IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD EARL BIRKHEAD — APPELLANT

VS. — NO. 2007-KA-0666

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD EARL BIRKHEAD **APPELLANT**

VS. **NO. 2007-KA-0666**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUES

I. THE TRIAL JUDGE PROPERLY RULED THAT THE DEFENDANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION IN THE STATE'S SELECTION OF JURY MEMBERS AND USE OF PEREMPTORY STRIKES.

II. ADMISSION OF THE VICTIM'S DEATH CERTIFICATE WAS NOT A VIOLATION OF THE CONFRONTATION CLAUSE.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE DEATH CERTIFICATE INTO EVIDENCE.

IV. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF DISMISSAL OF A JUROR AS THE ISSUE WAS NOT BROUGHT BEFORE THE TRIAL COURT.

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED A COMMENT REGARDING THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

VI. THE DEFENDANT IS PROCEDURALLY BARRED FROM ARGUING THAT JURY INSTRUCTION CR-12 PREJUDICED THE JURY AS HE FAILED TO OBJECT TO THE INSTRUCTION.

VII. THE DEFENDANT IS PROCEDURALLY BARRED FROM ARGUING CUMULATIVE ERROR AS THE ISSUE WAS NOT BROUGHT BEFORE THE TRIAL COURT.

STATEMENT OF THE FACTS

On evening of June 12, 2003, eighty-two-year-old Walter Lanier, left Hamburg, Arkansas for Greenville, Mississippi to go to "the boat." (Transcript p. 222 - 223). He never returned home.

In the early morning hours of June 13, 2003 while patrolling the area near the Jubilee Casino in Greenville, Mississippi, Officer Jeffrey Parsons noticed a Cadillac with a white male slumped over in the front seat and a black male wearing a ball cap seated in the center of the back seat. (Transcript p. 243 and 245). He thought the situation was strange and turned around to get a better look. (Transcript p. 244). As he approached the vehicle, Officer Parsons saw a black male in a light-colored shirt wearing a ball cap exit the rear passenger door. (Transcript p. 244). He described him as follows: "he was moving kind of at a rapid pace, walking down the hill towards the casino area." (Transcript p. 246). When Officer Parsons made it to the side of the Cadillac, he saw a wallet on the back seat. (Transcript p. 245). He then radioed another officer and asked him "to detain the black male that was walking down the hill, which at that time there was no one else walking in the area but that black male." (Transcript p. 247). Officer Parsons began following the black male down the hill and never lost sight of him. (Transcript p. 248). He saw Sgt. Rodrick Shannon detain him. (Transcript p. 248). While walking toward the suspect, Officer Parsons noticed a knife on the ground. (Transcript p. 249). As he approached the detained suspect, he also noticed red blots on his shirt. (Transcript p. 250). The suspect identified himself as the Defendant, Richard Birkhead (hereinafter "Birkhead"). (Transcript p. 308).

Meanwhile, Officer Brian Payne was called to the scene and while approaching the Cadillac in question saw an elderly man slumped over in the vehicle. (Transcript p. 330). He checked the man and found no pulse but testified that the body was still warm to the touch and that his blood had not started to clot yet. (Transcript p. 332). He also noticed what appeared to be stab wounds.

(Transcript p. 332). Mr. Lanier was pronounced dead later that morning. (Transcript p. 334). His death was determined to be a homicide. (Transcript p. 645).

Birkhead was arrested, taken to the police station, and booked. Money with blood spattered on it was removed from Birkhead's person. (Transcript p. 405-07). It was later determined that Mr. Lanier's blood was on the money taken from Birkhead, the knife found at the scene, and on Birkhead's jeans. (Transcript p. 761 and 763).

Birkhead was tried and convicted of capital murder. He was sentenced to serve life without the possibility of parole.

SUMMARY OF THE ARