial judge shall determine if a reasonable time to determine sentence has passed and, if so, the trial judge shall dismiss the jury); see also State v. Hunt, 558 A.2d 1259, 1286 (N.J. 1989) (New Jersey statute, analogous to Miss. Code Ann. 99-19-103, announces "decision not to agree [to sentence at penalty phase] is a legally acceptable outcome, which results not in a mistrial, but in a final verdict"). As a matter of statutory law, the jury's inability to unanimously agree on a sentence within a reasonable time shall constitute a final verdict – the trial court shall sentence the defendant to life without parole. The failure to be unanimous is specifically permitted by law and specifically remedied by operation of law.

Jury Instruction D-112 appears at CP. 1155 and reads as follows: "If you cannot, within a reasonable time, agree as to punishment, I will dismiss you and impose a sentence of life without the benefit of parole. If you cannot agree, know that any of you may inform the bailiff of this."

Jury Instruction D-113 appears at CP. 1156 and reads as follows: "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 [sic] life imprisonment without the possibility of parole or probation."

The State objected to D-112 claiming it was improper under Wilcher v. State.[141] (R. 1249). The trial court refused to give D-112. (R. 1249). Although the State conceded D-113 is a correct statement of law, the State objected to D-113 as it had already been adequately covered in the jury charge. (R. 1249).[142] The trial court refused D-113 as repetitious. (R. 1249).

As implicated in Washington, 434 U.S. at 510, and Mendoza-Navarro, 486 F.Supp. at 594, every criminal defendant is entitled to a jury instruction which not only advises the jury that the defendant may be found guilty only if all elements are proven beyond a reasonable doubt,[143] but also advises the jury that it need not reach a unanimous verdict. People v. Hines, 15 Cal.4th 997, 1069, 64 Cal.Rptr.2d 594, 643-44, 938 P.2d 388, 437-38 (1997). As stated above, this right is statutorily encompassed in the final sentence of Miss. Code Ann. 99-19-103[144] which specifically entertains the possibility of deadlock as to sentence and mandates a remedy for deadlock. Thus, D-112 and D-113 merely embraced the statutory acknowledgement that a deadlocked sentencing jury is a potential result and an acceptable result. See Vicksburg

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[141] The State provides no citation to "Wilcher v. State." (R. 1249). In Wilcher v. State, 863 So. 2d 719, 753 (Miss. 2003), this Court entertained a claim that the trial court should have recused because of bias that was evinced during consideration of a Jury Instruction similar to, but hardly identical to, D-112. This Court held that the statements made by the trial court did not require recusal. Id. This Court did not address the merits of a Jury Instruction advising the jury that it will be dismissed if unable to reach unanimity within a reasonable time in Wilcher, supra. Perhaps the State was referring to a Wilcher disposition other than the one selected by Ms. Fulgham in this footnote. If so, then State has provided no guidance to Ms. Fulgham or to the trial court. If not, then the State's reliance on Wilcher, 863 So. 2d at 753, is inapposite.

[142] If the State and the trial court are correct, then Ms. Fulgham's D-113 claim cannot prevail. Fortunately for this Claim, the trial court never instructed the jury that if it failed to reach a unanimous verdict as to sentence, that failure will "have no effect on the verdict you have already returned at the guilt trial." See CP. 1156. Therefore, the State's contention that D-113 was repetitious is contrived.

[143] Sullivan v. Louisiana, 508 U.S. 275, 278-81 (1993); Jackson v. Virginia, 443 U.S. 307, 315-18 (1979); In Re Winship, 397 U.S. 358 (1970).

[144] "If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of life imprisonment." Miss. Code Ann. 99-19-103.

Chemical Co. v. Thornell, 355 So. 2d 299, 301 (Miss. 1978) (jury instructions relating statutory standards to the jury are properly given in a civil case); Holder v. Kansas Steel Belt, Inc, 582 P.2d 244, 250 (Kansas 1978) (it is proper for jury to be advised of statutory remedy in civil case where statutory remedy is relevant to jury deliberations); see also Hopkinson v. Shillinger, 645 F.Supp. 374, 407-08 (D. Wyo. 1986) (instruction "[i]f the jury is unable to unanimously agree upon the penalty within a reasonable time, the Court will sentence the defendant to life imprisonment").

As the trial court refused to include either D-112 or D-113 in its jury charge, the death sentence must be vacated.

CLAIM 14

THE TRIAL COURT ERRED IN REFUSING ANY AND ALL OF MS. FULGHAM'S "PRESUMPTION OF LIFE" INSTRUCTIONS

A. Introduction

There are four jury instructions submitted by Ms. Fulgham that are at issue in this Claim. They are Instructions D-67, D-68, D-69 and D-77.

The State has the burden of proof at capital sentencing. See Tuilaepa v. California, 512 U.S. 967, 971-72 (1994). This burden is eviscerated if the defendant is forced to prove herself ineligible for death. Damien P. DeLaney, Better to Let Ten Guilty Men Live: The Presumption of Life – A Principle to Govern Capital Sentencing, 14 Cap. Def. J. 283, 290 (2002). Cf Taylor, 436 U.S. at 484 n.12 (while the prosecution must prove all necessary elements beyond a reasonable doubt, the defendant may "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion.") (quoting John Wigmore, Evidence § 2511 (3d ed. 1940). "The presumption of life should ensure that neither the fact that the crime with which the defendant was charged was labeled 'capital' nor the fact that the

prosecution is seeking the death penalty is considered evidence in support of a sentence of death." Beth S. Brinkmann, The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing, 94 Yale L.J. 351, 363 (1984). Unsurprisingly, the United States Supreme Court has acknowledged that it is appropriate to compel "the jury to determine whether the prosecution has proved its case" at capital sentencing – in other words to explicitly place upon the state the burden of persuasion. Bullington v. Missouri, 451 U.S. 430, 444 (1981); see also Arizona v. Rumsey, 467 U.S. 203, 209-11 (1984).[145]

In Bullington, 451 U.S. at 446, the Court noted the importance in sentencing of the government's burden of persuasion by proof *beyond a reasonable doubt*, which mandated the extension of guilt-phase trial rights to the sentencing phase. See Esparza, 310 F.3d at 421 (relying on Gardner v. Florida, 430 U.S. 449 (1977)); see also Monge, 524 U.S. at 732 (1998); Dycus, 440 So. 2d at 257-58 (Miss. 1983). In Apprendi, supra, and Ring, supra, the reasoning of In Re Winship, 397 U.S. 358 (1970) was applied to require the reasonable doubt rule to apply to facts increasing the range of punishment. See Claim 5, supra. Mississippi's capital-sentencing scheme – indeed, every constitutional sentencing scheme – requires a discrete element to be proven at sentencing which would justify imposition of a sentence greater than life imprisonment. Ring, supra. "The effect of an incorrect result is that a person guilty of murder, but undeserving of death, could be subjected to death." DeLaney, supra, at 290.

[145] An elementary requirement of the Eighth and Fourteenth Amendment is that the government must satisfy a burden of proof as to aggravation for a death sentence to be imposed. Kansas v. Marsh, 548 U.S. 163, 170-71 (2006) (citing Walton v. Arizona, 497 U.S. 639, 650 (1990) overruled on other grounds at Ring v. Arizona, 536 U.S. 584 (2002)); Turner v. State, 573 So. 2d 657, 668 (Miss. 1990). If the government must satisfy some burden as a precondition to a death sentence, then there is necessarily a presumption of life; if the government produces no evidence at all at the capital sentencing, then the sentence cannot be death. Put differently, concurring with the validity of the preceding sentence dictates the conclusion that there is a presumption of life.

B. Facts

Jury Instruction D-67 was submitted, opposed by the State and refused at R. 1212. D-67, which appears along with its annotations at CP. 1131, reads as follows:

> You are to begin your deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in his case would be life imprisonment. These presumptions remain with Ms. Fulgham throughout the sentencing hearing and can only be overcome if the prosecution convinces each one of you, beyond a reasonable doubt, that death is the only appropriate punishment.

Jury Instruction D-68 was submitted, opposed by the State and refused at R. 1212-13. D-68, which appears along with its annotations at CP. 1132, reads as follows:

> The State has the sole burden to satisfy you that the death penalty is appropriate.
>
> Ms. Fulgham has no burden to produce evidence or to prove anything to you in this sentencing proceeding.
>
> Ms. Fulgham has no duty to present evidence which overcomes any aggravating circumstance.
>
> Ms. Fulgham has no burden to satisfy you that any sentence, let alone a sentence other than death, is appropriate.
>
> Ms. Fulgham is presumed to deserve a sentence of life imprisonment, and it is the prosecution's burden to convince you beyond a reasonable doubt that death is the appropriate punishment.
>
> As such, even if you find that aggravation outweighs mitigation, if the State has not satisfied you that death is the appropriate punishment, you must not return sentence of death.

Jury Instruction D-69 was submitted, opposed by the State and refused at R. 1213-14. D-69, which appears along with its annotations at CP. 1385, reads as follows:

> You are never required to return a sentence of death to this Court.
> Indeed, you must begin with the presumption that a sentence less than death is appropriate.

Jury Instruction D-77 was submitted, opposed by the State and refused at R. 1216. D-77, which appears along with its annotation at CP. 1137, reads as follows:

> The fact that the prosecution has alleged that the aggravating circumstance exists is not entitled to any weight. To the contrary, you are to presume it does not exist. That presumption remains unless each and every one of you is convinced that each of the elements of one or more of the alleged aggravating circumstances has been proved beyond a reasonable doubt. You are the sole and exclusive judges of the facts and evidence. It is your duty alone to determine if the prosecution has met its burden of proof with respect to the alleged aggravating circumstances. If you are unable to unanimously agree beyond a reasonable doubt that one or more of the alleged aggravating circumstances exists in this case, it is your duty to cease deliberations.

C. Discussion

In addition to the discussion of law in Part A of this Claim and Footnote 145, supra, the Fourteenth Amendment precludes a state from depriving an individual of "life, liberty or property, without due process of law." Ms. Fulgham has a due process right to the presumption that life is the appropriate sentence at penalty phase – a right analogous to the presumption of innocence that due process affords Ms. Fulgham at the culpability phase.[146] The presumption of life is indicative of the State's burden of proof at capital sentencing, Tuilaepa v. California, 512 U.S. 967, 971-72 (1994); Taylor, 436 U.S. at 483, and the "beyond a reasonable doubt" burden of persuasion at capital sentencing. In Re Winship, 397 U.S. 358, 364 (1970); White, 532 So. 2d at 1219; King, 421 So. 2d at 1017-1018; Gray v. State, 351 So. 2d 1342, 1346 (Miss. 1977) ("[a]t the punishment stage of the hearing the [trial] court required the defendant to proceed before the state. This was error because the state has the burden to prove, not only the guilt of the defendant, but also to prove aggravating circumstances"); see also Annotations at CP. 1131; CP. 1132; CP. 1133; CP. 1137. The government's respective burdens are nothing but illusory if Ms.

[146] See Taylor v. Kentucky, 436 U.S. 478, 486 n.13 (explaining the value of the presumption of innocence as a protection of a defendant's entitlement to conviction only by proof beyond a reasonable doubt); Beckwith v. State, 707 So. 2d 547, 592 (Miss. 1997); Heidel v. State, 587 So. 2d 835, 843 (Miss. 1991).

Fulgham is forced to prove herself inappropriate for the death sentence. Yet, it is respectfully submitted that if Ms. Fulgham's death sentence is affirmed, this is precisely the result that will be achieved.

Reliability is a due process concern, White v. Illinois, 502 U.S. 346, 363-64 (1992), with the Fifth and Fourteenth Amendment rights to due process applicable at every stage of criminal procedure[147] including sentencing. United States v. Galbraith, 200 F3d 1006, 1112 (7th Cir. 2000). The Eighth Amendment requires even greater reliability and consistency in capital proceedings; specifically, reliability in the life/death decision. Monge v. California. 524 U.S. 721, 732 (1998); Sawyer v. Smith, 497 U.S. 227, 235 (1990) (citing Caldwell v. Mississippi, 472 U.S. 320, 338 (1985)); Clemons v. Mississippi, 494 U.S. 738, 748 (1990); Note, The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials, 107 Harv. L.Rev. 1923, 1933 (1994). Even more specifically -- and at minimum -- the Eighth and Fourteenth Amendment mandates for reliable death-sentencing determinations require the State to prove something and to prove beyond a reasonable doubt whatever that thing is. The refusal to instruct on this fundamental precept creates a presumption of death: if the State proves nothing, then death is appropriate unless the capital defendant proves something. See Adamson v. Ricketts, 865 F.2d 1011, 1042-1044 (9th Cir. 1988); Jackson v. Dugger, 837 F.2d 1469, 1473-74 (11th Cir. 1988); People v. Tenneson, 788 P.2d. 786, 797 (Colo. 1990) ("[t]o the extent that an instruction embodying a presumption of life imprisonment expresses no more than that before a death sentence can be imposed the jury must be convinced beyond a reasonable doubt that the sentence

[147] Moore v. Dempsey, 261 U.S. 86, 90-91 (1923); see also Montana v. Egelhoff, 518 U.S. 37, 63 (1996); United States v Lovasco, 431 U.S. 783, 790 (1977); Thompson v. City of Louisville, 362 U.S. 199, 203-04 (1960).

should be imposed, it correctly expresses the law"); DeLaney, 14 Cap. Def. J. at 290, 291, 299 (2002); Brinkman, 94 Yale L.J. at 363; see also Footnote 145, supra.

For these reasons, Ms. Fulgham's death sentence must be vacated.

CLAIM 15

IN LIGHT OF CLAIM 2, THE TRIAL COURT ERRED IN REFUSING TO INCLUDE INSTRUCTION D-78 IN THE JURY CHARGE

There is a speculative element to this Claim and to Claim 16, infra. Indeed, rank speculation is the unavoidable and unconstitutional outgrowth of the introduction of extraneous information into the jury room during jury deliberations. When the Holy Bible is introduced into jury deliberations at the specific request of a juror, would the resulting verdict have been salvaged if the jury were properly charged in the first place? While this Claim and Claim 16, infra, may fail as conjecturable ventures in cases where the penalty-phase jury is not provided a Holy Bible during jury deliberations, in this case jury instructions refused by the trial court may have preemptively weakened the impermissible impact of the imported Divine Instructions.

Jury Instruction D-78 appears at CP. 1141 and reads as follows:

> 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 jurors, 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 your fellow jurors, or because of the lateness of the hour, or for the mere purpose of returning a unanimous verdict, or for any other reason whatsoever.
>
> (CP. 1141).

The annotation for D-78 appears at CP. 1141 and reads as follows: "McKoy v. North Carolina 494 U.S. 433, 444 (1990); Caldwell v. Mississippi 472 U.S. 320, 333-341 (1985) (each juror

must individually decide each question involved in the sentencing decision); Williams v. State, 684 So. 2d 1179, 1196 (Miss. 1996) cert. denied 520 U.S. 1145 (1997) (aggravating circumstances must be found unanimously beyond reasonable doubt); Miss. Code Ann. 99-19-103."

The State objected to D-78, claiming D-78 was argumentative. (R. 1217-18). The trial court agreed and refused D-78. (R. 1218).

Ms. Fulgham claims that D-78 was required to be included in the jury charge based on the case authority cited in this Claim and the facts and argument brought to light in Claim 2, supra. The portion of D-78 commanding the jury not to retreat from their opinion "because of pressure from your fellow jurors, or because of the lateness of the hour, or for the mere purpose of returning a unanimous verdict, or for any other reason whatsoever" could have been the difference between life and death in this matter had the jury heard this lawful command ***before*** a juror requested and the jury received a Holy Bible during jury deliberations. See Claim 2, supra. See generally United States v. Rosario-Peralta, 199 F.3d 552, 567 (1st Cir. 1999) cert. denied 531 U.S. 902 (2000); People v. Arnold, 96 N.Y.2d 358, 367-68 (2001); State v. Spruill, 106 A.2d 278, 282 (N.J. 1954).

As briefed in Part C of Claim 2, supra, as the trial court did not ascertain during the trial court's *en masse* interrogation of the jury what portions of the Holy Bible were read (if any), or read aloud (if at all), or if read, then by whom, Ms. Fulgham is uncertain whether D-78 would have been, at least in some way, ameliorative. Ms. Fulgham advances this Claim because the pernicious introduction of the Holy Bible into the jury room during jury deliberations and at the explicit request of a juror may have been preemptively diluted had D-78 been included in the jury charge. Because D-78 was not included in the jury charge and because of the error fully detailed in Claim 2, supra, Ms. Fulgham's death sentence must be vacated.

CLAIM 16

IN LIGHT OF CLAIM 2, THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-96 IN THE JURY CHARGE

Jury Instruction D-96 appears at CP. 1152 and 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.

The annotation for D-96 appears at CP. 1152 and reads as follows: "Ring v. Arizona, 536 U.S. 584-602-03 (2002); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976); Branch v. State, 882 So. 2d 36, 64 (Miss. 2004) cert. denied 125 S.Ct. 1595 (2005) (statement that 'life sentence is no different than a death sentence' is legally erroneous); People v. Memro, 12 Cal.4th 783, 879, 47 Cal. Rptr.2d 219, 271, 905 P.2d 1305, 1357 (1995) cert. denied 519 U.S. 834 (1996)."

The trial court refused D-96. (R. 1234).

In Claim 2, supra, the pall of extrinsic sources of information introduced during jury deliberations is fully examined. See also Claim 15, supra. Had D-96 been given, it would have emphasized to Ms. Fulgham's jurors that, notwithstanding the fact that a juror requested and received a Holy Bible during jury deliberations, death remains the most severe punishment that can be inflicted upon Ms. Fulgham. In the same manner that Jury Instruction D-78 could have, in some way, ameliorated the ruination of Claim 2, supra, Ms. Fulgham submits that D-96 could also have served to preemptively weaken the impact of the introduction of the Holy Bible during jury deliberations. Because D-96 was not included in the jury charge and because of the error fully detailed in Claim 2, supra, Ms. Fulgham's death sentence must be vacated.

CLAIM 17

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-86 IN THE JURY CHARGE

There is no definition of "mitigating circumstance" in Miss. Code Ann. 99-19-101. While Subdivision (6) of that statute lists statutory mitigators, it provides no definition of the term "mitigating circumstance."

As stated in Part C of Claim 14, supra, reliability is a due process concern[148] and the due process clause requires every criminal convictions to be reliable and trustworthy. Donnelly v. DeChristoforo, 416 U.S. 637, 646 (1974) (relying on Miller v. Pate, 386 U.S. 1, 7 (1967)); Thompson v. City of Louisville, 362 U.S. 199, 204 (1960) (where state fails to support all elements of an offense with evidence, resulting conviction violates due process); see Rose v. Clark, 478 U.S. 570, 577-78 (1986) ("[w]ithout these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair"). In addition to Fourteenth Amendment requirements, free-standing Eighth Amendment requirements mandate the reliability of result at a capital sentencing. California v. Brown, 479 U.S. 538, 561 (1987); Caldwell v. Mississippi, 472 U.S. 320, 329 (1985); Flores v. Johnson, 210 F.3d 456, 458-59 (5th Cir. 2000) cert. denied 531 U.S. 987 (2000) (death is final and must not be imposed in an arbitrary and capricious manner). Adequate jury instructions are required to ensure reliable results. Boles v. Stevenson, 379 U.S. 43, 44, 45 (1964); Woody v. United States, 379 F.2d 130, 133 (D.C. Cir. 1967) (Bazelon, J., dissenting); see Brown, 479 U.S. at 561 (reliability in jury instruction at capital penalty phase required by the Eighth Amendment).

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[148] White v. Illinois, 502 U.S. 346, 363-64 (1992).

Where the jury is required to grapple with terms that are not commonly understood or that have a technical meaning peculiar to the law,[149] the defendant is entitled to an instruction on the meaning of the term.[150] Gagliardo v. United States, 366 F.2d 720, 725 (9th Cir. 1966) (failure to define term "indecent" constituted error); State v. Currier, 662 A.2d 204, 205-06 (Me. 1995) (failure to define term "public way" constituted error); Williams v. State, 554 P.2d 842, 847 (Okla. Crim. App. 1976) (failure to define term "proximate cause" constituted error); State v. Mundy, 144 S.E.2d 572, 573 (N.C. 1965) (failure to define noun phrase "felonious intent" constituted error); People v. Pitmon, 170 Cal.App.3d 38, 52, 216 Cal.Rptr. 221, 228 (Cal. Ct. App. 3 1985) (failure to define term "force" constituted error); People v. Hill, 141 Cal.App. 3d 661, 669. 190 Cal.Rptr. 628, 633 (Cal. Ct. App 4 1983) ("[t]he jury here was ignorant of the nature of the intent required for simple kidnap and the nature of the acts required to convict of aggravated kidnap. Instructing as to an uncharged offense while failing to give appropriate instructions as to charged offenses is not due process"); People v. McElheny, 137 Cal.App.3d 396, 403-04, 187 Cal.Rptr. 39, 44 (Cal. Ct. App. 1982) (failure to define term "assault" constituted error).

Jury Instruction D-86 appears at CP. 1146 and reads as follows:

> 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.

The annotation for D-86 appears at CP. 1146 and reads as follows: "Brown v. State, 749 So. 2d 82, 91 (Miss. 1999) (citing Eddmonds v. Peters, 93 F.3d 1307, 1321 (7th Cir. 1996)."

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[149] In the State of Indiana, for example, a party to a civil action has a right to a jury instruction defining "mitigating damages." Compare Abercrombie v. State, 478 N.E.2d 1236, 1239 (Ind. 1985) with Hahn v. Ford Motor Co., 434 N.E.2d 943, 955 (Ind. Ct. App. 1982). If civil parties, who have no Sixth or Eighth Amendment right to a reliable result, are entitled to a jury instruction on what constitutes "mitigating damages" in the jury calculation of mere dollars and cents, surely Ms. Fulgham, a human being with Sixth, Eighth and Fourteenth Amendment rights to a reliable result, is entitled to a jury instruction defining "mitigating circumstance" in the decision of whether she lives or she is put to death.

[150] People v. Kimbrel, 120 Cal.App.3d 869, 872, 174 Cal.Rptr. 816, 818 (Cal. App. 1981).

The State objected to D-86 stating "[t]he Brown case does not authorize this instruction.[151] There's not authority for the granting of it, and it's somewhat repetitious,[152] as well." (R. 1228). The trial court refused D-86. (R. 1228).

Based on the argument and case law recited above, it is respectfully submitted that D-86 correctly stated the law and that no other instruction in the jury charge contained this correct statement of law. There is no justification for refusing to give an instruction that will clarify the jury's task at sentencing. See Spivey v. Zant, 661 F.2d 464, 470-71 (5th Cir. 1981). The trial court is duty bound to clearly explain the law, Brazile v. State, 514 So. 2d 325, 326 (Miss. 1987), and the jury must be instructed on any ground of law on which it may rest its decision. Sheppard v. State, 777 So. 2d 659, 663 (Miss. 2000). A trial court's refusal to grant an instruction is an abuse of discretion where the requested instruction was a correct statement of the law; and the instruction was not substantially covered elsewhere in the jury charges; and the instruction was 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. Chatman v. State, 761 So. 2d 851, 845-55

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[151] D-86 is taken *verbatim* from Brown, 749 So. 2d at 91. As detailed in Claim 10, supra, jury instructions must, at minimum, provide adequate guidance to the jury as to governing law. Kolberg v. State, 829 So. 2d 29, 45 (Miss. 2002) cert. denied 538 U.S. 981 (2003) (citing cases); see also People v. Marquez, 963 F.2d 1311, 1315 (9th Cir. 1992); State v. Miller, 400 S.E.2d 611, 612-13 (W.Va. 1990); Atterberry v. State, 731 P.2d 420, 422 (Okla. Crim. App. 1986); Mabry v. State, 248 Miss. 149, 150-52, 158 So. 2d 688, 688-89 (1963). This Court is the final expositor of the meaning of Mississippi law. Fairley v. George County, 871 So. 2d 713, 718 (Miss. 2004); City of Belmont v. Miss. Tax Comm., 860 So. 2d 289, 307 (Miss. 2003); In Re R.G., 632 So. 2d 953, 955 (Miss. 1994); Bailey v. State, 463 So. 2d 1059, 1062 (Miss. 1985); Miss. Tax Comm. v. Brown, 188 Miss. 483, 195 So. 2d 465, 469-70 (1940). When the appellate courts of Mississippi answer a question, that answer has universal application. Courts shall apply principles of law to ensure like cases shall be decided alike. United Services Auto Ass'n v. Stewart, 919 So. 2d 24, 30 (Miss. 2005); State ex rel. Moore v. Molpus, 578 So. 2d 624, 634 (Miss. 1991); Turner v. Duke, 736 So. 2d 495, 497-98 (Miss. App. 1999). Because of this, the appearance of language in an appellate opinion requiring the law pronounced in that opinion to be included in a jury charge is unnecessary. There is no "magic language" required in an appellate opinion noticing trial courts that the content of that appellate opinion must be included in a jury instruction. See Claim 10, supra. Trial court must decide whether – in a particular case and under particular facts – a party is entitled have a particular statement of law included in the jury charge.

[152] The State does not reveal the portion of the jury charge that D-86 repeats. See Footnotes 139 and 142, supra.

(Miss. 2000); Bailey v. State, 837 So. 2d 228, 233 (Miss. Ct. App. 2003); United States v. Davis, 132 F.2d 1092 (5th Cir. 1998).

For these reasons, it is respectfully submitted that the trial court erred in refusing to include D-86 in the jury charge. Therefore, Ms. Fulgham's death sentence must be vacated.

CLAIM 18

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-91A IN THE JURY CHARGE

Jury Instruction D-91A is a mercy instruction.

Jury Instruction D-91A was submitted by Ms. Fulgham as a mercy instruction.[153]

Jury Instruction D-91A was the only mercy instruction submitted by Ms. Fulgham. D-91A appears at CP. 1150 and reads as follows:

> 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.

The annotation for D-91A appears at CP. 1150 and reads as follows: "Marsh v. Kansas, ____ U.S. ____, 126 S.Ct. 2516, 2527, 165 L.Ed.2d 429, ___ Slip Op. 04-1170, at pg. 12 (June 26, 2006). "The 'mercy' jury instruction [which is recited above *verbatim*] alone forecloses the possibility of Furman-type error[.]" Marsh, ___ U.S. at ___, 126 S.Ct. at 2527, n. 3, Slip Op. 04-1170, pg. 12, n.3."[154] During April 25, 2006, oral argument before the United States Supreme Court in Marsh, the Attorney General for the State of Kansas reminded the Court that the jury

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[153] After the State's numerous contentions that previous instructions submitted by Ms. Fulgham were nothing more than mercy instructions, Ms. Fulgham was finally able to submit a mercy instruction with D-91A. The following colloquy occurred: "By the Court: D-91A? By Mr. Lappan: Your Honor, we submit that, and that is – By the Court: It's a mercy instruction. By Mr. Lappan: That is mercy, but that's the – By the Court: It is a mercy instruction." (R. 1231).

[154] Official citations are now available for Marsh. The official citation for this annotation is: Marsh v. Kansas, 543 U.S. 163, 176 n.3 (2006)

was properly instructed to consider mercy. See www.supremecourtus.gov/oral_arguments/Argument_transcripts/04-1170b.pdf (pages 3-4, 13-14).

It is not Ms. Fulgham's contention that a capital defendant is always entitled to Instruction D-91A. It is Ms. Fulgham's contention, however, that she was constitutionally entitled to Instruction D-91A in light of the instructional error briefed in Claims 8 through 17, supra. As relied upon in Marsh, supra and as is the fulcrum of Claim 21, infra, the content of the jury charge effects the reliability of a death sentence under Furman v. Georgia, 408 U.S. 238 (1972). Because D-91A would have remedied some of the instructional error briefed supra, and because D-91A "alone forecloses the possibility of Furman-type error[,]" the failure to include D-91A in the jury charge requires Ms. Fulgham's death sentence to be vacated.

CLAIM 19

THE TRIAL COURT ERRED IN DENYING MS. MALLETTE'S PRE-TRIAL MOTION TO WITHDRAW AS COUNSEL

In Claim 6, supra, Ms. Fulgham's suppression claim matured with the State's use of the June 2 custodial statement during its penalty-phase cross-examination of Dr. Webb.

In this Claim, and for the same reason, Ms. Fulgham contends the trial court erred in overruling co-counsel Stephanie Mallette's motion to withdraw as co-counsel on October 30, 2006, (R. 229-30), and erred in overruling Ms. Fulgham's motion to reconsider this ruling on November 6, 2006. (CP. 921).

I. Facts

To avoid needless repetition of facts, Claim 6, supra, is respectfully incorporated herein.

When the prosecutor advised Ms. Fulgham's penalty-phase jury that Ms. Fulgham "completely blames everything on her 13-year-old brother, and says he did it, he did it" during her June 2 custodial statement, (R. 1099), the State unilaterally placed into issue the events and

the circumstances surrounding that June 2 custodial statement. This was the basis for Ms. Mallette's pre-trial motion to withdraw as counsel. (CP. 800-04).

Ms. Mallette was required to testify at the March 28, 2006, evidentiary hearing to suppress Ms. Fulgham's June 2 custodial statement as the parties were unable to enter into a stipulation of facts regarding Ms. Fulgham's motion to suppress. (R. 139-40). Maintaining that Ms. Mallette's testimony on the issue of suppression was necessary, the trial court ruled that Ms. Mallette should be sequestered in the witness room until being called during the defendant's case-in-chief. (R. 140). Ms. Mallette's testimony at the evidentiary hearing appears at R. 178-197.

As the incorporated facts from Part I of Claim 6, supra, and the immediately preceding paragraphs constitute the necessary factual predicate for this Claim, Ms. Fulgham now proceeds to a discussion of relevant law.

II. Analysis

Nothing about Ms. Mallette's September 20, 2006, motion to withdraw, (CP. 800-04), was left to speculation. Sitting as fact finder at the March 28, 2006, suppression hearing, the trial court was abundantly acquainted with the content of Ms. Mallette's trial testimony.[155] It is conceded that the materiality of Ms. Mallette's trial testimony was contingent,[156] but that contingency evaporated at the State's unilateral election to use Ms. Fulgham's June 2 custodial statement during its cross-examination of Dr. Webb.[157]

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[155] Ms. Mallette's testimony concerning police interference with Ms. Fulgham's post-attachment right to counsel was bolstered ***in its entirety*** by Deputy Tommy Whitfield. See this Claim, infra.

[156] As Ms. Mallette said during the October 30, 2006, argument of her motion to withdraw: "So I would be a witness with regard to the voluntariness of the statement if the State seeks to introduce that statement, which I'm assuming they're going to. I think that's a very safe assumption. So, obviously, we don't know what the State's going to do." (R. 226).

[157] As with Claim 6, supra, 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 Ms. Fulgham's jury. It did however.

Mississippi Rule of Professional Responsibility 3.7(a) prohibits a lawyer from appearing at trial where that lawyer is likely to be a witness. As the trial court stated at the hearing on Ms. Mallette's motion to withdraw: "I think Mississippi law is pretty clear on it, too. If you are a material and necessary witness in the course of a trial, you have to file a motion to withdraw." (R. 226). Citing legal authority, Ms. Mallette annexed a discussion of law in support of her motion to withdraw. (CP. 803-04). During argument of her motion to withdraw, Ms. Mallette stood on that annexed discussion. (R. 226). This discussion of law at CP. 803-04, which cites several cases, is respectfully incorporated into this Claim to avoid needless duplication. In addition to the authority cited by Ms. Mallette at CP. 803-04, the following is offered in further support of her position: United States v. Vereen, 429 F.2d 713, 715 (D.C. Cir. 1970); Cornell v. State, 878 P.2d 1352, 1371 (Ariz. 1994) (citing People v. Goldstein, 130 Cal.App.3d 1024, 1031-32, 182 Cal.Rtpr. 207, 211 (Cal. App. 1982)); Calton Properties, Inc. v. Ken's Discount Building Materials, Inc., 669 S.W.2d 469, 470-71 (Ark. 1984); State v. Smith, 856 A.2d 466, 476 (Conn. App. 2004) aff'd on different grounds at 907 A.2d 73 (Conn. 2006); 81 Am.Jur.2d Witnesses, sec. 225; see also State v. Vocatura, 922 A.2d 110, 116-17 (R.I. 2007).

The trial court ruled:

> Ms. Mallette didn't see her client that day [June 2, 2003]. I think when she arrived at the jail, the officers did not allow her entry during the interview and that's it.[158] That's her testimony. I cannot see how she can be used as a material

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That unilateral decision carries constitutional consequences. Claim 6, supra, and this Claim are two such consequences.

[158] In finding that Ms. Mallette's testimony material to whether Kristi Fulgham's June 2 custodial statement was voluntary would be limited to (i) Ms. Mallette arrived at the jail and (ii) police did not allow Ms. Mallette to consult with Ms. Fulgham, the trial court enters a finding that undermines the trial court's ruling on Ms. Mallette's motion to withdraw in two respects. First, assume *arguendo* that Ms. Mallette's testimony before Ms. Fulgham's jury would be limited to "when she arrived at the jail, the officers did not allow her entry during the interview and that's it." This testimony, in itself, ***would*** be material to Ms. Fulgham's contention that her June 2 custodial statement was involuntary and otherwise unreliable. See cases cited to trial court in Motion 041 at CP. 912-14 and 916. Even if the trial court's finding "when she arrived at the jail, the officers did not allow her entry during the interview and that's it" is deemed flawless on appeal, the finding, in itself, contradicts any conclusion that Ms. Mallette had nothing material to convey to Ms. Fulgham's jury should the State elect to use the June 2 statement. Second, in

and necessary witness in the course of the trial, or why she should be allowed to withdraw. Her record is preserved on that issue.

(R. 230).

The trial court's finding that Ms. Mallette's testimony at trial would be limited to her recounting the refusal of police to permit her to consult with Ms. Fulgham once Ms. Mallette arrived at the Oktibbeha County Jail on June 2 is clearly erroneous.[159] Contrary to this finding, Ms. Mallette testified at the suppression hearing:

- Between 2:15 and 2:30 p.m. on Monday, June 2, 2003, she received a call at her law office from Oktibbeha County Deputy Sheriff Tommy Whitfield. (R. 181-82).
- Deputy Whitfield told Ms. Mallette that Ms. Fulgham had communicated to police that she wanted to take a polygraph. (R. 182).
- Ms. Mallette told Deputy Whitfield: "No, absolutely not, under any conditions, is – is she going to take a polygraph exam. Don't do anything. I'll be right there." (R. 182).
- That Ms. Mallette drove from her office to the jail, arriving at the jail about 2:45 p.m. (R. 182).
- That, notwithstanding all of the above, police did interrogate Ms. Fulgham, conducting a polygraph incident to that interrogation. (R.183).
- That, notwithstanding all of the above, police refused to allow Ms. Mallette to consult with Ms. Fulgham precisely because police would not permit the interrogation to be interrupted by post-attachment counsel. (R. 183).

The State called Deputy Whitfield in rebuttal at the suppression hearing. (R. 198). Although a rebuttal witness, Deputy Whitfield ***confirmed*** every point of Ms. Mallette's testimony inventoried above,[160] solidifying the clearly erroneous nature of the trial court's

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actuality, Ms. Mallette's testimony would ***not*** be limited to this single statement. See Footnotes 159 and 160, infra, and their accompanying text. The sworn testimony of Ms. Mallette and the fully corroborative testimony of Deputy Whitfield at the March 28 evidentiary hearing negates the trial court's determination that Ms. Mallette's sole material point to the jury would be that police did not permit her to consult with Ms. Fulgham during Ms. Fulgham's June 2, post-attachment interrogation.

[159] See Part III of this Claim.

[160] Deputy Whitfield confirmed that he phoned Ms. Mallette at her office on the afternoon of June 2, 2003 and told her that Ms. Fulgham wanted to take a polygraph. (R. 203). He called Ms. Mallette because he knew that Ms. Mallete was Ms. Fulgham's attorney. (R. 204). He testified that he told Oktibbeha County Chief Deputy George Carrithers that Ms. Mallette did not agree to having Ms. Fulgham undergo questioning. (R. 200; 204). He testified that Ms. Mallette came to the jail and that he met Ms. Mallette outside of the jail. (R. 204-05). He testified that Ms.

fractional determination that "the officers did not allow her entry during the interview and that's it." Deputy Whitfield bolstered Ms. Mallette's testimony rather than rebut it.

The fact that the trial court rules a custodial statement to be constitutionally admissible shall not foreclose jury determinations as to the facts surrounding the custodial statement. Thus, when the State decides to use a custodial statement at trial, "a defendant is entitled to submit evidence and have the jury pass upon the factual issues of its truth and voluntariness and upon its weight and credibility." Wilson v. State, 451 So. 2d 724, 726 (Miss. 1984) (relying on Anderson v. State, 241 So. 2d 677 (Miss. 1970); see United States v. Kampiles, 609 F.2d 1233, 1243 (7th Cir. 1979); People v. Gilliam, 670 N.E.2d 606, 619 (Ill. 1996) cert. denied 520 U.S. 1105 (1997); Commonwealth v. Adams, 617 N.E.2d 594, 597-98 (Mass. 1993); Palmes v. State, 397 So. 2d 648, 653 (Fla. 1981) cert. denied 454 U.S. 882 (1981); State v. Jenkins, 232 S.E.2d 648, 653 (N.C. 1977); Witt v. Commonwealth, 212 S.E.2d 293, 296-97 (Va. 1975); Ross v. State, 504 S.W.2d 862, 864 (Tex. Crim. App. 1974); see also Crane v. Kentucky, 476 U.S. 683, 688-89 (1986); Malinsky v. New York, 324 U.S. 401, 404 (1951) (custodial statement should be considered by jury only if jury only if jury believes statement is voluntary); Parent v. State, 18 P.3d 348, 353-54 (Okla. Crim. App. 2000). Therefore, the following points, all of which were before the trial court well in advance of the trial court's October 30 ruling on Ms. Mallette's motion to withdraw and all of which were sworn to by Ms. Mallette and confirmed under oath by Deputy Whitfield, were relevant to the truth, voluntariness, weight and credibility of Ms. Fulgham's June 2, post-attachment interrogation: (A) that police were concerned enough about securing the approval of post-attachment counsel for Ms. Fulgham's request for polygraphy to

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Mallette communicated to him that she had come to the jail to meet with Ms. Fulgham. (R. 201-02; 205). He testified that he did not let Ms. Mallette into the jail to meet with Ms. Fulgham, (R. 205), because Ms. Fulgham was being questioned. (R. 201-02). He testified that Ms. Mallette could not have lawfully walked past him into the jail to meet with Ms. Fulgham. (R. 206). In every respect, Deputy Whitfield provided sworn confirmation to the testimony Ms. Mallette could have presented to Ms. Fulgham's jury material to a contention that her June 2 custodial statement was involuntary.

telephone post-attachment counsel at her law office and seek that approval; (B) that post-attachment counsel did not approve; (C) that post-attachment counsel told police not to interrogate her client; (D) that post-attachment counsel told police that she would come to the jail; (E) that post-attachment counsel did arrive at the jail to consult with her client; (F) that police refused to permit post-attachment counsel to counsel to consult with her client entirely because police were interrogating her client. Because Ms. Mallette could testify to all of these facts – facts that were confirmed by Deputy Whitfield -- Ms. Mallette moved to withdraw as counsel. Because the State insisted on using Ms. Fulgham's June 2 custodial statement during the penalty phase, Ms. Fulgham was prohibited from responding to this use because the trial court had denied Ms. Mallette's motion to withdraw. Ms. Fulgham is entitled to conflict-free counsel who can represent her to the best of their ability – particularly in a proceeding where the party who insists on using the infected custodial statements also seeks her execution.

The trial court erred in refusing to grant Ms. Mallette's motion to withdraw on October 30, 2006. The trial court erred in refusing to reconsider this ruling on November 6, 2006. Because Ms. Fulgham was represented by conflicted counsel at her penalty phase, her death sentence must be vacated.

III. Standard of Review

The utter indefensibility of the trial court's determination that the totality of Ms. Mallette's trial testimony would be limited to "the officers did not allow her entry during the interview and that's it" behooves a discussion about the appropriate standard of review.

As stated in this Claim, questions of fact are reviewed for clear error. Pierce v. Underwood, 487 U.S. 552, 557-58 (1988). While "[i]t is idle to try and unpack the meaning of the phrase 'clearly erroneous,'" United States v. ALCOA, 148 F.2d 416, 433 (2nd Cir. 1945) (opinion by Hand, J.), a trial court commits clear error where the reviewing court "is left with a

firm and definite conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Ponthieux v. State, 532 So. 2d 1239, 1244 (Miss. 1988); Divine v. State, 947 So. 2d 1017, 1020 (Miss. App. 2007) (citing cases).

Is clear error the proper standard upon which to review the trial court's denial of Ms. Mallette's motion to withdraw?

A credibility determination cannot explain the trial court's failure to find the facts inventoried in Part II of this Claim: Ms. Mallette's testimony and Deputy Whitfield's testimony interlock in all material respects. The State's rebuttal witness rebutted nothing. Instead, the State's rebuttal witness provided the trial court a sworn confirmation of Ms. Mallette's testimony.

For the same reason, an "alternative interpretation of facts" offers no plausible explanation for the trial court's failure to find the facts inventoried by Ms. Fulgham in Part II of this Claim -- Ms. Mallette's testimony and Deputy Whitfield's testimony interlock in all material respects.

There simply are no facts in dispute.

As there are no facts in dispute, it is respectfully submitted that the "clear error" standard is inapplicable. As there was no issue of fact before the trial court, Ms. Mallette's motion to withdraw was reconstituted as a question of law. See, e.g., United States v. Wright, 496 F.3d 371, 374 (5th Cir. 2007); United States v. Hernandez, 477 F.3d 210, 213 (5th Cir. 2007); United States v. Jaime, 473 F.3d 178, 181 (5th Cir. 2006) cert. denied 127 S.Ct. 2445 (2007); United States v. Perez, 217 F.3d 323, 327 (5th Cir. 2000) cert. denied 531 U.S. 973 (2000); State v. Boilard, 488 A.2d 1380, 1384 (Me. 1985); State v. Washington, 358 N.W.2d 304, 307 (Wis. App. 1984); State v. Caserta, 463 N.E.2d 190, 193 (Ill. App. 1984); see also Courtney v. Merchants and Mfrs. Bank, 680 So. 2d 866, 868 (Miss. 1996) ("[t]he pertinent facts of the case

are not in dispute among the parties, and it is thus proper for this Court to decide the case as a matter of law"); Adams v. Miss. State Oil & Gas Board, 854 So. 2d 7, 8 (Miss. App. 2003) cert. denied 859 So. 2d 392 (Miss. 2003). As a question of law, this Court must review the trial court's refusal to grant Ms. Mallette's motion to withdraw *de novo*. Pierce, supra; Delashmit v. State, 991 So. 2d 1215, 1218 (Miss. 2008).

Ms. Fulgham includes the preceding discussion in this Part entirely for completeness. The State explicitly chose not to respond to Ms. Mallette's motion to withdraw.[161] In doing so, the State elected not to introduce facts which may have created some question of fact for the trial court as there otherwise was none.

The entirety of the trial court's determination has been briefed supra. Therefore, even though it is appropriate for this Court to decide this Claim *de novo*, if this Court applies the more deferential standard of clear error, Ms. Fulgham respectfully submits that she nonetheless prevails under this Claim. Trial courts may not ignore uncontested material facts which mandate the relief sought by a capital defendant. When a trial court does so, relief is assured -- either under an appropriate *de novo* regime or under the inappropriate, more deferential standard of clear error.

The trial court's decision to deny Ms. Mallett's motion to withdraw was erroneous. The State's subsequent decision to use Ms. Fulgham's June 2 custodial statement during the penalty-phase rendered the trial court's erroneous decision reversible. Ms. Fulgham has a right to be represented by conflict-free counsel in the trial for her life. The right was abrogated for reasons stated in this Claim. Ms. Fulgham's death sentence must be vacated.

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[161] "[W]ith respect as to whether or not to let Ms. Mallette out of the case or not, that's a decision we're going to leave with the Court, and we're not going to take the position. They don't tell the State who prosecutes the case, and we don't want to be put in a position for some appellate court to look and say, well, gosh, the State was even picking who her lawyer was." (R. 227).

CLAIM 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. THIS ERROR WAS EXACERBATED WHEN THE STATE EMPHASIZED MS. FULGHAM WAS REPRESENTED BY THE OFFICE OF CAPITAL DEFENSE COUNSEL DURING PENALTY-PHASE SUMMATION

In addition to presenting irrelevant and inflammatory evidence to Ms. Fulgham's jury that she is a promiscuous,[162] greedy,[163] incestuous pedophile,[164] the State also presented irrelevant and inflammatory evidence to the jury that Ms. Fulgham was indigent and represented by court-appointed counsel.

Facts

During cross-examination of Dr. Webb at the penalty phase, the following took place:

> [BY MS. FAVER]: You have never testified for this district; is that right?
>
> [BY DR. WEBB]: That's correct, I have not.
>
> [BY MS. FAVER]: And just so we understand, your testimony today for the Office of Capital Defense, that's who hired you, right?
>
> [BY DR. WEBB]: That is correct.
>
> [BY MS. FAVER]: It wasn't Ms. Mallette, Ms. Fulgham's local attorney that hired you to come into court today, was it?
>
> [BY MR. LAPPAN]: Your Honor, objection to the relevance of who hired Dr. Webb.
>
> [BY THE COURT]: Overruled. It is relevant.
>
> [BY MS. FAVER]: Ms. Mallette, her local attorney, she didn't hire you, did she?
>
> [BY DR. WEBB]: That's correct, she did not.

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[162] See Claim 3 of this Brief, supra.

[163] See Claim 23 of this Brief, infra.

[164] See Claim 24 of this Brief, infra.

> [BY MS. FAVER]: It was specifically the Office of Capital Defense out of Jackson that hired you?
>
> [BY DR. WEBB]: That's correct.
>
> (R. 1088-89).

As a review of the record makes apparent, Ms. Mallette did not ask a single question during *voir dire*. Ms. Mallette did not question any witness at trial. Ms. Mallette did not address the jury at opening statement or in summation.[165]

Similar to several other Claims in this brief, the damage the State created during the presentation of evidence was magnified during the State's summation. During the State's final argument at penalty-phase summation,[166] Mr. Clark stated the following:

> Joey didn't have a lawyer to come up and argue mitigating circumstances for him. He didn't have an Office of Capital Defense Counsel to do an intense social history[167] or a psychiatrist from Jackson to claim he had posttraumatic stress disorder.
>
> (R. 1280).

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[165] Ms. Mallette was silent for the entire trial of Kristi Fulgham. The trial court's error in refusing to grant Ms. Mallette's pre-trial application to withdraw as Ms. Fulgham's attorney, see Claim 19, supra, made this a practical necessity. The trial court required Ms. Mallette to remain one of Ms. Fulgham's trial attorneys, and the effect of that decision required Ms. Mallette to remain silent throughout the trial in the event the State elected to use Ms. Fulgham's June 2 custodial statement.

[166] As this statement was made during the State's rebuttal, Ms. Fulgham had no opportunity to respond. See Part C of Claim 3, supra.

[167] It is utterly perverse for the State to mention Ms. Fulgham's intensive social history. In doing so, the State belittles Ms. Fulgham for adducing Lockett evidence that was never adduced! Ms. Fulgham's jury never heard her Lockett evidence because the State underhandedly convinced the trial court to exclude it from jury consideration. See Claim 1, supra. Thus, after the State unconstitutionally ***prevented*** presentation of Ms. Fulgham's duly-noticed mitigation, the State then grumbled that it was unfair for Ms. Fulgham to have presented it. A prosecutor is simply not permitted to fabricate. See e.g., Footnote 79, supra; see Paxton v. Ward, 199 F.3d 1197, 1216-18 (10th Cir. 1999) (prosecutor commits forensic misconduct when prosecutor adduces evidence of a prior case involving defendant and then "mendaciously" claims ignorance as to why defendant's case was dismissed when prosecutor knew sustained objections prevented the defendant from presenting evidence that case was dismissed by the State after defendant passed a polygraph); see also Miller v. Pate, 386 U.S. 1, 5-7 (1967); United States v. Udechukwu, 11 F.3d 1101 1105-06, (3rd Cir. 1993) (prosecutor commits forensic misconduct when prosecutor puts forward facts the prosecutor knows to be untrue); United States v. Toney, 599 F.2d 787, 790-91 (6th Cir. 1979) (same); State v. Streitz, 150 N.W.2d 33, 34-35 (Minn. 1967) (same).

Law

The jury should never be advised that the defendant is represented by counsel appointed by the Court. See United States v. Naylor, 566 F.2d 942, 943 (5th Cir. 1978) (court-appointed attorney advising jury that he is court-appointed is "not commendable"); Ploof v. State, 856 A.2d 539, 547 (Del. 2004) (no error where prosecution's reference to defense counsel as "public defender" was merely a cumulative reference and was (a) stricken by the trial court followed by (b) a jury instruction to disregarding the improper reference); Sanders v. State, 429 So. 2d 245, 252 (Miss. 1983) ("condemning" the practice of court-appointed attorneys advising juries that they are "court appointed" and stating that this practice should be stopped immediately); State v. Marks, 211 So. 2d 261, 265 (La. 1968) vacated on other grounds at 408 U.S. 933 (1972) (no error occurs where trial court statement to venire that defendant was represented by court-appointed counsel was followed by curative instruction to disregard that statement); People v. Busby, No. D049606, 2007 WL 466131, *8 (Cal. App. Feb. 14, 2007) (prosecutor's comments at summation about "public defender school" are "unfortunate and improper");[168] see also State v. Doporto, 935 P.2d 484, 495 (Utah 1997) (prosecutorial comments concerning the indigency of the defendant (or lack thereof) are "irrelevant and inappropriate"). Cf. State v. Bailey, 677 N.W.2d 380, 404 (Minn. 2004); State v. Keenan, 613 N.E.2d 203, 206-07 (Ohio 1993); State v. Pierce, 439 N.W.2d 435, 445-46 (Neb. 1989); Compton v. State, 460 So. 2d 847, 848 (Miss. 1984)[169]. See generally United States v. Fahnbulleh, 748 F.2d 473, 478 (6th Cir. 1984) cert.

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[168] On federal habeas for the same prosecution, the United States District Court for the Central District of California found even though the state prosecutor's comment that defense counsel's tactics were learned in "public defender school" was invited, it remained "arguably improper." Busby v. Felker, ___ F.Supp.2d , ___, No.EDCV-08-0410-DOC (MLG), 2008 WL 5099634 (C.D.Cal., Dec. 3, 2008).

[169] During unrecorded *voir dire*, the circuit judge informed the venire that defense counsel was court appointed. Compton, 460 So. 2d at 848. Back on the record, defense counsel moved for mistrial on grounds that the court's statement "might prejudice" the defendant. Id. The circuit court then offered defense counsel an opportunity to present evidence of prejudice. Id. Defense counsel declined the court's invitation. Id. On appeal, this Court held

denied 471 U.S. 1139 (1985) ("the district judge brought the jury back into the courtroom and instructed them that whether Collazos's attorney was retained or appointed had nothing to do with the facts or law in the case, and directed the jury to return a verdict under the instructions given by the court"). Cf. Chalupiak v. United States, 223 F.2d 522, 522-23 (6th Cir. 1955) (inference that can be drawn from trial court's commentary in the presence of the jury regarding the defendant's court-appointed attorney is that the defendant wanted his attorney to present a questionable defense). If the rationale for raising the fact that Ms. Fulgham was represented by the Office of Capital Defense Counsel was not to comment on the fact that Ms. Fulgham is indigent and represented by appointed counsel, then was the reference simply a broadside disparagement of defense counsel? If so, such a reference is also irrelevant and improper. See, e.g., United States v. Diaz-Carreon, 915 F.2d 951, 958 (5th Cir. 1990); see United States v. Xiong, 262 F.3d 762, 675 (7th Cir. 2001) (disparaging "remarks can prejudice the defendant by directing the jury's attention away from the legal issues in or by inducing the jury to give greater weight to the government's view of the case"). See generally Dozier v. State, 257 So. 2d 857, 860 (Miss. 1975) ("intemperate language which reflected upon the integrity of counsel for appellant" was regrettable and "by no means approved by this Court"); People v. Lombardi, 20 N.Y.2d 266, 272-73, 282 N.Y.S.2d 519, 523, 229 N.E.2d 206, 209-10 (1967). Cf. Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983) cert. denied 469 U.S. 920 (1983).[170]

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there was no reversible error on this record, but that "great caution should be taken in informing jurors that an attorney represents his client as a court appointed attorney." Id.

[170] The State has a right to inquire whether the defendant's expert is compensated and, if so, is permitted to inquire as to the terms of the expert's compensation. Such inquires are proper to establish interest and bias. See Miss. R. Evid. 616. Indeed, the State asked Dr. Webb about his compensation and Dr. Webb provided that information. (R. 1089-90). Once the State established that Dr. Webb was being paid $300 per hour for all services to the defendant, how is it relevant for the State to establish that Dr. Webb's fees were not being by Ms. Fulgham's "local attorney" Stephanie Mallette (the attorney for Ms. Fulgham that the State effectively gagged by securing the trial court's ruling that Ms. Fulgham's June 2 custodial statement was constitutionally admissible and then not disclosing whether it would use the June 2 custodial statement until the penalty-phase, cross-examination of Dr. Webb) but were being paid by the Office of Capital Defense Counsel (the only attorney who spoke for Ms. Fulgham at her trial

Based on the case authority cited above, overruling Ms. Fulgham's objection on relevance grounds was error. Further, Mr. Clark's reference to the Office of Capital Defense Counsel in the State's summation rebuttal was prejudicial in that Ms. Fulgham was powerless to respond to the State's emphasis of this irrelevant information. For the same reason that the elicitation of this testimony from Dr. Webb could not have had a proper purpose, see Claim 3, supra, the prosecutorial comment on this testimony at summation was also without a proper purpose. See generally Part C of Claim 3, supra.

The trial court erred in overruling Ms. Fulgham's objection to the elicitation of evidence that she (a) was represented by the Office of Capital Defense Counsel and that (b) the Office of Capital Defense Counsel, and not the attorney for Ms. Fulgham that the trial court silenced, paid Dr. Webb's fees. This error was then compounded when the State emphasized this information during its summation rebuttal. Because of this, Ms. Fulgham's death sentence must be vacated.

CLAIM 21

THE DEATH SENTENCE VIOLATES MISS. CODE ANN. 99-19-105 (3)(A) AND FURMAN v. GEORGIA

> *From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.*
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> *Gardner v. Florida, 430 U.S. 349, 357-58 (1977).*

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and at her penalty phase for the same reason – the trial court ruled the June 2 statement was constitutionally admissible and did not permit Ms. Mallette to withdraw). As jurors were unaware of the pre-trial ruling which effectively prohibited Ms. Mallette's representation of Ms. Fulgham, it is reasonable for a juror to have considered whether Ms. Mallette remained silent throughout the proceeding because Ms. Mallette (a) did not wish to hire Dr. Webb and (b) did not believe Dr. Webb. Such an interpretation of Ms. Mallette's unexplained silence would have been eliminated had the State limited its cross-examination of Dr. Webb to relevant items or had the trial court simply granted Ms. Mallette's motion to withdraw.

The Eighth Amendment bars punishment that is unnecessary, disproportionate and excessive. See Robinson v. California, 370 U.S. 660, 667 (1962); Trop v. Dulles, 356 U.S. 86, 99-103 (1958); Weems v. United States, 217 U.S. 349, 381-82 (1910); Anthony F. Granucci, "Non Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal.L. Rev. 839, 857-60 (1969). The death penalty violates the Eighth Amendment when it is imposed arbitrarily. Furman v. Georgia, 408 U.S. 238, 290-40 (1972). " Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, 428 U.S. 153, 188 (1976); Louis D. Bilionis, Process, the Constitution and Substantive Criminal Law, 91 Mich.L. Rev. 1269, 1325-26 (1998). Therefore, Furman requires that sentencing discretion "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg, 428 U.S. at 189; see also Lewis v. Jeffers, 497 U.S. 764, 782 (1990); Saffle v. Parks, 494 U.S. 484, 493 (1990).

Death is qualitatively different from any other punishment. Zant v. Stephens, 462 U.S. 862, 884 (1982). Death is different in that it is final. Gardner, 430 U.S. at 357. Beginning with Furman, supra, the Eighth Amendment requires specialized sentencing procedures where the death penalty is sought. Bilionis, supra, at 1326 (the Court rejected a due-process challenge to jury discretion in 1971 only to welcome an Eighth Amendment challenge to jury discretion in 1972); see Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (because death is different, the sentencing requirements at a capital penalty phase are incomparable to non-capital requirements). There must be consistency in sentencing decisions taking into account the individual offender and the offense to assure that death is the appropriate punishment. Graham v. Collins, 113 S.Ct. 892, 898 (1993); Lewis, 497 U.S. at 774; Proffitt v. Florida, 428 U.S. 242, 259-60 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976); Gregg, 428 U.S. at

189. Indeed, the mere risk of arbitrariness at capital sentencing is itself of constitutional moment. Turner v. Murray, 476 U.S. 28, 35-36 (1986).

This Eighth Amendment command finds a statutory embodiment in Miss. Code Ann. 99-19-105(3)(a) – that is, this Court must determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor."

In light of the totality of Claims 1 through 20, supra, it is respectfully submitted that the execution of the death sentence in this case would be nothing other than the unreasoned and fatal culmination of an entirely arbitrary sentencing proceeding. See generally Pinkney v. State, 538 So. 2d 329, 338 (Miss. 1988) vacated on other grounds 494 U.S. 1075 (1990). Certainly, this Court has granted relief for arbitrariness on a record which evinces erroneous factors contributing to death sentence far less pervasive than the egregious errors that mar the case at bar. Walker v. State, 740 So. 2d 873, 890 (Miss. 1999) (death sentence vacated as arbitrary under Miss. Code Ann. 99-19-105(3)(a) for erroneous admission of baseless and inflammatory evidence at penalty phase); see also Taylor v. State, 672 So. 2d 1246, 1276 (Miss. 1996) (where three of the five aggravators submitted to the penalty phase jury were premised entirely on "conjecture, not evidence," the State has failed in its burden to demonstrate to this Court that the death sentence is proper).

Ms. Fulgham's Furman Claim is grounded in the following: After exposure to inadmissible evidence of bad character[171] and to information from a custodial statement taken in derogation of her post-attachment right to counsel[172] which her lawyer was unable to discredit because her motion to withdraw had been wrongly denied,[173] Ms. Fulgham's jury was prohibited

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[171] See Claims 3 and 20, supra, and Claims 23 and 24, infra.

[172] See Claim 6, supra.

[173] See Claim 19, supra.

from hearing duly noticed Lockett evidence.[174] The same jury returned a death sentence after being unconstitutionally charged[175] and then exposed to the Holy Bible during jury deliberations at the specific request of a juror.[176]

It exceeds the confines of comprehension that Ms. Fulgham's death sentence survives Furman. A civilized society does not put a citizen to death in the aftermath of a sentencing procedure as permeated with error as the procedure at bar. Walton v. Arizona, 497 U.S. 639, 676 (1990) (Blackmun, J., dissenting with Brennan, J.) overruled at Ring v. Arizona, 536 U.S. 584 (2002) ("[t]he Lockett and Furman principles speak to different concerns underlying our notion of civilized punishment; the Lockett rule flows primarily from the Amendment's core concern for human dignity (cite deleted), whereas the Furman principle reflects the understanding that the Amendment commands that punishment not be meted out in a wholly arbitrary and irrational manner. (cite deleted). Our cases have applied these principles together to 'insis[t] that capital punishment be imposed fairly, *and* with reasonable consistency, or not at all.' (cite deleted)").

Based on case authority cited in this Claim, supra, Ms. Fulgham is entitled to relief. Most simply put, where a jury returns a death sentence for an illegitimate reason, a wrong reason, or no reason at all, that sentence is arbitrary and capricious in derogation of Furman.[177] Because of this, and because of this Court's constitutional and statutory obligation to review every death sentence for arbitrariness, it is respectfully submitted that this Court must vacate the sentence of death pursuant to Miss. Code Ann. 99-19-105(3)(a) and the case law cited in this Claim.

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[174] See Claim 1, supra.

[175] See Claim 4, Claim 5 and Claims 8 through 18, supra.

[176] See Claim 2, supra.

[177] Jury Instruction D-61 preemptively instructed the jury to return a sentence of life without with possibility of parole. The instruction appears at CP. 1119. It was submitted and refused at R. 1209. In light of this Claim, it was reversible error for the trial court to have refused D-61.

CLAIM 22

MISS. CODE ANN. 99-19-101 IS FACIALLY UNCONSTITUTIONAL

Ms. Fulgham respectfully submits that Miss. Code Ann. 99-19-101, 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. Baze v. Rees, ___ U.S. ___, 128 S.Ct. 1520, 1551 (2008) (Stevens, J., concurring); Callins v. Collins, 510 U.S. 1141, 1143-1159 (1994) (Blackmun, J., dissenting); Strickland v. Washington, 466 U.S. 668, 717 n. 18 (1984) (Marshall, J., dissenting); Gregg v. Georgia, 428 U.S. 153, 227-241 (1976) (Brennan, J., dissenting); Furman v. Georgia, 408 U.S. 238, 240-57 (1972) (Douglas, J., concurring); Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., dissenting from denial of certiorari); Doss v. State, No. 2007-CA-00429-SCT, 2008 WL 5174209, ___ So. 2d ___, (Miss., Dec. 11, 2008) (Diaz, P.J., dissenting). As such, Ms. Fulgham's death sentence must be vacated as cruel and unusual punishment.

CLAIM 23

THE CONVICTION MUST BE VACATED AS JURY INSTRUCTION D-48 WAS REFUSED. THIS ERROR WAS EXACERBATED BY IMPROPER ARGUMENT DURING THE STATE'S SUMMATION.

> *It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process. [Presnell v. Georgia, 439 U.S. 14, 16-17 (1978); Cole v. Arkansas, 333 U.S. 196, 201 (1948)] These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend. E.g., Hovey v. Elliott, 167 U.S. 409, 416-20 (1897). Cf. Boddie v. Connecticut, 401 U.S. 371, 377-79 (1971). (...) In [In Re Winship, 397 U.S. 358, 364 (1970)], the Court held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction 'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'*
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> *Jackson v. Virginia, 443 U.S. 307, 314-15 (1979).*

I. Introduction

Where the State proceeds on a capital indictment under Miss. Code Ann. 97-3-19(2)(e), the defendant has a right to a proper instruction on the elements of the underlying felony. Hunter v. State, 684 So. 2d 625, 635 (Miss. 1996); see Moore v. Garraghty, 739 F.Supp. 285, 289 (E.D.Va. 1990) aff'd 932 F.2d 963 (4th Cir. 1991) cert. denied 502 U.S. 960 (1991) (citing cases); Ballenger v. State, 761 So. 2d 214, 217 (Miss. 2000).

The underlying offense in the instant indictment is robbery. (CP. 30).

Robbery is a unitary offense. People v. Randolph, 648 N.W.2d 164, 169-70 (Mich. 2002) (citing Blackstone); People v. Dennis, 692 N.E.2d 325, 334 (Ill. 1998) ("the offense of armed robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will"); Barnes v. State, 824 S.W.2d 560, 561-62 (Tex. Crim. App. 1991); Madewell v. State, 720 S.W.2d 913, 915 (Ark. 1986); Miller v. State, 314 S.E.2d 684, 685-86 (Ga. App. 1984); see also Parks v. State, 884 So. 2d 738, 745 (Miss. 2004) (defendant, charged with accessory after the fact, "undoubtedly" knew robbery had been completed when defendant saw the principle take money from the complainant); Bankston v. State, 391 So. 2d 1005, 1006 (Miss. 1980) (robbers flee on foot after "robbery completed" at the motel); Day v. State, 382 So. 2d 1071, 1072 (Miss. 1980) ("[t]he two men entered the store, one moved to the checkout counter and the other toward the cooler; the first man went behind the counter, displayed a gun and announced that the place was being robbed. The robbery was completed in a few minutes, and the robbers fled the scene"); Hosey v. State, 300 So. 2d 453, 454 (Miss. 1974) ("[o]n one side of the car the appellant, Hosey, at gun point robbed Canfield of a wallet which contained Canfield's 'mad money' consisting of two 'Barr Dollars' plus other small items. At the same time, on the opposite side of the car, the two girls were robbed by another individual [a co-indictee], who wielded a large knife. After the robbery was completed, the appellant, along with

his co-indictee, and several other unidentified participants in the robbery escaped into the woods"); Thompson v. State, 226 Miss. 93, 95, 83 So. 2d 761, 762 (1955). See generally Toussie v. United States, 397 U.S. 112, 115 (1970) (a determination that an offense is a continuing offense "should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one").

Robbery is a specific-intent crime. Thomas v. State, 278 So. 2d 469, 472 (Miss. 1973); see Pierce v. State, 860 So. 2d 855, 860 (Miss. App. 2003) (citing cases). Capital murder is a specific-intent crime. Pinkney v. State, 538 So. 2d 329, 354 (Miss. 1988).[178] At absolute minimum, then, Ms. Fulgham has a right to have her jury instructed as to "a special *mens rea* above and beyond that which is required for the *actus reus* of the crime."[179] 1 LaFave & Scott, Substantive Criminal Law, Sec. 3.5, pgs. 314-15 (1986); see United States v. Carmona, 422 F.2d 95, 98-99 (3rd Cir. 1970) (because robbery is specific-intent crime, unanimous jury agreement on *actus reus* of charged crime is precondition to a determination of guilty as charged); see also United States v. Dollar Bank Money Market Account No. 1591768456, 980 F.2d 233, 237 (3rd Cir. 1992); Frey v. State, 708 So. 2d 918, 919 (Fla. 1998); State v. Carlson, 3 P.3d 67, 79-80 (Idaho Ct. App. 2000). The fact that robbery is a unitary offense only serves to strengthen this Claim – Ms. Fulgham is entitled to proper jury instructions because of the specific-intent nature

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[178] "Specific intent is an essential element of the alleged offense [capital murder], and the state must prove beyond a reasonable doubt such specific intent. Such specific intent, as the term implies, means more than the general intent to commit an unlawful act. To establish specific intent to steal the personal property of Tracey Hickman, the state must prove beyond a reasonable doubt that the defendant knowingly did an act which the law forbids, purposefully intending to violate the law and unless you believe beyond a reasonable doubt that the defendant intended to steal the aforesaid personal property, then you should find the defendant not guilty of capital murder." Pinkney, 538 So. 2d at 354.

[179] Obviously, this necessitates that (a) the prosecution proceed with a unitary *actus reus* and that (b) the jury be instructed to unanimously agree on that unitary *actus reus*. Yet, the jury was never instructed to unanimously agree on a unitary *actus reus*. See Part II(A) of this Claim. And, the prosecution invited the jury to return a guilty verdict without unanimously agreeing on a unitary *actus reus*. See Part III of this Claim.

of the charged offense, because of the specific-intent nature of the underlying offense, and, as will be fully developed infra, because the underlying offense is unitary.

II. The refusal to give Jury Instruction D-48, in itself, requires reversal

II(A). Law

Jury Instruction D-48 is a straightforward statement requiring unanimity in the *actus reus*. It reads as follows:

> 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.
>
> (CP. 1025).

Defense counsel advised the trial court that D-48 was required as a matter of federal and state constitutional law. During the charge conference, defense counsel stated:

> My issue, Judge, is that Kristi's entitled to have all 12 jurors agree that Kristi robbed this item, whether it be the case or something else. The jury must agree on what object Kristi stole from her husband if they're going to convict her of robbery. That's the point of this instruction. It's a unanimous verdict instruction.
>
> (R. 972).

In addition to defense counsel's oral argument at the charge conference, the annotation which accompanied D-48 (CP. 1025) cited ten cases to the trial court and the State as authority in support of the instruction, *viz.*: United States v. Beros, 833 F.2d 455, 462 (3rd Cir. 1987) (composite verdicts are unconstitutional verdicts); People v. Diedrich, 31 Cal.3d 263, 282-83, 182 Cal.Rptr. 354, 364, 643 P.2d 971, 981(1982); State v. Solano, 930 P.2d 1315, 1323 (Ariz. App. 1996) review denied 938 P.2d 1110 (Ariz. 1997); State v. Handyside, 711 P.2d 379, 381-82 (Wash. App. 1985); see Markham v. State, 46 So. 2d 88, 89 (Miss. 1950) (defendant has a state constitutional right to unanimous verdict under Article Three, Section Thirty-One of the

Mississippi Constitution); see also Hamling v. United States, 418 U.S. 87, 117-18 (1974); United States v. Hess, 124 U.S. 483, 488-89 (1888); United States v. Edmonds, 80 F.3d 810, 818-19 (3rd Cir. 1996) (en banc) cert. denied 519 U.S. 927 (1996); United States v. Starks, 515 F.2d 112, 116-17 (3rd Cir. 1975) (constitutional right to unanimous verdict guards against duplicitous result); United States v. Tanner, 471 F.2d 128, 138-39 (7th Cir. 1972); cert. denied 409 U.S. 949 (1972) (same). In addition to the cases cited in the annotation to D-48, Hill v. State, 252 Miss. 827, 830-31, 173 So. 2d 920, 922 (1965) and Barry v. State, 187 Miss. 221, 233-34, 192 So. 841, 845 (1940), provide additional support for Ms. Fulgham's Article Three, Section Thirty-One, contention that the right to unanimous verdict under the Mississippi Constitution required the trial court to give D-48. Finally, and connecting with case authority cited in this Claim supra, the following cases provide further support for the federal constitutional right to unanimous verdict: United States v. Richardson, 233 F.3d 223, 227-28 (4th Cir. 2000) cert. denied 534 U.S. 1077 (2002); United States v. Fawley, 137 F.3d 458, 470-71 (7th Cir. 1998) (citing Johnson v. Louisiana, 406 U.S. 356 (1972); United States v. Adkinson, 135 F.3d 1363, 1377-78 (11th Cir. 1998) (citing United States v. Gipson, 553 F.2d 453, 458 (5th Cir. 1977) ("[r]equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required");[180] Andres v. United States, 333 U.S. 740, 748 (1948); Hawaii v. Mankichi, 190 U.S. 197 (1903)); United States v. Holley, 942 F.2d 916, 929 (5th Cir. 1991) cert. denied 510 U.S. 821 (1993); United States v. Helmsley, 941 F.2d 71, 91 (2nd Cir. 1991) cert. denied 502 U.S. 1091 (1992);[181] United States v. Duncan, 850 F.2d. 1104, 1110-13 (6th Cir. 1988); State v. Coleman,

[180] In United States v. Gipson, 553 F.2d 453, 457-58 (5th Cir. 1977), the Fifth Circuit held that jury must unanimously agree on conceptually distinct acts constituting the *actus reus* of the crime charged.

[181] In the prosecution of Leona Helmsley for conspiracy to defraud the federal government or conspiracy to violate one of four statutes, the district court's jury instruction concerning unanimity as to the specific object of the

150 P.3d 1126, 1127-28 (Wash. 2007); People v. Riel, 22 Cal.4th 1153, 1199, 96 Cal.Rptr.2d 1, 36, 998 P.2d 969, 1001 (2000);[182] State v. Saunders, 992 P.2d 951, 965-66 (Utah 1999); R.A.S. v. State, 718 So. 2d 117, 121 (Ala. 1998); Commonwealth v. Conefrey, 650 N.E.2d 1268, 1270-71 (Mass. 1995); State v. Seymour, 515 N.W.2d 874, 879-80 (Wis. 1994); State v. Greene, 623 A.2d 1342, 1344-45 (N.H. 1993);[183] State v. Lyons, 412 S.E.2d 308, 312 (N.C. 1991); State v. Brown, 823 S.W.2d 576, 583-84 (Tenn. Crim. App. 1991); State v. Spears, 788 P.2d 261, 266 (Kan. 1990) (reversing a misdemeanor conviction for larceny "on the possibility there was some confusion" in the failure to include a unanimous verdict instruction as to what property was stolen even though, in light of the facts, Kansas Supreme Court concluded "[w]e think it highly unlikely the jury could have been misled[,]"); State v. Boots, 780 P.2d 725, 727-31 (Or. 1989); Probst v. State, 547 A.2d 114, 120-22 (Del. 1988); People v. Dellinger, 163 Cal.App.3d 284, 301, 209 Cal. Rptr. 503, 513-14 (Cal. App. 1984) ("[a]s long as there are multiple acts presented to the jury which could constitute the charged offense, the defendant is entitled to an instruction on unanimity"); People v. Deletto, 147 Cal.App.3d 458, 471, 195 Cal.Rptr. 233, 241 (Cal. App.

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conspiracy was affirmed by the Second Circuit. The language from the jury charge noted by the Second Circuit follows: "[I]f you find that any defendant agreed with another person to accomplish any one of the five objectives charged by the indictment, then you may find that defendant guilty of conspiracy if you find the other elements of the crime satisfied. However, *you must all agree on the specific object the defendant agreed to try to accomplish.*" Helmsley, 941 F.2d at 91 (emphasis in original).

[182] "Defendant argues that the evidence disclosed two distinct acts of robbery: (1) the initial robbery at Rambo's Truck Stop; and (2) the later taking of money from Middleton's wallet in the car. He argues the prosecution either had to elect which act it was relying on or the court had to require the jury to agree unanimously on one specific act. (CALJIC No. 17.01). Otherwise, he contends, some of the jurors might have found him guilty of the first of these acts but not the second, and other jurors might have found him guilty of the second but not the first. In that event, the jury would have reached no unanimous verdict that he was guilty of any specific robbery at all. See generally People v. Diedrich, 31 Cal.3d 263, 280-83, 182 Cal.Rptr. 354, 643 P.2d 971 (1982). It does not appear that defendant asked the court to give CALJIC No. 17.01, but he may still raise the issue on appeal. Even absent a request, the court should give the instruction 'where the circumstances of the case so dictate.' People v. Carrera, 49 Cal.3d 291, 311 n. 8, 261 Cal.Rptr. 348, 777 P.2d 121 (1989)." Riel, 22 Cal.4th at 1199, 96 Cal.Rptr.2d at 36, 998 P.2d at 1001.

[183] "Jurors must be unanimous, however, about what constitutes the essential culpable act committed by the defendant and prohibited by the statute. Where discrete factual predicates can provide alternative bases for finding an element of the offense to have been established, a defendant is entitled to jury unanimity as to the factual predicate supporting a finding of guilt." Greene, 623 A.2d at 1345.

1983) cert. denied 466 U.S. 952 (1984); Scott W. Howe, Jury Fact Finding in Criminal Cases: Constitutional Limits of Factual Disagreements Among Convicting Jurors, 58 Mo. L.R. 1, 8-11 (1993); see also United States v. Villegas, 494 F.3d 513, 514 (5th Cir. 2007);[184] United States v. Garcia-Rivera, 353 F.3d 788, 792 (9th Cir. 2003);[185] State v. Weldy, 902 P.2d 1, 6-7 (Mont. 1995).

In light of the above, voluminous case authority mandates appellate relief for the refusal to give Jury Instruction D-48 on no less than six separate and free-standing constitutional grounds. First, because D-48 ensured Ms. Fulgham's constitutional right to unanimous verdict

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[184] "In making this determination [the determination whether the jury must be instructed to be unanimous on a factual occurrence], courts should consider several factors, including [A] statutory language and construction, [B] legislative intent, [C] historical treatment of the crime by the courts, [D] duplicity concerns with respect to defining the offense, and the [E] likelihood of juror confusion in light of the specific facts of the case. (cite deleted). A court should also [F] consider the risk that allowing the jury to avoid addressing specific factual details will cover up disagreement among the jurors about the defendant's conduct, or [G] that the jury might convict based on evidence that generally paints the defendant in a bad light rather than focusing on the facts of the case." Villegas, 494 F.3d at 514. As to Factors [A] and [B], the obvious legislative intent is found in the remarkably consistent statutory definition of robbery. The statutory definition of robbery at Miss. Code Ann. 97-3-73 is *verbatim* with the statutory definition discussed 162 years ago by the Mississippi High Court of Errors and Appeals. McDaniel v. State, 16 Miss. 401, 418 (Miss. 1847) (("[t]he statutory definition of robbery, in the first degree, *to wit*, the felonious taking the personal property of another in his presence, or from his person, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person; does not alter the common law definition of robbery"); see also Sec. 2362 of Miss. Code of 1942 (also *verbatim*). As to Factor [C], see Jackson & Miller, 3 Encyclopedia of Mississippi Law (West Pub. Co, 2001), sec. 23:84 through 23:90 (discussing consistent case authority to 1933). Factor [D] may be dispensed with expeditiously: the duplicity engendered by refusing to include D-48 in the jury charge facially violated the annotation that appears on the face of D-48. See CP. 1025. In part, [E] begs the question. The duplicity considered in [D] is prohibited precisely because it confuses the jury and the defendant. See, e.g., State v. Stevens, 172 P.3d 570, 578 (Kan. 2007); see also United States v. Gleave, 786 F.Supp. 258, 265 (W.D.N.Y. 1992) rev'd on other grounds at 16 F.3d 1313 (2nd Cir. 1994). However, the likelihood of juror confusion in this case in addition to the failure to include D-48 in the jury charge is extraordinary as the prosecution specifically invited the jury to arrive at a non-unanimous verdict. See Part III of this Claim. As to [F], the trial court was on specific oral notice from Ms. Fulgham as to why she was entitled to D-48 (see R. 972) and specific written notice as found in the case authority in the annotation of D-48. See CP. 1025. Notwithstanding the exhaustive argument placed before the trial court mandating inclusion of D-48 in the jury charge, the trial court refused to include D-48 in the jury charge. Finally, [G] favors reversal as the State travailed to disparage Ms. Fulgham through spurious introduction of evidence that Ms. Fulgham was promiscuous (see Claim 3, supra) and an incestuous pedophile. See Claim 24, infra.

[185] "The district court's phrasing, however, was fatally ambiguous. The jury could have concluded that they were required to decide unanimously only that possession occurred during *any* of the three times enumerated, not that they had to unanimously agree on which one. With this understanding, the jury could have convicted, for example, even though four jurors thought possession took place uninterrupted between May 19, 2001 and June 7, 2001, four jurors thought that possession occurred about a week after the purchase of the firearm, and four jurors thought possession took place on June 7, 2001." Garcia-Rivera, 353 F.3d at 792.

and, therefore, the refusal of D-48 rendered the guilty-as-charged verdict on the single-count indictment duplicitous under Article III, Section Thirty-One of the Mississippi Constitution.[186]. Second, as this was a capital prosecution wherein the State sought and secured death, Ms. Fulgham had a Sixth Amendment right to unanimous verdict.[187] Third, because D-48 ensured Ms. Fulgham's due-process right to fair trial and unanimous verdict under the federal[188] and state constitution.[189] Fourth, because the State mobilized the jury to reach a non-unanimous verdict,[190] Ms. Fulgham was deprived of her right to remain fairly informed of the charge for which the State secured her conviction and execution.[191] Fifth, because D-48 ensured Ms. Fulgham's rights

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[186] Hill, supra; Markham, supra; Barry, supra.

[187] Andres v. United States, 333 U.S. 740, 748 (1948) ("[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply"); see also Apodaca v. Oregon, 406 U.S. 404, 406 n. 1 (1972) (rejecting Sixth Amendment challenge to state-court conviction in a non-capital case); Johnson v. Louisiana, 406 U.S. 356, 360-61 (1972) (same).

[188] Fawley, supra; Adkinson, supra; United States v. Russell, 134 F.3d 171, 176, 180-81 (3rd Cir. 1998) (due process mandates a beyond a reasonable doubt determination to every fact necessary to constitute the alleged crime and error is plain where jury charge permitted conviction upon different facts); Holley, supra; Helmsley, supra; Duncan, supra; Coleman, supra; Seymour, supra; State v. Miller, 650 N.W.2d 850, 855, 857-58 (Wis. App. 2002) review denied 653 N.W.2d 890 (Wis. 2002) ("[b]efore you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that act constituted the crime charged"); see Edmonds, supra (citing United States v. Holley, 942 F.2d 916, 928-29 (5th Cir. 1996) cert. denied 510 U.S. 821 (1993) ("when there is a real risk that a jury will convict without agreement on a discrete set of actions, courts have required specific unanimity instructions"); Beros, supra (prosecution "cannot rely on a composite theory of guilt, producing twelve jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict. Conviction by a jury that was not unanimous as to defendant's specific illegal action is no more justifiable than is a conviction by a jury that is not unanimous on the specific count"); Gipson, supra; Starks, supra; R.A.S, supra ("[t]he defendant is entitled either to have the State elect the single act upon which it is relying for conviction or to have the court give a specific unanimity instruction"); Handyside, supra see also Richardson v. United States, 526 U.S. 813, 820 (1999) (due process clause limits power of jury to convict while disagreeing about the means). Cf. Harris by and through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1292-93 (W.D.Wash. 1994) aff'd 64 F.3d 1432 (9th Cir. 1995).

[189] Butler v. State, 217 Miss. 40, 58, 63 So. 2d 779, 784 (1953) ("[t]he due process clauses of the state and federal constitutions require that a trial be conducted according to established criminal procedures"); Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950).

[190] See Part III of this Claim.

[191] Tanner, supra; People v. Bracewell, 34 A.D.2d 1197, 827 N.Y.S.2d 793 (4th Dept. 2006) (legally sufficient accusatory instrument rendered duplicitous by evidence adduced at trial, defeating defendant's right to fair notice of charge upon which he stands trial); see United States v. Crisci, 273 F.3d 235, 238 (2nd Cir. 2001); see also Gannett Co. v. DiPasquale, 443 U.S. 368, 379 (1979) (Sixth Amendment right to fair notice as incorporated in the Fourteenth Amendment); Hamling, supra; In Re Oliver, 333 U.S. 257, 273 (1948) (Fourteenth Amendment right to reasonable

to unanimous verdict, notice and due process, should this Court remand for new trial, Ms. Fulgham's constitutional right to raise double jeopardy as a bar to further prosecution of the offense at bar is forevermore extinguished by the trial court's refusal to grant D-48.[192] Finally, as the death penalty was sought and secured by the State, because Ms. Fulgham's death sentence is premised upon a duplicitous conviction, the death sentence may not be carried out in this case.[193]

II(B). Discussion

The State introduced evidence that Ms. Fulgham either took, or intended to take, various items of her husband's personal property, *viz.*:

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opportunity to defend accusation); Cooke v. United States, 267 U.S. 517, 536-37 (1925) (same); United States v. Dedman, 527 F.2d 577, 599-600 (6th Cir. 2008); State v. Paulsen, 726 A.2d 902, 904 (N.H. 1999).

[192] United States v. Drury, 687 F.2d 63, 66 (5th Cir. 1982) cert. denied 461 U.S. 943 (1983) ("duplicity is prohibited because confusion as to the basis of the verdict may subject defendant to double jeopardy in the event of a subsequent prosecution"); Starks, supra; Tanner, supra; Cooksey v. State, 752 A.2d 606, 610 (Md. 2000); Larson v. State, 569 P.2d 783, 786 (Alaska 1977) ("duplicity is prohibited because confusion as to the basis of the verdict may subject defendant to double jeopardy in the event of a subsequent prosecution"); Bracewell, supra at Footnote 191, supra (legally sufficient accusatory instrument rendered duplicitous by evidence adduced at trial, defeating defendant's ability to plead jeopardy in event of remand); Desire v. State, 829 So. 2d 948, 950 (Fla. Dist. Ct. App. 2002); see United States v. Moloney, 287 F.3d 236, 239 (2nd Cir. 2002) cert. denied 537 U.S. 951 (2002); United States v. Sturdivant, 244 F.3d 71, 77 (2nd Cir. 2001); United States v. Schlei, 122 F.3d 944, 977 (11th Cir. 1997) cert. denied 523 U.S. 1077 (1998); United States v. Kimberlin, 781 F.2d 1247, 1248-49 (7th Cir. 1985) cert. denied 479 U.S. 938 (1986); see also State v. Roberts, 14 P.3d 713, 737 (Wash. 2000); Paulsen, supra at Footnote 191, supra; State v. New Jersey Trade Waste Ass'n, 472 A.2d 1050, 1057 (N.J. 1984) ("[o]ne vice of duplicity is that a general verdict for the defendant on that count does not reveal whether the jury found him not guilty of one crime or not guilty of both. Conceivably this could prejudice the defendant in protecting himself against double jeopardy"); State v. Altgilbers, 786 P.2d 680, 695 (N.M. App. 1989) cert. denied 785 P.2d 1038 (N.M.1 990) (citing United States v. Shorter, 608 F.Supp. 871, 879 (D.C.D.C. 1985)) Cf. State v. Bazemore, 945 A.2d 987, 995-96 (Conn. App. 2008) cert. denied 951 A.2d 573 (Conn. 2008). The Fifth Amendment, as incorporated by the Fourteenth Amendment, guarantees Ms. Fulgham the right not to be placed in jeopardy for the same offense more than once. Benton v. Maryland, 395 U.S. 784, 794 (1969). Article III, Section Twenty-Two, of the Mississippi Constitution provides the correlative right not to be placed in jeopardy for the same offense in state court. Holly v. State, 671 So. 2d 32, 43-45 (Miss. 1996) cert. denied 518 U.S. 1025 (1996)

[193] The United States Supreme Court has often recognized the necessity of greater reliability in cases where death is sought. See, e.g., Kyles v. Whitley, 514 U.S. 419, 422 (1995); Herrera v. Collins, 506 U.S. 390, 405 (1993); Murray v. Giarrantano, 492 U.S. 1, 8-9 (1989); Turner v. Murray, 476 U.S. 28, 36 n. 8 (1986) ("the only question is at what point that risk [the jury's ultimate decision to kill] becomes constitutionally unacceptable"). "Our cases created and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties." Harmelin v. Michigan, 501 U.S. 957, 995 (1991).

- That Joey Fulgham cashed a paycheck of just over $1,000 on the evening before his death. (R. 676). This money was provided mostly in hundred-dollars bills. (R. 677-78). That Joey Fulgham put all of this cash into his wallet proclaiming that his wallet was his savings account. (R. 677). That Joey Fulgham "felt like he was just broke if he didn't have a good bit of money on him." (R. 677).

- That an official from Bancorp South testified that Joey Fulgham cashed a paycheck at that bank at 1:13 p.m. on Friday, May 9, 2003, in the amount of $1,021.23. (R. 694).

- That hours after the State alleged Joey Fulgham was killed, Ms. Fulgham had hundred dollar bills in her purse. (R. 786-87). That while Ms. Fulgham was on the Mississippi Gulf Coast on the day of Mr. Fulgham's death, she paid for items, including a hotel room at the Beau Rivage, with cash. (R. 787-88, 790, 791-92). Kyle Harvey, Ms. Fulgham's boyfriend, testified that Ms. Fulgham selected the Beau Rivage as a place to stay, and that they did not typically stay at a hotel as expensive as the Beau Rivage and that he was concerned about the expense incurred staying at the Beau Rivage. (R. 787-88).

- No wallet was found at the crime scene and a crime-scene investigator was led to believe that a wallet had been removed because of receipts and papers found in the garbage at the crime scene. (R. 832-33). See also State's Exhibit 27.

- That Joey Fulgham had life-insurance benefits from the Mississippi National Guard in the amount of $305,000. (R. 702).

- That about a month prior to Joey Fulgham's death, Ms. Fulgham inquired from the National Guard about the amount of Joey Fulgham's life-insurance benefit. (R. 705). However, Ms. Fulgham was told that this information would not be released to her because Joey Fulgham had signed a privacy statement. (R. 705). Ms. Fulgham "seemed upset because I [a National Guard representative] wouldn't tell her." (R. 706).

- That Ms. Fulgham told her father that she wanted Joey Fulgham dead "and that he [Joey Fulgham] has a life insurance policy, and said the kids would get 300,000, and I [her father] would get 200,000." (R. 744)

- That Ms. Fulgham went looking for houses in the Jackson area with her boyfriend, Kyle Harvey, shortly before Joey Fulgham died. (R. 778-79). That Mr. Harvey did not have the money to afford a house. (R. 778). That Ms. Fulgham told Mr. Harvey that she was expecting to receive a $300,000 inheritance from her grandmother and that inheritance would allow her to afford a house. (R. 778-79).

- That an executive from the Jackson Association of Realtors testified that handwritten references to residences seized by police at the residence of Ms. Fulgham during the death investigation of Joey Fulgham coordinated with residential listings during the same period of time that Mr. Harvey testified he was looking for houses with Ms. Fulgham. (R. 843-52).

- That no computer tower was found at the crime scene. (R. 835). "In the living room there was a computer screen, keyboard, mouse, all the wires down, back plug-ins for one, and – but the – the main tower part, the CPU, was gone." (R. 835). Further, "you could faintly see the outline probably where it was sitting on the carpet." (R. 836); See also State's Exhibit 28.

- That Ms. Fulgham was greedy. (R. 736). For Ms. Fulgham, "everything was material." (R. 736). "[A]t first it was Joey's money, and then it was another person's money, and then another person's money." (R. 736). That Ms. Fulgham moved back in with Mr. Fulgham because "[h]e had the money to take care of her." (R. 741).

As stated in the preface to the above table, the State introduced into evidence every item included in the above table.[194]

Which of these items does the State contend is the item Ms. Fulgham "feloniously took, by violence, from the person of her husband and against his will?"[195] Because robbery is a unitary offense, it is constitutionally necessary for the State to elect *an item* and for the jury to be charged to agree upon *an item*. Because robbery and capital murder are specific-intent crimes, unanimous jury agreement on the *actus reus* of the charged crime is a necessary precondition to any finding of guilt on the instant indictment. Carmona, 422 F.2d at 99; see also United States v. Fiedeke, 384 F.2d 407, 412 (7th Cir. 2004) cert. denied 543 U.S. 1079 (2005) (citing Black's Law Dictionary for the proposition that specific intent is "[t]he intent to accomplish *the precise*

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[194] This blunderbuss approach to prosecution coalesced into an unconstitutional morass at the jury-charge conference and during the State's summation. The State chummed the waters during its case-in-chief to provide it an avenue at summation to invite the jurors to reach a non-unanimous verdict. See Part III of this Claim.

[195] This quotation merely tracks the language of Miss. Code Ann. 97-2-73. A criminal conviction cannot rest upon a jury charge containing an equivocal and ambiguous instruction on an important issue. United States v. Washington, 819 F.2d 221, 226 (9th Cir. 1987). The important issue in play in this Claim is whether Ms. Fulgham's jury ever found her guilty – unanimously and beyond a reasonable doubt – of the offense for which the State has secured her execution.

criminal act that one is later charged with") (emphasis added); People v. Hill, 190 Cal.Rptr. 628, 632-33 (Cal. App. 1983) (where question of whether defendant is guilty of attempted robbery goes to the jury, the court must instruct jury as to the concurrence of the specific intent to attempt robbery and the act for which the prosecution alleges constituted the attempted robbery); Ambos, Toward a Universal System of Crime: Comments on George Fletcher's 'Grammar of Criminal Law', 28 Cardozo L.Rev. 2647, 2657 (2007) (necessity to decide on the *actus reus* in a specific-intent prosecution as it is impossible to ascertain the mental element necessary to capture the *actus reus* without first deciding what the *actus reus* is). Cf. Pulliam v. State, 515 So. 2d 945, 947-48 (Miss. 1987) (citing cases) (reasonable inference of uncertainty whether jury reached unanimous verdict is sufficient to order retrial).

Based on the argument in this Claim, supra, Ms. Fulgham respectfully submits it is impossible to affirm her conviction in light of the trial court's refusal to give Jury Instruction D-48. Ms. Fulgham's argument in support for reversal is all the more persuasive in light of the fact that her sentence of death is preconditioned upon a constitutionally infected finding of guilt. The heightened scrutiny of death-penalty jurisprudence is employed at the innocence phase and the penalty phase. Murray v. Giarrantano, 492 U.S. 1, 8-9 (1989)[196] (heightened scrutiny employed at the first and second phase where death has been secured); see Kyles v. Whitley, 514 U.S. 419, 422 (1995) (quoting Burger v. Kemp, 483 U.S. 776, 785 (1987)).

[196] "We have recognized on more than one occasion that the constitution places special constraints on the procedures *used to convict an accused* in a capital offense and sentence him to death. (cites deleted) The finality of the death penalty requires 'a greater degree of reliability' when it is imposed. (cite deleted) These holdings, however, have dealt with *the trial stage of the capital offense adjudication, where the court and jury hear testimony, receive evidence, and decide questions of guilt* and punishment." Murray, 492 U.S. at 8-9 (emphasis added). See also Footnote 193, supra.

III. The reversible error of refusing to give Jury Instruction D-48 was compounded when the State invited Ms. Fulgham's jury to reach a composite verdict in contravention to constitutional law

Part II of this Claim seeks reversal strictly for the trial court's erroneous refusal to include D-48 in the jury charge.

In the second textual paragraph of Part II(B) of this Claim, Ms. Fulgham asks: "[w]hich of these items does the State contend is the item Ms. Fulgham 'feloniously took, by violence, from the person of her husband and against his will?"

Part III of this Claim requires this question to be answered.

Fortunately for Ms. Fulgham, the answer is obvious. It is: "None. The State contends that Ms. Fulgham forcibly stole at least four different items. Furthermore, so long as every juror simply votes 'guilty as charged,' the State counseled the jury that there is no need for the jurors to unanimous agree on any one item to return that verdict."[197]

In this part of this Claim, Ms. Fulgham discusses the constitutional and ethical repercussions of this answer.

As fully discussed in the Statement of the Case appearing at pages 2 through 6 of this Brief, the State varied its argument to Ms. Fulgham's jury that the robbery at issue in the indictment was as follows:

> **Specifically invited finding number one: the object of the robbery was taken by force from the person of Joey Fulgham at the time he was killed**
>
> - an item stolen from Joey Fulgham "when he was killed" (R. 992)
>
> First contingency for the identification of the object of the robbery alleged: the item taken by force from Joey Fulgham when he was killed was his wallet
>
> - "Whoever killed Joey stole that wallet and stole that cash. *This is capital murder.*" (R.993)

[197] This is exactly – and undeniably – the only answer to this question in light of the prosecution's objection to D-48 and the State's subsequent argument to the jury in diametrical contraposition to D-48.

Second contingency for the identification of the object of the robbery alleged: the item taken by force from Joey Fulgham when he was killed was his checkbook

- "There was no wallet, there was no cash, there was no checkbook, there were no credit cards,[198] there was nothing." (R. 993).

Specifically invited finding number two: the object of the robbery was life-insurance proceeds (therefore, an item not stolen from Joey's Fulgham's person when he was killed)

- "Is it a coincidence that she's [Ms. Fulgham] talking about all the life insurance, that she's making phone calls about the life insurance, that she's already asked two people for a gun, told one of them she wanted to kill a dog, told another one she wanted to kill Joey, and then a week later Joey is found dead in his bed? Is it a coincidence? Or is it a little something more? Where there's smoke, is there really fire? *We could have rested right then and there and proven this defendant committed this capital murder*. (R. 998-99) (emphasis added)

Specifically invited finding number three: the object of the robbery was the wallet and the life-insurance proceeds (two items, one stolen from the person of Joey Fulgham at the time he was killed and one not stolen from the person of Mr. Fulgham at the time he was killed)

- "But ladies and gentlemen of the jury, to this defendant Joey Fulgham's life was worth $305,000 [supposed life-insurance proceeds] plus $1,000 in cash for a weekend at the Beau Rivage with her boyfriend. (R. 991); See R. 1047 ("Ladies and gentlemen, this is capital murder. She killed him for his life insurance that she thought she was going to get and she killed him for the $1,000 that he did have at the time, and she's guilty"); See also R. 1042 ("Her greed got in the way, because 300 [$300,000] wasn't enough. And Mr. Lappan's right, if it was just the money, if it was just the 300, *but it wasn't. She had to take the $1,000.* Couldn't leave it. She had to take it." (emphasis added); R. 1046 ("It was about the life insurance. It started that way. Mr. Lappan's right. And then it just got progressively worse, because her greed got worse").

[198] Presumptively, if Mr. Fulgham had credit cards, he would have kept them in his wallet. Assuredly, a wallet and a checkbook are different items. Ms. Fulgham does not challenge the identification of "credit cards" as yet another item upon which the jury may arrive at a non-unanimous verdict for two reasons. First, the State has already invited the jury to select Mr. Fulgham's wallet as just one possible object of the robbery upon which to agree or disagree. Second, because the State offered so many other discrete objects for the robbery, there is no sense in arguing that the various possible contents of any given wallet amount to willfully duplicitous, wantonly unconstitutional conduct by the prosecution. It is more than sufficient to simply itemize in Part III of this Claim the four, specifically invited objects of the same robbery – four separate *actus reus* – proposed by the State during its first-phase summation as willfully duplicitous and wantonly unconstitutional conduct.

Specifically invited finding number four: the object of the robbery alleged in the indictment was the computer

- "That computer was right there Friday night. It wasn't there Sunday afternoon. There was also a computer stolen. *This is capital murder.*" (R. 994).

As a result of the above, after the State had successfully convinced the trial court not to include D-48 in the jury charge because (1) it was repetitious as the trial court had included an instruction that the jurors must find Ms. Fulgham guilty of all of the elements of capital murder beyond a reasonable doubt and because (2) there was no authority for granting D-48,[199] the State then argued to the uninformed jurors that they are free to convict Ms. Fulgham if they believe she forcibly stole from Mr. Fulgham: (a) his wallet and its contents;[200] or (b) his supposed life-insurance proceeds; or (c) both his wallet and his supposed life-insurance proceeds; or (d) his checkbook; or (e) his computer. For any of those discrete items, "this is capital murder." (R. 993; 994; 999; 1046; 1047).

The breathtaking difficulty with the prosecution's explicit invitation to the jury to consider multiple items as the stolen item is that, in addition to the fact that the State successfully opposed D-48, the State of Mississippi then explicitly encouraged the jury to deliberate in a manner ***entirely antithetical*** to D-48 (and, therefore, entirely antithetical to the six free-standing constitutional rights safeguarded by D-48 as fully detailed in Part II(A) of this Claim). The combination of successfully opposing D-48 and then arguing repeatedly to its converse surely amounts to forensic advocacy of an impermissible factor. See, e.g., Havard v. State, 928 So. 2d 771, 791 (Miss. 2006) cert. denied 549 U.S. 1119 (2007) (State summation may not address an impermissible factor); Edge v. State, 393 So. 2d 1337, 1340 (Miss. 1981) (as it is a function of the trial court to instruct jury on the law, where prosecution advises jury on what law does or

[199] The prosecution must have overlooked the ten cases cited as authority in the annotation to D-48. (CP. 1025).

[200] See Footnote 198, supra.

does not require, that argument is improper). This prosecutorial misconduct only serves to further require reversal. See, e.g., United States v. Russell, 134 F.3d 171, 176-77 (3rd Cir. 1998) (citing numerous cases) (a specific unanimity instruction is necessitated by complexity of the case or "by other factors [that] create the potential that the jury be confused"); United States v. Tipton, 90 F.3d 861, 885 (4th Cir. 1996) cert. denied 520 U.S. 1253 (1997) ("[a] special unanimity instruction is required only when there is a genuine risk of juror confusion or that a conviction could result from different jurors having concluded that the defendant committed quite different acts within those of a prescribed set or among multiple means of violating a statute"); United States v. Jackson, 73 F.3d 1370, 1383 (9th Cir. 1995) cert. denied 517 U.S. 1157 (1996) (where multiple schemes are not presented by prosecution, necessity for unanimity instruction is less compelling); United States v. Barakett, 994 F.2d 1107, 1112 (5th Cir. 1993) cert. denied 510 U.S. 1049 (1994) ("[j]ury instructions on a single count embracing multiple separate offenses deprive a defendant of the right to unanimity where they create a genuine risk of conviction in the absence of unanimous juror agreement of the commission of one of them"); United States v. Sims, 975 F.2d 1225, 1240-41 (6th Cir. 1992) ("[i]n analyzing the need for a specific unanimity instruction, this Court has held, "The touchstone has been *the presence of a genuine risk that the jury is confused or that a conviction may occur as the result of different jurors concluding that a defendant committed different acts*") (quoting United States v. Duncan, 850 F.2d 1104, 1114 (6th Cir. 1988) (emphasis added); United States v. Sanchez, 914 F.2d 1355, 1360 (9th Cir. 1990) cert. denied 499 U.S. 978 (1991) ("[a] specific unanimity instruction is required where different jurors may have convicted a defendant based on the existence of different facts due to the complexity of the evidence, a discrepancy between the evidence and the indictment, or some other factor creating a real possibility of juror confusion"); State v. Voyles, 160 P.3d 794, 799-800 (Kansas 2007); Stuhler v. State, 218 S.W.2d 706, 719 (Tex. Crim. App.

2007) ("[t]he State did argue to the jury that the evidence would support a verdict based on either serious bodily injury or serious mental injury. Since the jury charge itself did not require the jury to agree on one result or the other, the jury could readily have convicted the appellant without even substantively debating which of the two types of injury she caused"); State v. Frisby, 811 A.2d 414, 424-25 (N.J. 2002); State v. Arceo, 928 P.2d 843, 869-75 (Hawaii 1996); State v. Eaker, 53 P.3d 37, 40 (Wash. App. 2002) ("[w]hen the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act had been proved beyond a reasonable doubt. [cite deleted] Failure to follow one of these options violates a defendant's state constitutional right to a unanimous jury verdict and his or her federal constitutional right to a jury trial"); State v. Stempf, 627 N.W.2d 352, 355-58 (Minn. App. 2001) ("in closing argument, the state told the jury it could convict if some jurors believed possessed the methamphetamine found on the premises while other believed he possessed the methamphetamine found in the truck"); People v. Simmons, 973 P.2d 627, 629-30 (Colo. App. 1998) ("[t]he jury instruction allows either conclusion because it does not specify a particular victim, and the prosecutor's comments, in effect, invited the jury to convict without regard to identity of the victim"); see also State v. Gain, 90 P.3d 920, 922-23 (Idaho App. 2004).

The purpose of the State's summation is to enlighten the jury and help individual jurors remember and interpret the evidence. *National District Attorneys' Association,* National Prosecution Standards (Second Edition), commentary to Standard 85.1-85.4 (1991).[201] The

[201] Summation in a criminal case permits counsel to summarize the evidence and propound arguments in support of a party's position. See, e.g., United States v. Johns, 734 F.2d 657, 660 (11th Cir. 1984) (citing United States v.Morris, 568 F.2d 396, 401 (5th Cir. 1978); United States v. Carter, 720 F.2d 941, 950 (7th Cir. 1983); Rogers v.

commentary to ABA Standard for Criminal Justice, Prosecution Function, Standard 3.5-8[202] reads:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's argument, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

Unsurprisingly, case authority mirrors the ethical standards. See, e.g., Dagley v. Russo, 540 F.3d 8, 17-18 (1st Cir. 2008) cert. denied 129 S.Ct. 933 (2009) (prosecutor's summation misstated the law of Massachusetts and amounted to misconduct, but misconduct did not amount to a due-process violation requiring writ of habeas corpus because the trial court correctly instructed the jury on Massachusetts law)[203]; see also Spivey v. Head, 207 F.3d 1263, 1274-76 (11th Cir. 2000) cert. denied 531 U.S. 1053 (2000) (quoting Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985) ("improper prosecutorial arguments, especially misstatements of law, must be considered carefully because 'while wrapped in the cloak of state authority [they] have a heightened impact on the jury'"); Boyd v. French, 147 F.3d 319, 329 (4th Cir. 1998) cert. denied 525 U.S. 1150 (1999) (citing Drake, supra) ("[a] prosecutor should refrain from stating his personal opinions during argument and misleading the jury about the law"); Mahorney v. Wallman, 917 F.2d 469,

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State, 769 So. 2d 1022, 1027-28 (Miss. 2001). Other model codes of professional conduct prohibit forensic argument contrary to law and prejudicial to a party. See, e.g., *Comment*, Mississippi Rule of Professional Conduct 3.8 ("[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate... [a]pplicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of [Mississippi] Rule [of Professional Conduct] 8.4"); ABA Model Code of Professional Responsibility DR 7-102(A)(1).

[202] ABA Standard for Criminal Justice 3.5-8(d) announces: "The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injected issues broader than the guilt or innocence of the accused under the controlling law[.]" The second sentence of ABA Standard for Criminal Justice 3.5-8(a): "It is unprofessional conduct for the prosecution intentionally to misstate the evidence or mislead the jury as to the inferences it may draw."

[203] Here, the State opposed a lawful instruction, the trial court refused to include a lawful instruction, and the State then time and again argued contrary to the law during summation.

473 (10th Cir. 1990) ("[a] misstatement of law that affirmatively negates a constitutional right or principle is often, in our view, a more serious infringement than the mere omission of a requested instruction"); United States v. Hammond, 642 F.2d 248, 249-50 (8th Cir. 1981) (prosecutor in appropriately misstated law during summation but defendant was not prejudiced because, unlike the matter at bar, the trial court correctly instructed the jury on the law). See generally Hennon v. Cooper, 109 F.3d 330, 333 (7th Cir. 1997) cert. denied 522 U.S. 819 (1997) ("[b]ecause a prosecutor is a public official charged with law enforcement, a jury is likely to repose greater trust in his arguments than in those of the defendant's lawyer. The prosecutor must not abuse that trust by misleading the jury about the law or the evidence or about the probity of the defendant's lawyer, or by appealing to jurors' prejudices and fears"); United States v. Myerson, 18 F.3d 153, 162 (2nd Cir. 1994) cert. denied 513 U.S. 885 (1994) (prosecutor has a "special duty not to mislead" during summation) United States v. Maccini, 721 F.2d 840, 846 (1st Cir. 1983) ("[i]t is as much his [the prosecutor's] duty to refrain from improper methods calculated to produce a conviction as it is to use every legitimate means to bring down a just one"). Cf. Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring) (misinformation espoused by prosecution at summation created an unacceptable risk that death penalty was secured whimsically, mistakenly, arbitrarily or capriciously).

As the state and federal constitution require each of Ms. Fulgham's jurors to agree on the criminal act she committed, and as the failure to instruct each juror to come to this agreement as a precondition to conviction affronts the state and federal constitutions, what result occurs when the prosecution (a) opposes a unanimity instruction and then (b) specifically and repeatedly during summation invites the jurors to return a non-unanimous verdict? If "[t]he purpose of jury instruction is to tell the jury what facts they have to find and who has the burden of proving or disproving these facts[,]" Harris v. State, 861 So. 2d 1003, 1016 (Miss. 2003), then what is the

purpose permitting the prosecution to prevent the jury from hearing lawful instruction as to the facts that the jury must find and then misinform the jury as to this duty? It is respectfully submitted that no jurisprudentially honorable response to this question exists.

It is respectfully submitted that the conviction must be reversed. To affirm on this record is to permit the State to succeed in wresting a constitutionally obligatory jury instruction from the jury charge and then further capitalize on this concocted deprivation by summation including argument in diametrical derogation of the refused, lawful instruction.

IV. Conclusion

Ms. Fulgham sought an instruction requiring her jury to reach a unanimous verdict. Ms. Fulgham submitted D-48 for precisely this purpose.

The State opposed D-48.

The trial court erroneously refused D-48.[204]

The trial court's error was then compounded by the prosecution's decision to misstate the law to Ms. Fulgham's jury. Had D-48 been given as required by law, the State's artifice would have failed. Without D-48, however, the State's summation ushered a non-unanimous verdict.

Thus, Ms. Fulgham stands before this Court convicted on capital murder on a patchwork verdict. For reasons stated above, a patchwork verdict is constitutionally intolerable in any criminal matter, and is only more inexcusable in a matter where the State has sought, and has secured, a death sentence.

The conviction must be reversed.

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[204] It is significant to bear in mind that Ms. Fulgham does not challenge the sufficiency of the evidence in this claim. Rather, in this claim, Ms. Fulgham challenges the adequacy of her jury instructions. See, e.g. United States v. Puerta, 38 F.3d 34, 40 (1st Cir. 1994) cert. denied 514 U.S. 1084 (1995) (rejecting government contention that challenge to adequacy of jury charge is foreclosed where evidence is sufficient to support conviction on every alternative fact-pattern than adequacy of jury charge is, in itself, an avenue for appellate relief). Ms. Fulgham challenges in the sufficiency of the evidence in Claim 35, infra.

CLAIM 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

In addition to the spurious elicitation of bad-character evidence briefed in Claim 3, infra, the State's thirst for unchecked disparagement was apparent during the first phase. In this Claim, Ms. Fulgham argues the trial court erred in permitting the State to present evidence of a romantic relationship[205] between Ms. Fulgham and her 13-year-old half brother, Tyler Edmonds.[206]

The relevant portions of the State's outrageous examination of Ms. Davis follow:

> Q. [BY MS. FAVER]: How often would you say you were in the presence of Tyler Edmonds and this defendant during that period of time?
>
> A. [BY MS. DAVIS]: Probably about three times.
>
> Q. During those three times, did you have an opportunity to observe their relationship, observe their interaction between the two of them? That being Tyler Edmonds, her brother, and this defendant?
>
> A. Yes, ma'am.
>
> Q. How would you describe it?
>
> A. Not brotherly wise.
>
> Q. What do you mean by that?
>
> A. It was a relationship wise, a boyfriend and girlfriend wise.
>
> Q. Why do you say that, Ms. Davis?
>
> BY MR. LAPPAN: Judge, objection to the relevance of this.
>
> BY THE COURT: Overruled.

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[205] Ms. Fulgham adopts the term used by the State's witness. (R. 733).

[206] The State informed the jury that Tyler Edmonds was Ms. Fulgham's 13-year-old half brother during opening statement. (R. 665).

> Q. [BY MS. FAVER]: Why would you say that, Ms. Davis? What did you observe that gave you that impression?
>
> A. [BY MS. DAVIS]: Romantic wise, when you put oil on somebody, or you're sun bathing, or – it's – it's a brother, you basically tell them to go play, and that wasn't the situation. I mean she asked him to put some baby oil on her, because we were out tanning on this occasion, and the way he was caressing her and putting the baby oil on, that's just not brotherly. That's – that wasn't how it worked.
>
> (R. 732-33).

The issues in any case derive from the pleadings. The single pleading in this capital case is the single-count indictment located at CP. 30. As revealed in this Claim, a review of the allegations put forth in the State's indictment and the extravagantly inappropriate evidence adduced by the State over the objection of Ms. Fulgham mandates reversal.

I. The trial court erred. The evidence adduced is irrelevant.

While authentication is the *sine qua non* of evidence law, see Claim 3, infra, relevance must be established for every item offered into evidence as a precondition to admissibility. Lockett v. State, 517 So. 2d 1317, 1330-31 (Miss. 1987) cert. denied 487 U.S. 1210 (1988); see also Douglass v. Eaton Corp., 956 F.2d 1339, 1344-45 (6th Cir. 1992) abrogated on other grounds at Weisgram v. Marley Co., 528 U.S. 440, 452 n. 8 (2000) (whether proferred evidence is relevant is a separate question from whether the proferred evidence is admissible because relevant evidence may be inadmissible for another reason); Graham C. Lilly, Principles of Evidence (4th ed. 2006), sec. 3.3, p. 49 ("[g]enerally speaking, if an item is not authentic, it is not relevant"). If the proferred evidence alters the probability of a consequential fact one way or another, then the proferred evidence is relevant under Rule 401. Conway v. Chemical Leaman Tank Lines, Inc., 525 F.2d 927, 930 (5th Cir. 1976); Hansen v. State, 592 So. 2d 114, 145 (Miss. 1991) cert. denied 504 U.S. 921 (1992); Harris v. State, 921 So. 2d 366, 370-71 (Miss. App. 2005) cert. denied 926 So. 2d 922 (Miss. 2006); Gribble v. State, 760 So. 2d 790, 792 (Miss. Ct.

App. 2000) (citing cases); see Smith v. Georgia, 684 F.2d 729, 736 (11th Cir. 1982); United States v. Curtis, 568 F.2d 643, 645-46 (9th Cir. 1978); International Merger & Acquisition Consultants, Inc. v. Armac Enterprises, Inc., 531 F.2d 821, 823-24 (7th Cir. 1976); see also United States v. Casares-Cardenas, 14 F.3d 1283, 1287 (8th Cir. 1994) cert. denied 513 U.S. 849 (1994). No precise, technical or legalistic tests exist for relevance. Courts must apply logical strictures to the relevancy determination. United States v. Allison, 474 U.S. 286, 289 (5th Cir. 1973) cert. denied 419 U.S. 851 (1974); Williams v. Newberry, 32 Miss. 256, 260 (1856) ("[t]he inference from a fact proved must be natural").

Mississippi Rule of Evidence 401, in its own terms, contemplates that relevant evidence is "of consequence." Rule 401's definition of relevance incorporates the concept of materiality.[207] Put differently, under Rule 401, nothing can be "relevant yet immaterial." United States v. Dornhofer, 859 F.2d 1195, 1199 (4th Cir. 1988) cert. denied 490 U.S. 1005 (1989) (noting separate inquiry for Rule 401 relevance and Rule 403 admissibility). Therefore, there are two components to Rule 401 evidence – materiality and probative value. See United States v. Hall, 653 F.2d 1002, 105 (5th Cir. 1981);[208] McCormick on Evidence (5th ed. 1999), sec. 185, p. 638; 1A Wigmore, Evidence in Trials and Common Law section 28, at 975 (1983 rev.).[209]

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[207] Relevant evidence is evidence which advances an inquiry (whether that inquiry is under consideration or not). Material evidence is much more specific. Material evidence is evidence that tends to prove a fact in question. McCormick on Evidence (Second Edition), sec. 185, p. 937 (1999). Relevance, as defined in Rule 401, "means advancing the inquiry about something that is in issue. As defined by the Federal Rules, relevance includes materiality." James W. McElhaney, McElhaney's Trial Handbook (Fourth Edition, 2005), p. 209; see Roger C. Park, Trial Objections Handbook, sec. 2:4, pp. 2-11 (2004) (incorporation of materiality into Rule 401 was critical as pleadings, admissions and stipulations control questions of materiality in that while evidence which proves or disproves a matter not in question is always immaterial, the matter itself may be relevant *e.g.*, a stipulation is relevant while facts which prove or disprove the stipulation are immaterial as the stipulation is not in question); 1985 Comment, Advisory Committee on Rules, Mississippi Rule of Evidence 401 ("Rule 401 makes no distinction between relevancy and materiality. The concept of materiality is merged into the concept of relevancy and retains no independent viability. Evidence is relevant if it is likely to affect the probability of a fact of consequence in the case.").

[208] "Implicit in that definition [Rule 401] are two distinct requirements: (1) the evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action." Hall, supra.

Does the testimony at bar prove or disprove ***any*** allegation set forth in the indictment? If not, then the evidence is irrelevant. See, e.g., United States v. Hawkins, 215 F.3d 858, 860-61 (8th Cir. 2000) cert. denied 531 U.S. 972 (2000);[210] United States v. Harwood, 998 F.2d 91, 97 (2nd Cir. 1993) cert. denied 510 U.S. 971 (1993); United States v. Dean, 980 F.2d 1286, 1288 (9th Cir. 1992);[211] United States v. Johnson, 558 F.2d 744 (5th Cir. 1977) cert. denied 434 U.S. 1065 (1978); United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979); State v. Barriner, 34 S.W.3d 139, 145-46 (Mo. 2006); State v. Lassiter, 692 N.W.2d 171, 175-78 (S.D. 2005); State v. Malafau, 906 P.2d 612, 615-16 (Hawaii 1995); Sampson v. Missouri Pac. R. Co., 560 S.W.2d 573, 586 (Mo. 1978);[212] Richardson v. Levee Commissioners, 68 Miss. 539, 550-51, 9 So. 351, 352 (1891); Gresham v. State, 566 S.E.2d 380, 383-84 (Ga. App. 2002); People v. Bailey, 159 A.D.2d 862, 863 note *, 553 N.Y.S.2d 512, 513 note * (3rd Dept. 1990); see also United States v. Gonzalez-Flores, 418 F.2d 1093, 1098-99 (9th Cir. 2005); State v. Martin, 582 So. 2d 306, 314-15 (La. Ct. App. 1991) writ denied 588 So. 2d 113 (La. 1991).

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[209] See 1985 Comment, Advisory Committee on Rules, Mississippi Rule of Evidence 401; see also Akin v. Hill's Estate, 440 P.2d 585, 590 (Kansas 1968) ("probative evidence" is that which contributes to, furnishes or establishes proof of the existence or the non-existence of a proposition); Louisville & N.R. Co. v. Lefevers' Adm'x, 155 S.W.2d 845, 847 (Ky. App. 1941) (probative evidence is "testimony of substance of relevant consequence; not vague or uncertain, but having the quality of proof or fitness to induce conviction of truth"). Cf. Ladner v. Campbell, 515 So. 2d 882, 889 (Miss. 1987).

[210] "The fact of consequence in this case was whether Hawkins possessed the gun, and the ammunition found in the upper unit has nothing to do with possession. While the ammunition may be relevant to proving ownership of the gun, ownership is not relevant to the offense in question." Hawkins, supra.

[211] "Long's out-of-court statements are probative of why Deputy Neddham went to the mobile home. However, his reasons for going there are not of consequence to the determination of the action, *i.e.*, they do not bear on any issue involving the elements of the charged offense." Dean, supra.

[212] "Standing alone, evidence of plaintiff's heart condition was of little use to the jury. It was evidence which required the connection of an additional fact to substantiate its relevance, to wit: the relationship between heart conditions of the kind which was Sampson's and life expectancy." Sampson, supra.

The evidence at bar indicates Ms. Fulgham engaged in an incestuous and pedophiliac relationship with her half-brother.[213] This evidence bears no rational connection to the indictment. As stated by this Court over thirty years ago: "Incompetent evidence, inflammatory in character, when presented to a jury carried with it a presumption that it was harmful." Coleman v. State, 285 So. 2d 177, 179 (Miss. 1973).

II. The irrelevant evidence erroneously adduced requires reversal

Reversal for the erroneous admission of a single irrelevant item is strong medicine. Therefore, reversal is mandatory only when the trial court's erroneous admission of irrelevant evidence detrimentally affects a substantial right of the defendant. United States v. Rea, 958 F.2d 1206, 1219-20 (2nd Cir. 1992).

In this case, the State sought and secured a conviction for the most serious crime under Mississippi law in the aftermath of eliciting evidence that Ms. Fulgham – in addition to being a thief and murderer – is also an incestuous pedophile. This is wantonly prejudicial and requires reversal. Gore v. State, 719 So. 2d 1197, 1199-1200 (Fla. 1998) (in a murder and robbery prosecution, evidence that the defendant had sex with a thirteen-year-old girl "had no relevance in this trial other than to prove that Gore was a morally reprehensible individual. Because the sole relevance of this evidence could only be to demonstrate Gore's bad character, it was inadmissible"); Walraven v. State, 297 S.E.2d 278, 283-84 (Ga. 1982); Gray v. State, 351 So. 2d

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[213] Perhaps because the only reason to introduce the evidence at bar was to sicken the jury and invite them to detest Ms. Fulgham, the State never concerned itself with establishing ***when*** Ms. Davis claims she witnessed the romantic relationship between Ms. Fulgham and her half-brother. See, e.g., Weinstein's Federal Evidence (Second Edition), "Remote Evidence Not Admissible," sec. 401.04[2][e][ii], pp. 401-29 (2008). When an item is offered for its materiality rather than for its raw power to sicken the jury, temporal remoteness generally favors exclusion. See, e.g., McCorkle v. McCorkle, 811 So. 2d 258, 267-68 (Miss. App. 2001) (remoteness of allegations of pedophilia in a civil action militated against admissibility); see also Fairchild v. United States, 240 F.2d 944, 947-48 (5th Cir. 1957) (proof of impoverishment too remote in a tax-deficiency prosecution). Notwithstanding the State's burden to demonstrate relevance, United States v. George, 201 F.3d 370, 373 (5th Cir. 2000), the trial court never required the State to demonstrate ***when*** Ms. Davis made her irrelevant, pedophiliac observations. As the naked intent of the evidence at bar was pure disparagement in the first place, the trial court's failure to sustain Ms. Fulgham's objection on the ground that the State never offered any indication as to the temporality of Ms. Davis's objectionable testimony was fortuitous for the State.

1342, 1345-46 (Miss. 1977) ("[t]he only purpose for introducing this evidence was to prejudice the jury by inferring that defendant was a child molester"); Raines v. State, 240 N.E.2d 819, 819-20 (Ind. 1968) (murder conviction premised on circumstantial evidence reversed for introduction of irrelevant evidence that defendant engaged in homosexual conduct on the night of the alleged murder); State v. Bouse 814-15 (irrelevant testimony that defendant molested his daughter in murder case constituted plain error as "[f]or a father to be charged with such bestial and incestuous conduct toward his own infant daughter would deeply shock the sense of moral decency and arouse the passions and prejudices of any normal person"); Fogelman v. State, 648 So. 2d 214, 217 (Fla. Dist. Ct. App. 1994) (evidence of attempted escape from custody irrelevant in prosecution for kidnapping, aggravated assaults and attempted sexual battery); People v. Wheat, 54 A.D.2d 951, 951, 388 N.Y.S.2d 328, 328 (2nd Dept. 1976) (relying on People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901)) ("[t]he arresting officer's testimony about the filing of other complaints charging the defendant with unrelated sexual crimes should not have been admitted as it unduly biased the jury and deprived defendant of a fair trial"); McMurtrey v. State, 74 So. 2d 528, 531-32 (Ala. App. 1954); see, e.g., United States v. Thomas, 321 F.3d 627, 636-37 (7th Cir. 2003) (in a circumstantial prosecution for criminal possession of a firearm, conviction reversed for introduction of (a) irrelevant photograph of tattoo of crossed revolvers appearing on defendant's body and (b) irrelevant prior convictions for criminal possession of a firearm); United States v. Garcia, 291 F.3d 127, 143-44 (2nd Cir. 2002) (in "largely circumstantial" narcotics prosecution, conviction reversed for introduction of (a) irrelevant prior drug conviction and (b) irrelevant opinion testimony from government informant); United States v. Utter, 97 F.3d 509, 514-15 (11th Cir. 1996) (circumstantial prosecution for, *inter alia*, arson, convictions reversed for admission of irrelevant evidence of (a) previous fire at defendant's residence and (b) defendant's alleged statement to tenant that defendant would "burn her out" of

her rental property); United States v. Madden, 38 F.3d 747, 751-54 (4th Cir. 1994) (conviction for bank robbery reversed for government's introduction of evidence that defendant used heroin and cocaine with no nexus coordinating this evidence to the bank robbery as "there is no doubt that it [use of heroin and cocaine] is among the worst of crimes with which one can be tarred"[214]); United States v. Ferreira, 821 F.2d 1, 8-9 (1st Cir. 1987); United States v. Shomo, 786 F.2d 981, 985-86 (10th Cir. 1986) (conviction for criminal possession of a firearm reversed on grounds that government introduced irrelevant evidence that defendant possessed firearms other than the firearm announced in the indictment); James v. State, 152 P.3d 255, 256-57 (Okla. Crim. App. 2007) ("defendant should be convicted, if at all, by evidence showing guilt of the offenses charged, rather than evidence indicating guilt for other crimes"); State v. Horton, 151 P.2d 9, 17-18 (Kansas 2007); State v. Bordis, 905 S.W.2d 214, 227-32 (Tenn. Crim. App. 1995) (conviction reversed in a homicide prosecution for child neglect where prosecution introduced irrelevant evidence that defendant (a) frequented gay bars and (b) watched his wife have sex with another man); Kiefer v. State, 153 N.E.2d 899, 905 (Ind. 1958);[215] Woodard v. State, 978 So. 2d 217, 219 (Fla. Dist. Ct. App. 2008); Foreman v. State, 965 So. 2d 1171, 1176 (Fla. Dist. Ct. App. 2007); Maynard v. State, 639 S.E.2d 389, 394-95 (Ga. App. 2006); Moore v. State, 659 So. 2d 414, 415-16 (Fla. Dist. Ct. App. 1995) review denied 670 So. 2d 940 (Fla. 1996); Coleman v. Superior Court 116 Cal.App.3d 129, 136-38, 172 Cal.Rptr. 86, 90-91 (Cal. App. 1981) cert. denied 451 U.S. 988 (1981); State v. Strong, 196 N.E.2d 801, 805-09 (Ohio App. 1963); see

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[214] How would the Fourth Circuit approach the irrelevant introduction of evidence that the defendant had sex with the defendant's 13-year-old half brother? Would that evidence surpass mere consumption of illicit drugs on the tolerable scale of crime with which one could be tarred?

[215] "It is the duty of the State to present relevant and material facts to the jury to stimulate their mental processes so that they might thereby arrive at the guilt or innocence of the accused. But to introduce evidence only for the purpose of arousing the passions and prejudices of the jury, in such a manner as to cause them to abandon any serious consideration of the facts of the case and give expression only to their emotions, is clearly outside the scope of such duty and a violation of an accused's right to a fair trial." Kiefer, 153 N.E.2d at 905.

United States v. Sumlin, 489 F.3d 683, 691-92 (5th Cir. 2007); United States v. Johnson, 439 F.3d 884, 889-90 (8th Cir. 2006); United States v. Jackson, 339 F.3d 349, 358-59 (5th Cir. 2003); United States v. Spinner, 152 F.3d 950, 960-61 (D.C. Cir. 1998); United States v. Merriweather, 78 1070, 1078-79 (6th Cir. 1996); United States v. Moorehead, 57 F.3d 875, 878-79 (9th Cir. 1995); United States v. Guerreo, 650 F.2d 728, 734-35 (5th Cir. 1981); United States v. Cook, 538 F.2d 1000, 1002-05 (3rd Cir. 1976) (conviction for bank robbery reversed where prosecution introduced prior conviction for sodomy even though sodomy conviction had some relevance); United States v. Blanton, 520 F.2d 907, 909-10 (6th Cir. 1975) (conviction reversed in prosecution for criminal possession of a firearm for introduction of irrelevant hearsay evidence of defendant's involvement in wholly unrelated bank robbery); State v. Barton, 88 P.2d 385, 387-88 (Wash. 1939); see also United States v. McGowan, 274 F.3d 1251, 1253-54 (9th Cir. 2001) cert. denied 537 U.S. 1050 (2002); United States v, Marshall, 173 F.2d 1312, 1317-18 (11th Cir. 1999); United States v. Sumner, 119 F.3d 658, 661-62 (8th Cir. 1997); United States v. Murray, 103 F.3d 310, 319-20 (3rd Cir. 1997); United States v. Has No Horse, 11 F.3d 104, 106 (8th Cir. 1993); United States v. Lewis, 651 F.2d 1163, 1165-66 (6th Cir. 1981); State v. Anthony, 189 P.3d 366, 370-72 (Ariz. 2008); Rindgo v. United States, 411 A.2d 373, 376-77 (D.C. 1980).

Admission of the evidence at bar achieved only one objective: it permitted Ms. Fulgham's jury to engage in bad-character reasoning. While this was standard operating procedure for the prosecution in this case, see, e.g., Claim 3, infra, it is impermissible in any criminal prosecution. See, e.g.,United States v. Hands, 184 F.3d 1322, 1328-29, 1333 n. 32 (11th Cir. 1999) (admission of evidence of spousal abuse in a narcotics prosecution was misconduct in that it was superfluous, highly inflammatory and likely to incite a jury into an irrational

determination); United States v. Vaulin, 132 F.3d 898, 901-02 (3rd Cir. 1997).[216] Rank denigration is simply intolerable in a prosecution when the very party who commits the wrong seeks[217] and secures the death penalty.[218] Indeed, the offensive conduct delineated in this Claim does more than affront Eighth Amendment concepts – erroneous admission of unreliable evidence abrogates Ms. Fulgham's due process right to trial on reliable evidence. Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988); Collins v. Scully, 755 F.2d 16, 18-19 (2nd Cir. 1985); Walker v. Engle, 703 F.2d 959, 962 (6th Cir. 1983); State v. Ray, 637 S.W.2d 708, 709-710 (Mo. 1982) overruled on other grounds at State v. Jones, 716 S.W.2d 799, 800 (Mo. 1986); see, e.g., Collins v. Scully, 755 F.2d 16, 17 (2nd Cir. 1985) (erroneously admitted evidence violates the defendant's due process rights where the evidence was crucial, critical and highly significant); see also United States v. Curtin, 489 F.3d 935, 956-57 (9th Cir. 2007) (en banc); United States v. Cabrera, 222 F.3d 590, 596-97 (9th Cir. 2000). See generally Romano v. Oklahoma, 512 U.S. 1, 12-13 (1994).

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[216] "The district court did not conclude that the prosecutor engaged in intentional misconduct in asking these questions and this record does not cause us to disagree with that conclusion. Nevertheless, we would hope that, in the future, the Government would exercise better judgment in conducting an examination of a witness such as McCoy and would not bring out this kind of testimony unless it is relevant to some issue in the case." Vaulin, 132 F.3d at 901-02.

[217] R. 55.

[218] "[I]n a capital case we will give painstaking scrutiny to the prosecutor's conduct." State v. Coyle, 574 A.2d 951, 969 (N.J. 1990). The ethical obligations of the prosecutor are only more acute where the death penalty has been secured. People v. Kidd, 675 N.E.2d 910, 937 (Ill, 1996) (McMorrow, J., concurring) cert. denied 520 U.S.1269 (1997). In the same way this Court is charged with the duty to apply heightened scrutiny in its review of conviction and sentences in death cases, Murray v. Giarrantano, 492 U.S. 1, 8-9 (1989); Woodson v. North Carolina, 428 U.S. 290, 305 (1976); see Caldwell v. Mississippi, 472 U.S. 320, 329-330 (1985); Bishop v. State, 812 So. 2d 934, 938 (Miss. 2002). The prosecution has a heightened duty to ensure justice is served in any capital prosecution. State v. Koskovich, 776 A.2d 144, 167 (N.J. 2001); Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998); Greene v. State, 931 P.2d 54, 62 (Nev. 1997); see McCaskill v. State, 227 So. 2d 847, 852 (Miss. 1969); Adams v. State, 202 Miss. 68, 74-75, 30 So. 2d 593, 596 (1947); Sanchez v. State, 792 So. 2d 286, 291 (Miss. Ct. App. 2001) cert. denied 792 So. 2d 286 (Miss. 2001).

III. Conclusion

The relevance determination shall be reversed only when the trial court abused its discretion. United States v. Taylor, 106 F.3d 801, 803 (8th Cir. 1997); United States v. Laughlin, 772 F.2d 1382, 1392-93 (7th Cir. 1985). Ms. Fulgham does not contend this Court would have decided the admissibility question differently, but that the trial court decided the admissibility of the testimony irrationally. See, e.g., United States v. Williams, 51 F.3d 1004, 1010 (11th Cir. 1995) cert. denied 516 U.S. 900 (1995). Clearly, the trial court abused its discretion in ruling that extraneous information that Ms. Fulgham committed or contemplated perversions at some unknown time before the State claims she robbed and killed her husband was relevant.

The trial court's ruling on the admissibility of the evidence at bar constituted reversible error and the conviction must be reversed.

CLAIM 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

I. Background

Out-of-court declarations attributed to Ms. Fulgham are at issue in this Claim. The trial court necessarily concluded the declarations were admissible as admissions, or admissible as hearsay within an exception to the hearsay rule, or admissible as out-of-court statements not offered for their truth. Ms. Fulgham presumes the trial court permitted testimony over her hearsay objection on the basis that the testimony constituted admissions and were, therefore, not hearsay.[219] See Miss. R. Evid 801(d)(2)(A).

[219] There are four objections at issue in this Claim. As to Ms. Fulgham's first objection (R. 729) and third objection (R. 730) on hearsay grounds, the trial court merely overruled the objection. As to the second objection (R. 730) on hearsay grounds, the trial court ruled that the prosecution would have to rephrase the question. The State did so and amended its original question – "Did she [Ms. Fulgham], in fact ask your grandmother, to your knowledge?" – to the following question: "She [Ms. Fulgham] asked you personally to request that your grandmother give her a gun, is

While this presumption seems the most sensible in light of the trial court's directive to discontinue further hearsay objections because the out-of-court declarations at bar are from "the same conversation" (R. 730), the presumption is undermined by the trial court's decision to include circumstantial-evidence instructions in its jury charge. Necessarily, the trial court concluded no admissions were admitted into evidence when the trial court concluded the State had presented a mere circumstantial case. See Claims 8 and 9, supra, and Claim 27, infra; see also Mack v. State, 481 So. 2d 793, 795 (Miss. 1985).

Notwithstanding this oddity, Ms. Fulgham must continue in the presumption that the out-of-court declarations were admitted as admissions as the out-of-court declarations were surely admitted for their truth[220] and do not fall within any exception to the hearsay rule.

As out-of-court declarations were wrongly admitted into evidence over the repeated and continuing hearsay objection of Ms. Fulgham, and as the State relied on these out-of-court admissions during its summation,[221] the legitimacy of these rulings is the gravamen of this Claim.

II. Discussion

"Admissions are simply words or actions inconsistent with the party's position at trial, relevant to the substantive issues in the case, and offered against the party." McCormick on Evidence (5th Ed. 2003), Sec. 254, p. 138 ("some degree of inconsistency with the declarant's

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that correct?" (R. 729-30). This amendment altered the question from one of whether Ms. Davis had knowledge of whether Ms. Fulgham said something to Ms. Davis's grandmother to whether Ms. Davis heard Ms. Fulgham say something to her. Finally, with the fourth objection to hearsay (R. 730) the trial court announced Ms. Fulgham had a continuing objection and that the hearsay objection is overruled as the out-of-court declaration is part of "the same conversation." (R. 730). Based on the content of this footnote, and the content of this footnote alone, Ms. Fulgham presumes the trial court determined the out-of-court declarations were admissible as admissions rather than (i) admissible as hearsay within an exception to the rule against hearsay or (ii) admissible non-hearsay.

[220] The prosecution surely relied on the truth of these out-of-court declarations during its first-phase summation. (R. 996-97).

[221] See Footnote 220, supra.

position at trial is required under fundamental, but admittedly lenient, relevancy requirement"). In Mississippi, the definition of "admission" is less comprehensive. An admission in Mississippi must implicate the fundamental issue of guilt-or-innocence. "An admission is but a statement by the accused which may be direct or implied by facts pertinent to the issue and *tending to prove his guilt.*" Lynch v. State, 877 So. 2d 1254, 1266 (Miss. 2004) cert. denied 543 U.S. 1155 (2005) (emphasis added). Whether applying the Mississippi standard or Professor McCormick's more lenient appraisal, an admission is something more than a mere out-of-court declaration. In a criminal matter, an admission is, at bare minimum, always a declaration from the accused that bears some relevance to the crime for which the accused stands trial.

Any admission made by Ms. Fulgham is admissible so long as there is a factual predicate for the admission, see United States v. Lang, 364 F.3d 1210, 1222 (10th Cir. 2004) cert. granted and vacated on other grounds at 543 U.S. 1108 (2005); see also Bourjaily v. United States, 483 U.S. 171, 178 (1987); United States v. Richards, 204 F.3d 177, 202 (5th Cir. 2000), and so long as the admission does not contravene Miss. R. Evid. 403. See, e.g., Givens v. State, 967 So. 2d 1, 19 (Miss. 2007) (Miss. R. Evid. 403 is the ultimate filter through which all otherwise admissible evidence must pass).

In this Claim, Ms. Fulgham challenges the legality of the trial court's ruling that out-of-court statements made by Ms. Fulgham were admissions in the first place. If the trial court erred, then hearsay was introduced over the objection of Ms. Fulgham.

The offending portion of Ms. Davis's direct examination by the State follows:

> Q. [BY MS. FAVER:] At that time when you were babysitting [about a month before the death of Joey Fulgham], did you have a conversation with her [Ms. Fulgham] regarding a dog or anything like that when she returned?
>
> A. [BY MS. DAVIS:] Yes, ma'am.
>
> Q. Can you explain to the ladies and gentlemen what the conversation was?

BY MR. LAPPAN: Objection, Your Honor. Hearsay.

BY THE COURT: Overruled. You may proceed.

Q. What was the conversation with the defendant at that time [about a month before the death of Joey Fulgham]?

A. We was – she had basically said that – she was talking about a stray dog that was around the house, and she wanted to know if I could ask my granny for a gun.

Q. And when she asked you to ask your granny, you're talking about Toni Mitchell, right?

A. Yes, ma'am.

Q. Did she, in fact, ask your grandmother, to your knowledge?

A. Not –

BY MR. LAPPAN: Your Honor, objection again. It's hearsay.

BY THE COURT: Rephase your question.

BY MS. FAVER: Okay.

Q. She asked you personally to request that your grandmother give her a gun; is that correct?

A. Yes, ma'am.

Q. Did your grandmother, Ms. Toni Mitchell, actually have a gun?

A. Yes, ma'am.

Q. How many times did she ask you to get a gun from your grandmother?

BY MR. LAPPAN: Objection, Your Honor, hearsay.

BY THE COURT: Overruled.

Q. How many times did the defendant ask you to get a gun from your grandmother?

A. Three times.

Q. Explain to the ladies and gentlemen when that – when each time was and what the circumstances were surrounding it. What I mean was when was the first time?

A. The first time she was talking about the dog, and she said that –

BY MR. LAPPAN: Judge, objection again. Hearsay.

BY THE COURT: The objection is overruled. You need not renew it.[222] *It's the same conversation.* (emphasis added).

BY MR. LAPPAN: Yes, sir.

BY THE COURT: You may proceed. *It's the defendant's statement that she is testifying about.* You may proceed. (emphasis added).

A. She – the first time was – we were sitting at the house, she was talking about the dog, and that SOB, and she wanted to shoot him. And then the second time was she had previously – we were out tanning, and she had asked if I asked my granny, Toni Mitchell, for the gun, and I told her no, that I wasn't going to do that, because I wasn't – she wasn't going to get it anyway. And the third time was did I ask her again.

Q. Did you ever ask your grandmother to get her the gun?

A. No. No, ma'am.

(R. 729-31).

As a result of the above, Ms. Davis testified over the objection[223] of Ms. Fulgham that Ms. Fulgham (a) had mentioned to her that Ms. Fulgham wanted to shoot a dog and (b) twice inquired whether Ms. Davis asked her grandmother to borrow a firearm to shoot the dog.

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[222] The trial court relieved Ms. Fulgham from making any further objection to the testimony from Ms. Davis as to what Kristi Fulgham said. (R. 730). See, e.g., State v. Larocque, 489 S.E.2d 806, 808 (Ga. 1997) (citing 4 C.J.S. Appeal & Error, sec. 218 (1993)). The trial court also made the finding that Ms. Davis's testimony concerned out-of-court declarations occurring during the same conversation – a conversation that the State established occurred a month before Joey Fulgham was killed. (R. 729). This ruling and finding is critical for two reasons. First, it alleviated the need for Ms. Fulgham to continue to object to further out-of-court declarations from "this conversation" on hearsay grounds. Second, while it found that the out-of-court declarations emanated from the "same conversation," the only testimony before the trial court was that the out-of-court declarations were made "about a month before" Mr. Fulgham's death. (R. 729). Ms. Fulgham continues in this appeal to contest the legality of the trial court's ruling on each of these grounds: that the testimony was inadmissible hearsay and that the State, as proponent, failed to establish a fact upon which the trial court based its ruling.

[223] It would be have been inappropriate for Ms. Fulgham to have objected further on grounds of hearsay following the trial court's ruling that Ms. Fulgham "need not renew" the hearsay objection (R. 730) after three previous objections on the same grounds (R. 729-30). See Footnote 222, supra.

Neither individually nor collectively can these out-of-court declarations be considered admissions. See, e.g., People v. Rodriguez, 684 N.E.2d 128, 131-32 (Ill. App. 1997) (in prosecution for unlawful use and discharge of a firearm, out-of-court declaration by defendant that "I am a sharp shooter" was not an admission, but hearsay); State v. Lozada, 608 A.2d 407, 412 (N.J. Super. A.D. 1992) appeal denied 612 A.2d 1218 (N.J. 1992); People v. Hoffstetter, 560 N.E.2d 1349, 1363-64 (Ill. App. 1990) appeal denied 564 N.E.2d 843 (1990); People v. Grabbe, 499 N.E.2d 499, 504 (Ill. App. 1986) appeal denied 508 N.E.2d 731 (Ill. 1987). See generally Landsdown v. United States, 348 F.2d 405, 411 (5th Cir. 1965); State ex rel. LaSota v. Corcoran, 583 P.2d 229, 234 (Ariz. 1978); Whitten v. State, 333 N.E.2d 86, 90 (Ind. 1975); State v. Case, 140 S.W.3d 80, 86-87 (Mo. App. 2004); Davis v. State, 106 So. 874, 875 (Ala. App. 1926). Because the out-of-court declarations were not admissions, they were inadmissible as hearsay. Rulings on admissibility are reviewed for an abuse of discretion and, therefore, reversed where premised upon a clearly erroneous finding of fact or a clearly erroneous conclusion of law. United States v. Jenkins, 313 F.3d 549, 559 (10th Cir. 2002); Mingo v. State, 944 So. 2d 18, 28 (Miss. 2006); see Nelson v. Apfel, 210 F.3d 372, 391 (7th Cir. 2000) (trial court abuses its discretion when no reasonable person would agree with the actions of the trial court); Kirk v. Pope, 973 So. 2d 981, 986 (Miss. 2007) (trial court abuses its discretion when trial court makes an error of law); Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (trial court abuses its discretion when trial court's ruling is so clearly wrong as to fall "outside the zone of reasonable disagreement"); see also Bocanegra v. Vicmar Servs., Inc., 320 F.3d 581, 584 (5th Cir. 2003).

Further, even if these out-of-court declarations were properly determined to constitute admissions, the out-of-court declarations were inadmissible in that their probative value was outweighed by the prejudicial effect of their admission. See, e.g., Williams v. Drake, 146 F.3d

44, 48 (1st Cir. 1998) (citing Weinstein's Federal Evidence, (Second Edition), sec. 801.20[3], p. 801-44 (1998)); United States v. Elizondo, 277 F.Supp.2d 691, 702 (S.D.Tex. 2002); People v. Perez, 42 Cal.App.3d 760, 766, 117 Cal.Rptr. 195, 199 (Cal. App. 1974); see also Church v. Cochran, 480 F.2d 155, 156 (5th Cir. 1973).

Finally, as the trial court made a finding that the out-of-court declarations objected to by Ms. Fulgham were made during "the same conversation" (R. 730), the State had a burden of producing facts – any facts – to support this finding. See, e.g., Lemer v. Boise Cascade, Inc., 107 Cal.App.3d 1, 12, 165 Cal.Rptr. 555, 562 (Cal. App. 1980); see also City of Long Beach v. Standard Oil Co. of California, 46 F.3d 929, 937 (9th Cir. 1995) ("[p]roponent of the evidence bears the burden of laying the proper foundation for the admission"); United States v. Starzecpyzel, 880 F.Supp. 1027, 1031 (S.D.N.Y. 1995). See generally Marcum v. United States, 452 F.2d 36, 39 (5th Cir. 1971); Florida Fruit Canners v. Walker, 90 F.2d 753, 758 (5th Cir. 1937) cert. denied 302 U.S. 738 (1937) (the general rules of evidence "are so well recognized as to require no citations in their support. The burden of proof rests primarily on him who has the affirmative of the issue"); Town of Ackerman v. Choctaw County, 157 Miss. 594, 128 So. 757, 758 (1930). As there was no factual basis upon which to rest the determination that the out-of-court declarations at bar were made during "the same conversation," that determination was necessarily an abuse of discretion. Jenkins, supra; Mingo, supra; see Nelson, 210 F.3d at 391; Kirk, 973 So. 2d at 986; Montgomery, 810 S.W.2d at 391; see also Bocanegra, 320 F.3d at 584.

Because the out-of-court declarations were not admissions, they were inadmissible hearsay. The trial court erred in permitting the State to adduce this inadmissible evidence and this error affronted Ms. Fulgham's due process rights under the federal and state constitution[224]

[224] Butler v. State, 217 Miss. 40, 58, 62 So. 779, 784 (1953) ("[t]he due process clauses of the state and federal constitution require that a trial be conducted according to established criminal procedures"); Brooks v. State, 209 Miss. 150, 155, 46 So. 2d 94, 97 (1950).

to trial premised entirely upon reliable evidence. See Part II of Claim 24, supra. Therefore, the conviction at bar must be reversed for reasons stated in this Claim.

CLAIM 26

THE TRIAL COURT ERRED IN OVERRULING A HEARSAY OBJECTION WHICH PERMITTED THE STATE TO PRESENT INADMISSIBLE EVIDENCE CONCERNING MS. FULGHAM'S PURPORTED DECLARATION THAT HER MARRIAGE WAS OVER

> *The hearsay rule is designed to prevent the admission of unreliable hearsay but to permit through its many exceptions the admission of reliable hearsay.*
>
> *Ferrier v. Duckworth, 902 F.2d 545, 547 (7th Cir. 1990) cert. denied 498 U.S. 988 (1990).*

Later in the direct examination of Ms. Davis, the State elicited over the hearsay objection of Ms. Fulgham testimony that Ms. Fulgham told Ms. Davis that her marriage to Joey Fulgham "wasn't going to work out." (R. 734). This hearsay statement was in conflict with immediately preceding testimony from Ms. Davis. The entirety of the testimony at issue now follows:

> Q. [BY MS. FAVER]: Okay. Tell the ladies and gentlemen what she told you about her relationship with Joey Fulgham during that period when she moved back into his home in March of 2003. What was their relationship supposed to be?
>
> A. [BY MS. DAVIS]: They were supposed to be getting back together and working things out.
>
> Q. Okay. But what did Kristi Fulgham tell you?
>
> BY MR. LAPPAN: Your Honor, objection, hearsay.
>
> BY THE COURT: Overruled.
>
> A. [BY MS. DAVIS]: On that occasion?
>
> Q. [BY MS. FAVER]: Uh-huh (indicating an affirmative response).
>
> A. That, you know, she was – it wasn't going to work out, basically.
>
> (R. 734).

Hearsay is inadmissible unless it falls within an exception. Allstate Ins. Co. v. Green, 794 So. 2d 170, 177 (Miss. 2001). As stated in Claim 25, supra, a trial court abuses its discretion where there is a clear error in judgment encompassing a clearly erroneous finding of fact or a clearly erroneous conclusion of law. Jenkins, 313 F.3d at 559; Mingo, 944 So. 2d at 28; see Nelson, 210 F.3d at 391); Kirk, 973 So. 2d at 986; Montgomery, 810 S.W.2d at 391; see also Bocanegra, 320 F.3d at 584. While an out-of-court declaration attributed to Ms. Fulgham that her marriage to the individual she was accused of murdering "wasn't going to work out" is "of consequence" to the determination of whether she killed her husband,[225] the out-of-court declaration is nonetheless inadmissible as a hearsay statements that does not fall within an exception to the rule against hearsay.[226]

In tandem with the hearsay error and discussion of law presented in Claim 25, supra, the trial court's erroneous ruling that Ms. Fulgham's alleged out-of-court declaration that her marriage "wasn't going to work out" was admissible over a hearsay objection constituted reversible error. As such, Ms. Fulgham's conviction must be reversed.

CLAIM 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 INSTRUCTION D-20 IN THE JURY CHARGE

To avoid needless repetition, this Claim respectfully incorporates Claim 8 and Claim 9, supra – Ms. Fulgham's penalty-phase claims concerning the trial court's refusal to grant circumstantial instructions in the penalty-phase jury charge even though the trial court determined at the first-phase that the State had presented a circumstantial case against Ms.

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[225] Miss. R. Evid. 401

[226] Hearsay is not admissible except as provided by law. Miss. R. Evid. 802.

Fulgham and that Ms. Fulgham would receive a circumstantial-evidence instruction in the first-phase jury charge. See R. 945-50 and Part II of Claim 8, supra.

Jury Instruction D-77A appears at CP. 1138-39 and reads as follows:

> 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 circumstance 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 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 circumstance beyond a reasonable doubt.

D-77A was refused. See Claim 8, supra.

Jury Instruction D-77B appears at CP. 1140 and reads as follows:

> 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.

D-77B was refused. See Claim 9, supra.

Finally, as briefed in Claim 8, supra, the trial court included two circumstantial-evidence instructions in the first-phase jury charge. They are:

> Jury Instruction C-12
>
> 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 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.
>
> (CP. 996).

Jury Instruction D-9A

> You are here to decide whether the prosecution has proved beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment neither are you to be concerned with the guilt of any other person not on trial as a defendant in this case.
>
> (CP. 1014).

Because the trial court determined the State presented a circumstantial case against Ms. Fulgham and gave Jury Instructions C-12 and D-9A, Mississippi law -- as well as the law of the case -- required the trial court to include Jury Instruction D-13B and D-20 in the first-phase jury charge.

I. Jury Instruction D-13B

Jury Instruction D-13B is a two-theory instruction that Ms. Fulgham was entitled to have included in her first-phase jury charge for reasons cited in Claim 9, supra. D-13B appears at CP. 1018 and 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.

The annotation for D-13B offered the following case authority: "United States v. Wolfe, 611 F.2d 1152, 1155 (5th Cir. 1980); People v. Bender, 27 Cal.2d 164, 175-77, 163 P.2d 8, 15-16 (1945) overruled on other grounds at People v. Lasko, 23 Cal.4th 101 (2000); California Jury Instructions -- Criminal [CALJIC] 2.01 (1996)." Additional authority for D-13B follows: United States v. Wright, 835 F.2d 1245, 1249 n.1 (8th Cir. 1987) (citing Clark v. Procunier, 755 F.2d 394, 396 (5th Cir. 1985); Cosby v. Jones, 682 F.2d 1373, 1383 (11th Cir. 1982)); United States v. James, 576 F.2d 223, 227 n. 3 (9th Cir. 1978); Gustine v. State, 97 So. 207, 208 (Fla.

1923) ("If the facts in proof are equally consistent with some other rational conclusion than that of guilt, the evidence is insufficient. If the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be"); see also United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992) (citing cases) (if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, the appellate court must reverse).

Ms. Fulgham submitted D-13B for inclusion into the jury charge. (R. 964-65). At the charge conference, the following took place:

> [BY THE COURT]: 13-B?
>
> [BY MR. LAPPAN]: I would submit that, Your Honor. That's a two theory instruction, I believe. I would submit it.
>
> [BY THE COURT]: Counsel?
>
> [BY MR. CLARK]; Your Honor, we're objecting to this on a couple of grounds. First, I realize that the Court has already ruled that a – a circumstantial evidence instruction, that being C-12, is appropriate, but once again, this is the so-called two-theory instruction, which is once again proper only in a purely circumstantial evidence case,[227] and the State's –
>
> [BY THE COURT]: Technically, this is not a two-theory instruction.[228]

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[227] In this assertion, undoubtedly unknowingly, the State presents the best argument for including D-13B in the jury charge. While the State does not enlighten as to how a "circumstantial case" differs from a "purely circumstantial" case, it remains undeniable that the trial court determined the State presented a circumstantial case. Because of this, the trial court was duty-bound to give a two-theory instruction if requested by the defendant. See Claim 9, supra.

[228] The Court provides no guidance as to how D-13B is not a two-theory instruction. Assuming – for whatever reason – the trial court was correct, Ms. Fulgham nonetheless remains entitled to a two-theory instruction so long as (a) the State's case is circumstantial and (b) the defendant seeks the instruction. See Claim 9, supra. Where the trial court finds difficulty with a defendant's jury instruction, the trial court must either permit the defendant an opportunity to correct the instruction or must correct the instruction *sua sponte*. Harper v. State, 478 So. 2d 1017, 1018 (Miss. 1985). While Ms. Fulgham submitted D-13B as a two-theory instruction below and continues to assert it is a two-theory instruction before this Court, even if D-13B is not a two-theory instruction, Ms. Fulgham remains entitled to have a two-theory instruction included in her jury charge. At minimum, she must be permitted by the

1923) ("If the facts in proof are equally consistent with some other rational conclusion than that of guilt, the evidence is insufficient. If the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be"); see also United States v. Menesses, 962 F.2d 420, 426 (5th Cir. 1992) (citing cases) (if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, the appellate court must reverse).

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> [BY THE COURT]: Counsel?
>
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> [BY MR. CLARK]: Right. It's – even in a case where this would be warranted, I believe it is not in the correct form.
>
> [BY THE COURT]: It's refused. I think it would be repetitious, and the Court will be properly instructing the jury on its own.
>
> (R. 964-65).

Because the trial court had correctly determined that the State presented a circumstantial case, Ms. Fulgham was entitled to have D-13B included in her jury charge based on the case authority cited in the annotation to D-13B and cited in this Claim. The trial court erred in refusing to include D-13B in the jury charge.

II. Jury Instruction D-20

Submitting Jury Instruction D-20 gave the trial court an opportunity to correct the error of refusing to include D-13B. D-20 appears at CP. 1023 and reads as follows:

> A conviction cannot be based upon evidence that is consistent with both innocence and guilt.

The annotation for D-20 offered the following case authority: United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir. 1971) (citing cases); Haskins v. Commonwealth, 602 S.E.2d 402, 406 (Va. Ct. App. 2004); People v. Rice, 61 A.D.2d 758, 759, 401 N.Y.S.2d 191, 192 (1st Dept. 1978). As D-20 was ameliorative of the refusal to include D-13B, the case authority requiring inclusion of D-13B also supports including D-20.

The following colloquy took place when Ms. Fulgham submitted D-20 for inclusion in the jury charge:

> [BY THE COURT]: D-20?
>
> [BY MR. LAPPAN]: Submitted.

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trial court to correct D-13B. Of course, this would have required the trial court to explain why it concluded D-13B was not a two-theory instruction.

[BY THE COURT]: Two-theory.[229] What says the State to D-20?

[BY MS. FAVER]: State would object, Your Honor. There isn't any authority for this – this instruction to be – to be granted.[230]

[BY THE COURT]: It's refused.

(R. 967).

Because the trial court had previously and correctly determined that the State presented a circumstantial case, Ms. Fulgham was entitled to have D-20 included in her jury charge – particularly in light of the fact that the trial court has refused to include her previous two-theory instruction at D-13B. The trial court erred in refusing to include D-20 in Ms. Fulgham's jury charge.

III. Conclusion

For reasons stated in this Claim and in Claims 8 and 9, supra, the trial court's refusal to include D-13B in Ms. Fulgham's jury charge requires her conviction to be reversed. Because including D-20 in the jury charge would have cured this error, it was further error for the trial court to refuse to include D-20 in Ms. Fulgham's jury charge. The refusal to include D-20 also requires Ms. Fulgham's conviction to be reversed.

CLAIM 28

BECAUSE OF CLAIM 23 THROUGH CLAIM 26, THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-54A IN THE JURY CHARGE

Jury Instruction D-54A appears at CP. 1029 and reads as follows:

> 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

[229] Unlike D-13B, the trial court determined that D-20 was a two-theory instruction. See Footnote 228, supra.

[230] Case authority mandating inclusion of a two-theory instruction in a circumstantial case is recited in Part II of Claim 9, supra.

> 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.

The annotation for D-54A reads as follows: "Speaks v. State, 161 Miss. 334, 136 So. 921, 921 (1931); see Easter v. State, 191 Miss. 651, 4 So. 2d 227, 288 (1941)."

D-54A was submitted. (R. 974). Ms. Fulgham stated to the trial court: "I don't know if your charge covers it [D-54A], but if not, I'd like to have the jury instructed." (R. 974). The State objected on the ground that D-54A is "very repetitious." (R. 974). The trial court obviously disagreed with the State's contention that D-54A was repetitious because the trial court stated that "there is no requirement in this state that any verdict by to a moral certainty." (R. 974).[231] The trial court refused D-54A. (R. 974).

D-54A is taken *verbatim* from the very case cited to the trial court in the annotation of D-54A: Speaks v. State, 136 So. 921, 921 (Miss. 1931). It is respectfully submitted that either the trial court is correct and Mississippi law never requires a verdict to a moral certainty,[232] or the trial court is incorrect because D-54A is proper in appropriate circumstances.

This Court wrote in Speaks, supra that D-54A is properly included in the jury charge "where there is serious conflict in the evidence upon the ultimate issue of the defendant's guilt[.]"[233] When there is such a serious conflict, D-54A serves to "prevent the control of the

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[231] The trial court's disagreement is implicit. If the trial court's position is that D-54A is an inaccurate statement of Mississippi law, then it stands to reason the trial court must reject the State's objection to D-54A as "repetitious." For the trial court to accept the State's repetitious objection, the trial court would have to agree that its jury charge contains legally inaccurate information.

[232] Affirming on this ground would necessitate overruling Speaks, supra.

[233] Characterizing the conflict of whether Ms. Fulgham's was found guilty as charged by a unanimous jury as "serious" would be an understatement. After convincing the trial court that Ms. Fulgham is not entitled to Jury Instruction D-48, the State then offered no less than four different theories to support a verdict of guilty as charged during first-phase summation. See Claim 23, supra. The Stat also introduced inadmissible evidence that served no purpose other than to sicken, inflame or mislead the jury. See Claims 24 through 26, supra. It is respectfully

verdict by two or three dominant characters who may happen to be on a jury." Speaks, supra. Under the operative facts of this case detailed in Footnote 233, supra, D-54A should have been given precisely because of Speaks, supra and Easter, supra.

It was error not to include D-54A in the jury charge for reasons stated in this Claim and because of the error briefed in Claims 23 through 26, supra. Ms. Fulgham's conviction must be reversed.

CLAIM 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

> *A conviction ought not to rest on an equivocal direction to the jury on a basic issue.*
>
> *Bollenbach v. United States, 326 U.S. 607, 613 (1946).*

In Claim 23, supra, Ms. Fulgham explains the pervasive, irreparable devastation caused in the refusal to instruct the jury to unanimously decide on the *actus reus* in a felony-murder prosecution. In this Claim, Ms. Fulgham discusses how this omission in the jury charge was even further aggravated.

Jury Instruction S-5 appears at CP. 1005. The trial court overruled Ms. Fulgham's objection to S-5, specifically to the definition of the phrase "while engaged in the commission of" to include "the actions of the Defendant leading up to the robbery, the actual robbery and/or the flight from the scene of the robbery." (R. 957).

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submitted that if the prohibition of lawful instruction as to unanimous verdict preceding the prosecution's explicit, forensic invitation to convict through unconstitutional patchwork verdict does not engender "serious conflict" as to the ultimate issue of Ms. Fulgham's guilt, then nothing will.

Which robbery does the State reference in Jury Instruction S-5?[234]

The State submission of S-5 for inclusion in the jury charge when the State opposed D-48 is outlandish. Where jurors are encouraged to rummage through the State's effete picnic basket of alternating theories[235] and are not required by the trial court to unanimously decide on a single *actus reus*, what is the purpose of S-5 other than to further distort the unanimity requirement? Where an instruction misleads the jury as to the correct legal standard or does not adequately inform the jury as to the law, that instruction is erroneous. United States v. Hassan, 542 F.3d 968, 987 (2nd Cir. 2008); United States v. Straub, 538 F.2d 1147, 1165 (9th Cir. 2008) ("[c]onvictions cannot rest on ambiguous jury instructions"); United States v. Thayer, 201 F.3d 214, 222 (3rd Cir. 1999) cert. denied 530 U.S. 1244 (2000); United States v. Smith, 619 F.Supp. 1441, 1447 (M.D.Pa. 1985) (trial court properly refuses any instruction which misleads the jury); Delgado v. State, 235 S.W.3d 244, 249-50 (Tex. Crim. App. 2007) (the function of the jury charge is "to lead and prevent confusion"). Jury instructions which only serve to confuse the jury debase the jury charge and, where the confusion encompasses a critical component of the jury charge,[236] the conviction must be reversed. United States v. Fishbach & Moore, Inc., 750 F.2d 1183, 1195 (3rd Cir. 1984) cert. denied 470 U.S. 1029 (1985); see United States v. Johnstone, 107 F.3d 200, 204 (3rd Cir. 1997) (because the jury charge must reflect the relevant legal standard, the jury charge must be structured in a way to avoid confusion); State v. Maizeroi, 760 A.2d 638, 642-43 (Me. 2000) (where jury instruction is confusing, and the confusion creates a possibility of verdict premised on impermissible criteria, the instruction is

[234] The State submitted numerous candidates for actus reus and explicitly invited the jury to consider all of them in deciding whether Ms. Fulgham robbed her husband. See Part II(B) of Claim 23, supra.

[235] See Part III of Claim 23, supra.

[236] In this Claim, as in several others, the critical component is whether Ms. Fulgham's jury ever found her guilty of the offense – capital murder, with the underlying crime of robbery – in the first place. As the State of Mississippi shall put Ms. Fulgham to death because of her conviction, it is constitutionally and morally imperative to reverse that conviction ***unless*** it is, indeed, a capital conviction.

erroneous); see also People v. Schyman, 29 N.E.2d 270, 273 (Ill. 1940) ("[a] defendant is entitled to have the jury so instructed that it may not become confused as to what constitutes the issue before it, and were it to appear that such confusion might reasonably arise, the giving of such an instruction would constitute error"). Indeed, even where a defendant submits a lawfully sound instruction, the trial court may refuse to give that instruction if it incites confusion. Commonwealth v. MacDonald, 358 N.E.2d 1005, 1007 (Mass. 1976).

In the aftermath of the chaos caused by Claim 23, supra, including S-5 in same jury charge where D-48 was excluded violated Ms. Fulgham's constitutional rights. See, e.g., Watson v. Anglin, 560 F.3d 687, 693-93 (7th Cir. 2009); see Parts II and III of Claim 23, supra. Because S-5 was included and D-48 was excluded, Ms. Fulgham's conviction cannot stand and must be reversed.

CLAIM 30

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-13 IN THE JURY CHARGE

I. Facts

Jury Instruction D-13 appears at CP. 1017 and reads as follows:

> 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.

The annotation for D-13 offered the following case authority: "Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (relying on Patterson v. New York, 432 U.S. 197 (1977)); In Re Winship, 397 U.S. 358, 364 (1970); People v. Carter, 48 Cal.2d 737, 758-59, 760-61, 312 P.2d 665 (1957); People v. Deletto, 147 Cal.App.3d 458, 472, 195 Cal.Rptr. 233, 241-42 (Cal. App. Ct. 1983)." (CP. 1017).

Ms. Fulgham submitted D-13 for inclusion into the jury charge. (R. 964). At the charge conference, the following took place:

> [BY THE COURT]: D-13?
>
> [BY MR. LAPPAN]: Submitted, Your Honor. With – with the proper amending, your Honor, if you give the instruction.
>
> [BY THE COURT]: Mr. Clark?
>
> [BY MR. CLARK]: I would object to it, Your Honor. It's repetitious with all the other instructions we've given them.
>
> [BY THE COURT]: Refused as repetitious.
>
> (R. 964).

At the time D-13 was submitted, the trial court had already determined the State presented a circumstantial case and decided to give Jury Instruction C-12 (CP. 996; R. 945-50) and Jury Instruction D-9 with an amendment. (CP. 1014, 1042; R. 962-63). See Part II of Claim 8, supra. As submitted by Ms. Fulgham, D-9 read:

> You are here to decide whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you to be concerned with the guilt of any other person not on trial as a defendant in this case.
>
> (CP. 1042; R. 962-63).

The State objected to D-9 (R. 962-63). The trial court overruled the State and gave D-9 as amended. Jury Instruction D-9A follows:

> You are here to decide whether the prosecution has proved beyond a reasonable doubt *and to the exclusion of every reasonable hypothesis consistent with innocence* that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment neither are you to be concerned with the guilt of any other person not on trial as a defendant in this case.
>
> (CP. 1014 – Jury Instruction D-9A) (emphasized language added by trial court).

In light of the trial court announcement that the case against Ms. Fulgham was circumstantial (R. 950) and the inclusion of Jury Instructions C-12 and D-9A in the jury charge, it is undeniable that the trial court decided to instruct the jury on circumstantial evidence. This determination by the trial court required inclusion of D-13 in the jury charge.

II. Law

If the prosecutor's objection to D-13 as repetitious had merit, Ms. Fulgham could not pursue this Claim. However, D-13 is not repetitious as the jury charge never advised Ms. Fulgham's jury that stacked inferences in a circumstantial case must be supported by facts proven beyond a reasonable doubt. The California Supreme Court found the refusal to provide this instruction in a circumstantial case to be reversible error. People v. Carter, 48 Cal.2d 737, 758-59, 312 P.2d 665, 678 (1957).[237] Other courts have spoken on this necessity: United States v. Vallejos, 421 F.3d 1119, 1127 (10th Cir. 2005) (McKay, J., dissenting) (stacked inferences must be found beyond a reasonable doubt); United States v. Johnson, 433 F.2d 1160, 1168, n.59-60 (D.C. Cir. 1970); Reyes v. State, 38 N.W.2d 539, 544-45 (Neb. 1949); State v. Dudley, 123 S.E. 241, 247-48 (W.Va. 1924); see also State v. Searle, 339 So. 2d 1194, 1205 (La. 1976) (statutory permissive presumption case citing Barnes v. United States, 412 U.S. 837, 943 (1973)); Charles R. Nesson, Reasonable Doubt and Permissive Inferences: The Value of Complexity, 92 Harv.L.Rev. 1187,1213-14 (1979); Barbara D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299, 1340 (1977) ("the constitutional aversion to errors that favor the government is limited to errors in determining facts that establish individual culpability"); Cf. In Re Winship, 397 U.S. 358, 364 (1970) ("the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime in which he is

[237] This case was cited in the annotation to D-13. (CP. 1017).

charged"); Tot v. United States, 319 U.S. 463, 467 (1943) (due process sets limits upon ability of government "to make proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated").

As the trial court determined the State presented a circumstantial case but refused to include D-13 in the jury charge, the trial court committed reversible error. Ms. Fulgham's conviction must be reversed.

CLAIM 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

The trial court erroneously included an instruction in the jury charge which required the jury to first unanimously find Ms. Fulgham innocent of capital murder before considering the lesser offense of murder.

S-3-A appears at CP. 1011-12. This instruction requires the jury to unanimously acquit Ms. Fulgham as charged before the jury is permitted to consider the lesser offense of murder. Ms. Fulgham objected to this instruction at R. 952-53 on the grounds that in required unanimity on innocence before any juror could consider a lesser charge. (CP. 1011; R. 952-53). Ms. Fulgham offered that Mississippi is not an acquittal-first state and, therefore, Ms. Fulgham would offer Jury Instruction D-51 to permit the jury to consider a lesser offense if not unanimous on capital murder. (R. 952).

The trial court overruled Ms. Fulgham's objection and gave S-3-A. (R. 953). Subsequently, S-3-A was withdrawn by the State and substituted with S-3-B to cure a difficulty the trial court found with language unrelated to this Claim. (R. 957). The trial court then gave S-3-B. (R. 956-57).

D-51 appears at CP. 1027 and reads as follows:

I have instructed you now on the crimes of capital murder and murder.

These are distinct crimes.

I instruct you that, if warranted by the evidence, you may find the defendant guilty of a crime lesser than capital murder. However, not withstanding this right, it is your duty to accept the law as given to you by the Court, and if the facts and law warrant a conviction of the crime of capital murder, then it is your duty to make such a finding uninfluenced by your power to find a lesser offense. This provision is included to prevent a failure of justice if the evidence fails to prove the original charge of capital murder but does justify a verdict for the lesser crime of murder.

The annotation for D-51 appears at CP. 1027 and reads as follows: "Carr v. State, 655 So. 2d 824, 848 (Miss. 1995) cert. denied 516 U.S. 1076 (1996) (citing Jenkins v. State, 607 So. 2d 1171, 1182 (Miss. 1992)); *Miss. Code Ann. 99-17-20* ("[t]he judge, in cases where the offense cited in the indictment is punishable by death, may grant an instruction for the state or the defendant which instructs the jury as to their discretion to convict the accused of the commission of an offense not specifically set forth in the indictment returned against the accused"); see Carr, 655 So. 2d at 848 (Mississippi jurisprudence neither requires nor forbids "acquittal first" instructions – that is, instructions mandating acquittal on the original charge before jury consideration of a lesser charge). Additional authority supports Ms. Fulgham's position: United States v. Jackson, 726 F.2d 1466, 1469 (9th Cir. 1984); Catches v. United States, 582 F.2d 453, 459 (8th Cir. 1978); United States v. Tsanas, 572 F.2d 340, 356-47 (2nd Cir. 1978); State v. LeBlanc, 924 P.2d 441, 442-43 (Ariz. 1996); State v. Thomas, 533 N.E.2d 286, 292-93 (Ohio 1988); People v. Kurtzman, 46 Cal.3d 322 329-31, 250 Cal.Rptr. 244, 248-50, 758 P.2d 572, 576-77 (1988); State v. Allen, 717 P.2d 1178, 1179-81 (Or. 1986); People v. Handley, 329 N.W.2d 710, 712 (Mich. 1982); State v. Ferreira, 791 P.2d 407, 408-09 (Hawaii App. 1990); Dresnek v. State, 697 P.2d 1059, 1063 (Alaska App. 1985) (court should instruct that jury is free to consider lesser offense before reaching unanimity on greater offense because Alaska adopted

the cognate approach to lesser-included offenses)[238]; People v. Helliger, 180 Misc.2d 318, 327-28, 691 N.Y.S.2d 858, 867 (Sup. Ct, N.Y. Co. 1998) aff'd 275 A.D.2d 270 (1st Dept. 2000) aff'd 96 N.Y.2d 462 (2001); see also Cantrell v. State, 469 S.E.2d 660, 662 (Ga. 1996); State v. Powell, 608 A.2d 45, 47 (Vt. 1992); Jackson & Miller, 4 Encyclopedia of Mississippi Law, 148. n.2 (section 27:26) (2001) (citing cases).

Because the trial court erroneously included Instruction S-3-B in the jury charge and erroneously excluded D-51 from the jury charge, Ms. Fulgham's conviction must be vacated.

CLAIM 32

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-18 IN THE JURY CHARGE

Ms. Fulgham submitted Jury Instruction D-18 (R. 967) and the following colloquy took place:

> [BY THE COURT]: D-18?
>
> [BY MR. LAPPAN]: Submitted.
>
> [BY THE COURT]: What says the State?
>
> [BY MR. CLARK]: We object to it, Your Honor. There's – there's no authority that says that this instruction had to be granted. There is one line in the whole –
>
> [BY THE COURT]: It's refused.

[238] Mississippi does not apply the cognate-pleadings approach to lesser offenses. Mississippi uses the statutory elements test (see, e.g., Green v. State, 884 So. 2d 733, 737 (Miss. 2004) (citing Sanders v. State, 479 So. 2d 1097, 1108 (Miss. 1985)) and the evidentiary approach. Poole v. State, 826 So. 2d 1222, 1230 (Miss. 2002); Gangl v. State, 539 So. 2d 132, 136 (Miss. 1989); see also Neal v. State, 805 So. 2d 520, 525 (Miss. 2002); Smith v. State, 802 So. 2d 82, 87 (Miss. 2001); Brown v. State, 749 So. 2d 82, 89 (Miss. 1999). While the statutory-elements test is more strict than the cognate-pleadings approach, the evidentiary approach is more generous than the cognate-pleadings approach. Amanda Peters. Thirty-One Years in the Making, 60 Baylor L.R. 231, 240-41 (2008); Catherine Carpenter, The All-or-Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry, 26 Am. J.Crim. Law 257, 264-68 (1999). Alaska's cognate-pleadings is suited to Mississippi's evidentiary approach. See Dresnek, supra.

[BY MR. CLARK]: Thank you.

[BY THE COURT]: Good argument.[239]

(R. 967).

Jury Instruction D-18 is located at CP. 1022 and reads as follows: "Guilt by association is neither a recognized nor tolerable concept in our criminal law." The annotation for D-18 reads as follows: "Davis v. State, 586 So. 2d 817, 821 (Miss. 1991) (citing Prior v. State, 239 So. 2d 911, 912 (Miss. 1970) and Matula v. State, 220 So. 2d 833, 836 (Miss. 1969)). Last year, citing Davis, supra, this Court wrote that "[c]riminal law does not recognize guilt by association." Hughes v. State, 983 So. 2d 270, 276 (Miss. 2008) cert. denied 129 S.Ct. 633 (2008); see also United States v. Pando Franco, 503 F.3d 389, 394 (5th Cir. 2007) cert. denied 128 S.Ct. 1874 (2008) (to prove criminal association, the prosecution must prove defendant shared in the principal's criminal intent); United States v. Del Carmen Ramirez, 823 F.2d 1, 3 (1st Cir. 1987) ("[t]he most a trial judge can do is clearly and carefully instruct the jury to consider the evidence against a particular individual, alone, and to determine guilt or innocence on that basis"); Commonwealth v. Perry, 256 N.E.2d 745, 747 (Mass. 1970). See generally United States v. Hamblin, 911 F.2d 551, 558 n.4 (11th Cir. 1990); United States v. Singletary, 646 F.2d 1014, 1018 (5th Cir. 1981).

Throughout the first-phase of this prosecution, the State tethered Ms. Fulgham to Tyler Edmonds. See, e.g., Claim 24, supra; see also R. 1001-1002;[240] R. 1004;[241] R. 1005-07;[242] R.

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[239] Mere argument from counsel, however, never substitutes for jury instruction from the trial court. Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978) (citing United States v. Nelson, 498 F.2d 1247, 1248-49 (5th Cir. 1974); United States v. Rubio, 834 F.2d 442, 447 (5th Cir. 1987) ("[closing] argument alone will never suffice to compensate for an omitted instruction, where that instruction is legally correct, represents a theory of defense with basis in the record which would lead to acquittal, and where that theory is not effectively presented elsewhere in the charge").

[240] First-phase closing argument of Mr. Clark wherein Mr. Clark comments upon the relationship Ms. Fulgham had with Tyler Edmonds, including: "Do you suppose that maybe the person who thought his half sister hung the moon,

1035.[243] Because of this prosecutorial decision, Ms. Fulgham was entitled to have D-18 included in her jury charge, As the trial court refused this request, Ms. Fulgham's conviction must be reversed.

CLAIM 33

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-22 IN THE JURY CHARGE

Jury Instruction D-22 appears at CP. 1024 and reads as follows:

> 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 your own judgment, give the testimony of each witness the credibility, if any, you think it deserves.

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the person who would do anything in the world for his sister, is the person who finally agreed to provide and assist her?" (R. 1002).

[241] First-phase closing argument of Mr. Clark wherein Mr. Clark discusses the dimensions of the alleged criminal enterprise between Ms. Fulgham and Tyler Edmonds. (R. 1004).

[242] First-phase closing argument of Mr. Clark wherein Mr. Clark continues to discuss the dimensions of the alleged criminal enterprise between Ms. Fulgham and Tyler Edmonds and discusses alleged written communication between Ms. Fulgham and Tyler Edmonds. (R. 1005-07).

[243] First-phase closing argument of Ms. Faver wherein Ms. Faver comments that once Ms. Fulgham and Tyler Edmonds were arrested, Ms. Fulgham "could not control the situation" and could not "manipulate the 13-year old anymore[.]" (R. 1035).

The annotation for D-22 cites Chatman v. State, 761 So. 2d 851, 854 (Miss. 2000). Ms. Fulgham submitted D-22 at R. 968. The following colloquy then took place:

> [BY MS. FAVER]: Your Honor, State would object. This is repetitious of the Court's instruction.[244]
>
> [BY THE COURT]: State is correct that it is repetitious in a lot of ways. This is an instruction that has been, while not approved by the Mississippi Supreme Court, it has been given in a lot of cases that have been affirmed by the Supreme Court. They've never had to call on this particular instruction alone.
>
> I've always been reluctant to give it, because I feel that I instruct the jurors on that. I think I instruct the jury still – I still think I instruct the jury exactly on that.[245] It's refused as repetitious.
>
> (R. 968).

During the first-phase, State witnesses testified to the following:

- Danny Edmonds, father of Kristi Fulgham, testified against his daughter. (R. 738-57). Danny Edmonds testified that Ms. Fulgham testified in a chancery court matter wherein his former wife had her child custody modified in an action brought by the former wife's ex-husband. (R. 753-54). This hearing occurred around 1993. (R. 754). Danny Edmonds testified that Kristi had made allegations that he had molested her. (R. 740). Danny Edmonds also testified that he phoned police immediately after he heard that Joey Fulgham had been killed and revealed to police incriminating declarations he testified Ms. Fulgham had made to him. (R. 752).

- Kyle Harvey, former boyfriend of Kristi Fulgham, testified against Ms. Fulgham. (R. 772-818). Mr. Harvey testified that Ms. Fulgham lead him to believe that she was divorced from Joey Fulgham when they began dating. (R. 774-75). Yet, on cross-examination, Mr. Harvey testified that he was married the entire time he dated Ms. Fulgham. (R. 800-02).

- Vanessa Davis, a former acquaintance of Kristi Fulgham, testified against Ms. Fulgham. (R. 725-38). Ms. Davis's wildly irrelevant and inflammatory testimony is the subject matter of Claim 24 through 26, supra. However, Ms. Davis testified that she did not recall whether she provided information to police in her two statements that she volunteered during her direct testimony. (R. 736-37).

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[244] The State does not indicate which part of the jury charge D-22 repeats. One possible explanation for this omission is that the State's assertion is untrue.

[245] If the trial court is correct, then this Claim fails. No party is entitled to an instruction already included in the jury charge. However, D-22 was not repetitious as it was included in the jury charge.

In Chatman, supra, this Court held that D-22 is supported by Mississippi law. To prevail on a claim that D-22 was wrongly excluded from a jury charge, the appellant "must show that [Jury Instruction D-22] 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." Chatman, 761 So. 2d at 854-55 (citing United States v. Davis, 132 F.3d 1092, 1094 (Miss. 1998)). Because D-22 is, *a fortiori*, a correct statement of law that was not covered in the jury charge, had a basis in the evidence and advanced the defense, it should have been given. Lenard v. State, 552 So. 2d 93, 96 (Miss. 1989); see also Greer v. State, 755 So. 2d 511, 517 (Miss. App. 1999). Because D-22 should have been included in the jury charge, Ms. Fulgham's conviction must be reversed.

CLAIM 34

THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-14 OR JURY INSTRUCTION D-15 IN THE JURY CHARGE

Jury Instruction D-14 appears at CP. 1019 and reads as follows:

> 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. [footnote in annotation citing as follows: "Hale v. State, 72 Miss. 140, 16 So. 387, 390 (1894) ('[a] reasonable doubt may arise from want of evidence as well as out of the evidence')"]. 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 her guilty. You might to 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.

The annotation for D-14 reads as follows: "Mississippi Model Jury Instruction C.108 (1992); see Mississippi Model Jury Instructions – Criminal 1:10 (2005); see also Massachusetts Jury

Instruction – Criminal 1-2 (1999)." D-14 was submitted by Ms. Fulgham at R. 965. The trial court refused D-14, stating: "This is mere probability. It will be refused. I think I've instructed on them on that. Mere probability is not be used." (R. 965).

Jury Instruction D-15 appears at CP. 1020. The first sentence of D-15 tracks D-14 closely. D-15 reads as follows:

> A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. [footnote in annotation citing as follows: "Mississippi Model Jury Instructions – Criminal, MJI – Criminal C 1:8 (West Publishing Co.).] 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.

The annotation for D-15 reads as follows: "United States v. Cleveland, 106 F.3d 1056, 1062-63 (1st Cir. 1997); United States v. Poindexter, 942 F.2d 354, 360 (6th Cir. 1991) ("[i]n every criminal case, the mosaic of evidence that comprises the record before a jury includes both the evidence and the lack of evidence on material matters"); United States v. Holland, 209 F.2d 516, 522-23 (10th Cir. 1954); United States v. Greer, 697 A.2d 1207, 1210-11 (D.C. 1997); State v. McFarland, 287 N.W.2d 162 (Iowa 1980); see also Michigan Criminal Jury Instructions, CJI 2nd 3.2 (ICLE, 2nd ed., 2000/2001); Georgia Suggested Pattern Jury Instructions – Criminal Cases, Part 2(D), Page 7, Paragraph 5, Sentence 5 (Carl Vinson Institute of Government, University of Georgia, 2nd ed., 2000); North Carolina Pattern Jury Instructions – Criminal, NCPI-Crim 101.10 (TRCC 1999); Washington Pattern Jury Instructions – Criminal Series, 1.01 (West Pub. Co., 2nd ed., 1994)."

D-15 was submitted by Ms. Fulgham. (R. 966). The trial court refused D-15 stating: "It is a good jury argument,[246] it is repetitious with what I have already given properly, I think, and it's refused." (R. 966).

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[246] See Footnote 239, supra. Argument of counsel never substitutes for an instruction from the trial court.

Based on the case authority cited in the annotations for D-14 and D-15, the trial court was required to give either D-14 or D-15 if requested by Ms. Fulgham. The refusal to include either D-14 or D-15 in the jury charge requires Ms. Fulgham's conviction to be reversed.

CLAIM 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

A. Background: The devastation of Claim 23 continues

The constitutional insult caused by error briefed at Claim 23, supra, makes it impossible to discern whether Ms. Fulgham was ever convicted of capital murder.[247] Some jurors could have concluded that Ms. Fulgham robbed Joey Fulgham of his wallet while others rejected that conclusion only to decide that Ms. Fulgham robbed Joey Fulgham of his computer. See Part III of Claim 23, supra. Other jurors may have decided that Ms. Fulgham killed Joey Fulgham for insurance proceeds and disagreed that she robbed him of his wallet or his computer. Id. The combinations are as endless as the error of refusing Jury Instruction D-48 is irreparable. Whether Ms. Fulgham's jury unanimously found her guilty as charged is simply unknowable.

Over seventy years ago, Justice Holmes wrote that while a jury verdict may be the result of jury compromise or jury mistake, it cannot be challenged on these grounds. Dunn v. United States, 284 U.S. 390, 394 (1932). But what about a verdict that is internally inconsistent? Where the trial court refuses to instruct the jury on the necessity for unanimity on *actus reus* and the State offers multiple theories of prosecution during closing statement, inviting the jury to

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[247] A jury verdict is not a judgment. See, e.g., Temple v. State, 671 So. 2d 58, 59 (Miss. 1996); State v. Brown, 620 So. 2d 508, 512 (La. App. 1993) writ denied 625 So. 2d 1062 (La. 1993); Commonwealth v. Pollack, 606 A.2d 500, 502 (Pa. Super. 1992) appeal denied 619 A.2d 700 (Pa. 1993).

pick and choose among these various theories, must the State support each of its theories with legally sufficient evidence?[248] The answer is in the affirmative: United States v. Garcia, 907 F.2d 380, 381 (2nd Cir. 1990); Lamb v. State, 668 So. 2d 666, 667 (Fla. Dist. Ct. App. 1996). See generally Glenn v. United States, 420 F.2d 1323, 1324-25 (D.C. Cir. 1969) (citing cases) (reversing conviction and holding courts insist "upon definiteness as an indispensable quality of a valid verdict, and have adhered to the rule that a verdict must be set aside if its meaning is unalterably ambiguous"); Owsley v. State, 769 N.E.2d 181, 187 (Ind. App. 2002) ("[b]ecause we cannot delve into the thought processes of the jury, we cannot know whether it believed there was sufficient evidence to convict Owsley of both possession and conspiracy to commit dealing in cocaine and acted out of leniency, or whether it believed there was insufficient evidence Owsley carried out the alleged overt act of providing cocaine to Stallworth but nonetheless convicted him improperly").

B. In soliciting an unconstitutional, patchwork verdict from the jury, the State failed to adduce legally sufficient evidence for one of its alternate theories of prosecution

As demonstrated in Part III of Claim 23, supra, the State offered a computer tower as one possible object of the robbery at bar. During first-phase summation, the State advised Ms. Fulgham's jury: "That computer was right there Friday night. It wasn't there Sunday afternoon. There was also a computer stolen. This is capital murder." (R. 994).

Unfortunately for the prosecution, there is no evidence that a computer tower "was right there Friday night[.]" Nor is there ***any*** evidence that ***any*** computer was appropriated by criminal means. The only evidence adduced at trial concerning a computer tower follows:

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[248] Put differently, when the State seeks the unconstitutional result of a patchwork verdict, must the means by which the State seeks this unconstitutional result be constitutional? The question strikes a chord of absurdity. Yet, absurdity is nothing more than the natural consequence of a jury unadvised by the trial court of the necessity for unanimity on *actus reus* and then advised by the State to specifically consider multiple *actus reus* in coming to its verdict. See, e.g., McKlemurry v. State, 947 So. 2d 987, 991 (Miss. App. 2006) (citing cases) (as the purpose of the jury charge is to "inform the jury of the critical facts and applicable law on which the issue of guilt may be resolved[,]" the trial court was obliged to ensure the jury is adequately charged).

[BY MR. CLARK]: Deputy Elmore, what about the computer?

[BY DEPUTY ELMORE]: We did not find the CP unit part of the computer.

Q. All right. What is the CPU unit?

A. That is the hard drive, the main frame, which handles all the processing.

Q. Did you see a place where you believed a CPU unit or the main processing unit of the computer should be?

A. Yes, sir. In the living room there was a computer screen, keyboard, mouse, all the wires down, back plug-ins for one, and – but the – the main tower part, the CPU, was gone.

Q. Did you see anything about the situation that led you to believe how long the unit had been missing?

A. Couldn't have been too long. The carpet was still – you could faintly see the outline probably where it was sitting on the carpet.

Q. You could still see the indentations in the carpet where the main part of [where] the computer had been?

A. Yes, sir.

(R. 935-36).

The State introduced a photograph of the scene that is described in this testimony. (R. 836; State's Exhibit 28, a photograph of the "area over in the living room area where the computer desk would be, where the main unit it missing").

Mere evidence that "an item is missing" is not evidence that the item was criminally appropriated.[249] And yet, the only evidence supporting the State's theory – one of no less than

[249] To prove theft or robbery, there must be some evidence of a taking. People v. Magallanes, 173 Cal.App.4th 529, ___, 92 Cal.Rptr.3d 751, 755 (Cal. App. 2009); State v. Lopez, 610 P.2d 753, 755-56 (N.M. App. 1980) aff'd 610 P.2d 745 (N.M. 1980); see also State v. Cothern, 115 N.W. 890, 891 (Iowa 1908) (absent some evidence of a taking, proof sufficient for conspiracy to embezzle but insufficient to prove larceny); Preswood v. State, 118 So. 768, 768 (Ala. App. 1928) (larceny occurs with the taking); Smith v. State, 83 S.E. 437, 438-39 (Ga. App. 1914) (defendant guilty of "attempt to defraud" but not larceny until there is a taking)

four theories[250] -- that Ms. Fulgham forcible stole her husband's computer is the evidence inventoried supra. This is legally insufficient. Garcia, supra; Lamb, supra. See generally Tait v. State, 669 So.2d 85, 88 (Miss. 1996) (where the State fails to meet its burden of proving each and every element of the charged offense beyond a reasonable doubt, the evidence is legally insufficient to sustain the conviction);[251] Smith v. State, 646 So.2d 538, 542 (Miss. 1994); May v. State, 460 So.2d 778, 781 (Miss. 1994); Glass v. State, 278 So.2d 384, 386 (Miss. 1973).

There is no way of ascertaining whether a single juror, several jurors or no jurors found Ms. Fulgham guilty of capital murder with the underlying offense being the robbery of a computer tower. Conversely, it ***is*** certain that the State's evidence supporting this determination is legally insufficient. Therefore, Ms. Fulgham's conviction cannot stand as it is unsupported by the evidence adduced at trial and against the overwhelming weight of the evidence. This Court must reverse Ms. Fulgham's conviction.

CLAIM 36

THE TRIAL COURT ERRED IN TRANSFERING VENUE TO UNION COUNTY

The trial court granted Ms. Fulgham's motion to change venue. (CP. 786). In her motion to change venue, Ms. Fulgham argued that the trial court does not enjoy unfettered discretion as to the designation of a transfer venue. (CP. 402-03). Referring to Paragraph's 17 through 19 of Ms. Fulgham motion to change venue, Ms. Fulgham wrote:

> 17. In asserting her right to a fair trial by an impartial jury Ms. Fulgham does not waive her right to a jury selected from a fair cross section of the community. Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (assertion of one constitutional right cannot be conditioned on waiver of another); Mississippi Publishers Co. v. Coleman, 515 So.2d 1163, 1165 (Miss. 1987) (courts must seek to make the "two rights harmonious neighbors"). As such, the defendant retains her right to a transfer

[250] See Part III of Claim 23, supra.

[251] Because the State insisted on pursuing a patchwork verdict, the State was required to adduce legally sufficient evidence for all of its theories. Had the trial court simply given Jury Instruction D-48, of course, this Claim would not arise. See Claim 23, supra.

county where she could secure an impartial jury (and preserve her right to a fair trial) and a jury comparable in vicinage to Oktibbeha County (preserving her right to community standards analogous to those in this County). Thus, this transfer should be to a county with at least the same proportion of black citizens as Oktibbeha County. Beckwith v. State, 707 So.2d 547, 596-97 (Miss. 1997) cert. denied 525 U.S. 880 (1998) (approving consideration of racial demographics in changing venue).

18. In light of the exhibits annexed to this motion, it is respectfully submitted that counties adjoining Oktibbeha County as well as the counties comprising the First Circuit Court District are tainted as a result coverage in Starkville, Columbus and Tupelo media outlets and, as such, are unsuitable transfer counties.

19. According to the 2000 Census, excluding counties contiguous with Oktibbeha County and counties within the First Circuit Judicial District, four counties with the similar racial demographics are (in alphabetical order): Attala County, Grenada County, Madison County and Warren County. As such, Ms. Fulgham requests venue to be transferred to one of these counties. Annexed hereto as Exhibit 75 (Oktibbeha County) [see CP. 569], Exhibit 76 (Attala County) [see CP. 570], Exhibit 77 (Grenada County) [see CP. 571], Exhibit 78 (Madison County) [see CP. 572] and Exhibit 79 (Warren County) [see CP. 573] are 2000 census documents [footnote in original citing to www.census.gov] supporting this contention.

(CP. 402-03).

The State responded to Ms. Fulgham's change of venue motion at a pretrial hearing date:

[BY MS. FAVER]: Your Honor, as we indicated earlier, the State is not going to object as to the change of venue out of – outside of Oktibbeha County.

However, the motion that the defense has provided goes into a lot more detail as to where they believe the – the jury should be picked from and where and why, as far as similar demographics and things of that nature.

Your Honor, the State's position is that based on all the exhibits that they have provided, we do not have any objection and do not feel we can object to a change of venue outside of Oktibbeha County.

However, going into further details as to where it should be moved to and the reasons why, we would object.

[BY THE COURT]: I take that as argument.

[BY MS. FAVER]: Sir?

[BY THE COURT]: I take that as argument. There's more to it than just what they say – they're urging me to do these things.

[BY MS. FAVER]: Yes, sir.

[BY THE COURT]: If you – if you are going to agree that a motion for change of venue should be sustained because the Supreme Court of the State of Mississippi has said under this circumstance it should be, then that's all you need to do.

[BY MS. FAVER]: Yes, sir.

[BY THE COURT]: What I do now want from you is, from the State and the defendant, a list of four counties from which a jury might be selected. A lot of this depends on scheduling with other courts and everything.

[BY MR. LAPPAN]: Yes, sir. Your Honor, if it please the Court, paragraph 19 of out motion, we gave the Court four counties that we believe are similar demographically to Oktibbeha, and they are all outside of this judicial district and outside of the First Judicial District, which we believe the press has – has polluted all of that.[252] So we gave you four, Judge, in paragraph 19.[253]

[BY MS. FAVER]: Judge, in paragraph 19 they actually give you seven – several more than four[254], but my position is that there –

[BY THE COURT]: Well, I've got 81, really.

[BY MS. FAVER]: -- isn't any case law the requires that they be similarly demographic.

[BY THE COURT]: I know that. I'm going to be the one choosing.

[BY MS. FAVER]: I understand, Judge, but in their motion, which they are relying on, is what they're setting forth, that it has to be and it should be, and my position is that it does not.

(R. 132-33).

The trial court ultimately transferred venue to Union County. (CP. 786).

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[252] As stated supra, Ms. Fulgham argued in her motion that counties adjoining Oktibbeha County and all counties comprising the First Circuit Court District would be improper transfer venues in light of media coverage in the Starkville, Columbus and Tupelo media outlets. (CP. 402).

[253] As stated supra, the four counties with similar demographics to Oktibbeha County and sufficiently divorced from the Starkville, Columbus and Tupelo media outlets were: Attala County, Grenada County, Madison County and Warren County. (CP. 402-03).

[254] The State is obviously incorrect. Ms. Fulgham supplied the trial court with exactly four counties. See Footnote 253, supra.

Ms. Fulgham objected to the transfer to Union County by motion filed on September 22, 2006. (CP. 808-20). This motion contended that Union County was an unsuitable transfer county for the following reasons:

> [Paragraph 1(C)]: As stated in Paragraph 17 of Motion 036, Ms. Fulgham retains 'her right to a transfer county where she could secure an impartial jury (and preserve her right to a fair trial) and a jury comparable in vicinage to Oktibbeha County (preserving her right to community standards analogous to those in this County). Thus, this transfer should be to a county with at least the same proportion of black citizens as Oktibbeha County. Beckwith v. State, 707 So.2d 547, 596-97 (Miss. 1997) cert. denied 525 U.S. 880 (1998) (approving consideration of racial demographics in changing venue).'
>
> (CP. 809).
>
> [First Objection to the transfer county]: As Union County is contiguous with Lee County, it is respectfully submitted that transfer to Union County is of no value. Upon information and belief, Union County has no daily newspaper. The daily newspaper commonly circulating in Union County is the (Tupelo) Daily Journal. In addition, and upon information and belief, Union County has no television affiliate for local, daily news. The daily-televised, network-affiliated news programming commonly relied upon in Union County emanates from the Tupelo market. As such, Ms. Fulgham respectfully submits that transferring this capital prosecution for jury selection in Union County does not resolve the taint of media attention pervasive enough in the prosecution of Tyler Edmonds to have the prosecution move for a gag order in that matter. See '*Exhibit A*' annexed hereto ("Motion for Continuance and Gag Order," filed September 26, 2003) [CP. 814-15]. More compellingly, the media attention was sufficiently pervasive to require the Circuit Court to issue a Gag Order in the Tyler Edmonds prosecution. See '*Exhibit B* annexed hereto (Order entered October 14, 2003) [CP. 816-18].
>
> (CP. 810).
>
> [Second Objection to transfer county]: Annexed hereto as '*Exhibit C*' is 2000 Census data of Union County pertaining to racial demographics. [footnote in original citing to www.census.gov]. Referring to '*Exhibit 75*' of Motion 036, [CP. 569] and referring to 2000 Census data of Oktibbeha County annexed hereto as '*Exhibit D*' [CP. 820], the Court's attention is respectfully drawn to the racial demographic data of Oktibbeha County.
>
> In light of the above, and in further amplification of Paragraph 17 of Motion 036, [CP. 402] Ms. Fulgham respectfully notes the demographic disparity made clear by the annexed exhibits, specifically:

Oktibbeha County	Union County[255]
59.2 percent white	84.0 percent white
37.7 percent black	15.2 percent black
42,902 (total population)	25,362 (total population)

> Based on the above representation, Ms. Fulgham respectfully submits that transfer to Union County is constitutionally intolerable. State v. Timmendequas, 737 A.2d 55, 79 (N.J. 1999) cert. denied 534 U.S. 858 (2001); see also United States v. Jones, 36 F.Supp.2d 304, 311 n.8 (E.D.Va. 1999); Beckwith v. State, 707 So. 2d 547, 597 (Miss 1997) cert. denied 525 U.S. 880 (1998) (racial demographics may be considered); Simon v. State, 633 So. 2d 407, 416-20 (Miss. 1993) (Banks, J., dissenting).
>
> (CP. 811).

To avoid needless repetition, all facts and case authority cited from the record on appeal, supra, are respectfully incorporated into this Claim.

The State filed no written response to Ms. Fulgham's written objection to the transfer venue.

At oral argument on Ms. Fulgham's motion held on October 30, 2006, Ms. Fulgham stood on her written objection. (R. 230-31).

The State opposed Ms. Fulgham's objection. The State correctly announced that Ms. Fulgham's written objection erroneously claimed that the State did not oppose transfer to a county of comparative demographics. (R. 231-32). The State then incorrectly claimed that "[a]s a matter of fact, we stated there was case law quite to the contrary." (R.232).[256] The State

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[255] The census data for Union County is located at CP. 819. This was "Exhibit C" to Ms. Fulgham's written objection to the venue transfer to Union County.

[256] As a matter of fact, the State merely – and erroneously -- contended at the oral argument on Ms. Fulgham's motion to change venue that no case authority supported Ms. Fulgham's position that she is entitled to a transfer county of similar racial demographics. (R. 133). The State cited no authority whatsoever during oral argument, let alone cite to authority ***contrary*** to Ms. Fulgham's position. (R. 132-37). Indeed, Ms. Fulgham is aware of no authority sanctioning a trial court's decision to take racial demographics into consideration when transferring venue and then intentionally transferring venue to a county with ***dissimilar*** racial characteristics. This, of course, would be "quite to the contrary" of Ms. Fulgham argument that the trial court must take racial demographics into consideration and then transfer to a venue of similar demographics.

contended that Ms. Fulgham "is not entitled to a change of venue to a county with similar racial demographics. All the defendant is entitled to is a fair and impartial jury which represents a cross-section of the community."[257] Claiming that the Office of Capital Defense Counsel represented Eddie Lee Howard in a post-conviction matter,[258] the State advised the trial court that the "supreme court once again reiterated that there is no right to a change of venue to a county with similar racial characteristics." (R. 232).[259] The State chose not to address any of the case authority cited by Ms. Fulgham in her written objection to the transfer venue. (CP. 811).

In addition to the incorporated argument found in Ms. Fulgham's written objection to the transfer to Union County found at CP. 811, Ms. Fulgham also cites the following in support of this Claim: House v. State, 978 P.2d 967, 996 (N.M. 1999) cert. denied 528 U.S. 894 (1999) ("[t]he trial court may in its discretion determine, when selecting a new venue, that a fair trial in a particular case will be impossible unless ethnic proportions remain unchanged. But there is no requirement that the fair cross section of the old venue mirror the fair cross section of the new venue"); Vineet R. Shahani, Change the Motion, Not the Venue: A Critical Look at the Change

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[257] The State is correct. The proper "community" to hear this case is a fair cross section of Oktibbeha County. When the trial court changes venue, however, the trial court must endeavor to ensure that the defendant is transferred to a "community" with similar racial demographics to promote trial by a "community" with a similar cross-section as the original venue. Ms. Fulgham made this point at CP. 402.

[258] The Office of Capital Defense does not appear in post-conviction matters. See Miss. Code Ann. 99-18-7.

[259] In Howard v. State, 945 So. 2d 326, 341 (Miss. 2006) cert. denied 128 S.Ct. 49 (2007), collateral counsel claimed defense counsel's decision not to seek a change of venue to a county with "a racial makeup more favorable to [Howard]" constituted ineffective assistance of counsel. This argument is specious, and this Court noted as such, citing Mitchell v. State, 886 So. 2d 704, 709 (Miss. 2004). Criminal defendants have no right to venue shop. Criminal defendants do, however, have a constitutional right to trial in the venue where the crime is alleged to have occurred. State v. Caldwell, 492 So. 2d 575, 577 (Miss. 1986). Where a defendant cannot receive a fair trial in the county where venue is proper, the defendant may move to change venue. See CP. 393-403. Ms. Fulgham's position – below and here – is that where a change of venue is proper, the trial court should take racial demographics into consideration in selecting the transfer venue. It is not Ms. Fulgham's position – and it never has been Ms. Fulgham's position – that she is entitled to transfer venue to a county that she believes to be more favorable to her. Therefore, the prosecution's reliance on Howard, supra is hopelessly inapposite.

of Venue Motion, 42 Am. Crim. L.Rev. 93, 114-15 (2005);[260] Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, 75 N.Y.U.L.Rev. 1658, 1665 (2000) ("[i]n the aftermath of the Rodney King trial, a number of scholars argued that courts must consider racial demographics in determining the appropriate venue to transfer the trial to. (Footnote deleted). Should courts decide to transfer a case, it is sensible for them to try to recreate the original community, even if race is a constitutionally problematic proxy for doing so"); James Oldham, The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, The Reasonable Cross-Section Requirement, and Peremptory Challenges, 6 Wm. &. Mary B. Rights J. 623, 673 n. 300 (1998); Andrew G. Deiss, Negotiating Justice: The Criminal Trial Jury in a Pluralist America, 3 U.Chi. L.Sch. Roundtable 323, 324 n. 10 (1996); Darryl K. Brown, The Role of Race in Jury Impartiality and Venue Transfers, 53 Md. L.Rev. 107, 112 (1994); Note, Out of the Frying Pan or Into the Fire? Race and Choice of Venue After Rodney King, 106 Harv. L.Rev. 705, 706 n.7 (1993).

For these reasons, the trial court committed reversible error in transferring venue from Oktibbeha County to Union County. Ms. Fulgham's conviction must be reversed.

CLAIM 37

THE AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH SENTENCES AS A MATTER OF FEDERAL CONSTITUTIONAL LAW

Errors of law that might not individually require reversal may, cumulatively, produce a trial setting that is fundamentally unfair. In this event, the Due Process rights of the defendant

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[260] "A defendant is not entitled to a jury of any particular racial or gender composition. (footnote deleted). As such, the racial composition of the district in which the charged crime occurred is largely irrelevant in a change of venue decision. (footnote deleted). In the aftermath of [Powell v. Superior Court, 232 Cal.App.3d 785, 282 Cal.Rptr. 777 (Cal. App. 1991)], however, racial composition of alternative venues could have an effect on a choice of venue decision because statutes in many jurisdictions now compel judges to consider the racial similarity of alternative venues before moving a trial. (footnote deleted)." Shahani, Change the Motion, at 114-15.

under the Fourteenth Amendment are violated. Taylor v. Kentucky 436 U.S. 478, 487 n.15 (1978); Thomas v. Hubbard, 273 F.3d 1164, 1179-80 (9th Cir. 2001) overruled on other grounds at Payton v. Woodford, 299 F.3d 815 (9th Cir. 2002); United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001); United States v. Parker, 997 F.2d 219,221 (6th Cir. 1993); United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc); Menzies v. Procunier 743 F2d 281, 288-89 (5th Cir. 1984); People v. Hill, 17 Cal.4th 800, 844-45, 72 Cal.Rptr.2d 656, 681, 952 P.2d 673, 698 (1998). "[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have been,' the resulting conviction violates due process. See Chambers [v. Mississippi], 410 U.S. 284, 294 (1973)." Parle v. Runnels, 505 F.2d 922, 927 (2007)."

In light of the totality of Claims 23 through 36, supra, it is respectfully submitted that Ms. Fulgham the argument in support of aggregate error is abundant. Only in the aftermath of an illegitimate transfer of venue,[261] the introduction of inadmissible hearsay,[262] the introduction of irrelevant evidence of a incestuous, pedophiliac relationship,[263] and instructional error[264] including the refusal to require the jury to reach a unanimous verdict on *actus reus*[265] compounded by the State's repeated and varied forensic solicitations for a patchwork verdict,[266] did Ms. Fulgham's jury return a guilty verdict.

In Claim 21, supra, Ms. Fulgham presented her argument in support of sentencing relief under Furman v. Georgia, 408 U.S. 238 (1972) and Miss. Code Ann. 99-19-105(3)(A). This

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[261] See Claim 36, supra.

[262] See Claims 25 and 26, supra.

[263] See Claim 24, supra.

[264] See Claims 27 through 34, supra.

[265] See Part I and II of Claim 23, supra.

[266] See Part I and II and III of Claim 23 and Claim 35 supra.

Claim is respectfully incorporated herein to support Ms. Fulgham's contention that the aggregate error in her sentencing phase requires this Court to vacate her death sentence.

As such, should this Court conclude that previous claims do not mandate relief, in and of themselves, then it is respectfully submitted that, based on the above discussion of federal constitutional law, Ms. Fulgham must benefit from appellate relief on the basis of cumulative error. Ms. Fulgham's conviction must be reversed and her sentence must be vacated.

CLAIM 38

THE AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE AS A MATTER OF STATE LAW

As a matter of State law, this Court's review of death penalty cases takes into consideration the aggregate effect of the variety of errors which often appear in a capital trial. See, e.g., Hansen v. State, 592 So.2d 114, 153 (Miss. 1991); Griffin v. State, 557 So.2d 542 (Miss. 1990); White v. State, 532 So.2d 1207 (Miss. 1988); Stringer v. State, 500 So.2d 928 (Miss. 1986); Cannaday v. State, 455 So.2d 713 (Miss. 1984); Williams v. State, 445 So.2d 798 (Miss. 1984). Also as a matter of state law, *bona fide* doubts must be resolved in favor of Mr. Gillett. Fisher v. State, 481 So. 2d 203, 211 (Miss. 1985) (relying on Gambrell v. State, 92 Miss. 728, 736, 46 So. 138, 139 (1908)).

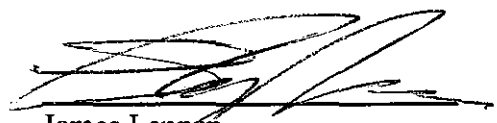
With the above in mind, when viewing the prejudicial impact of the same array of errors inventoried and urged in Claim 37, supra, it is respectfully submitted that Ms. Fulgham is entitled to cumulative-error relief under Mississippi law. Ms. Fulgham's conviction must be reversed and her sentence must be vacated.

CONCLUSION

For the foregoing reasons, as well as such other reasons as may appear to the Court on a full review of the record and its statutorily mandated review, Kristi Fulgham respectfully requests this Court reverse her conviction and vacate her death sentence.

DATED: Wednesday, 3 June 2009.

Respectfully submitted,



James Lappan
Counsel for Kristi Fulgham

James Lappan
Miss. Bar No. 9504
Office of Capital Defense Counsel
510 George Street, Suite 300
Jackson, MS 39202
(601) 576-2316

CERTIFICATE OF SERVICE

I, James Lappan, hereby certify that I mailed, postage pre-paid, by United States Mail, a true and correct copy of the above Original Brief of Appellant, in the matter of Kristi Fulgham v. State of Mississippi, No. 2007-DP-01312-SCT, to the following three individuals:

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

Marvin E. White, Esq.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

SO CERTIFIED, this the Third Day of June, 2009.

James Lappan

James Lappan
Miss. Bar N[redacted]
Office of Capital Defense Counsel
510 George Street, Suite 300
Jackson, MS 39202
(601) 576-2316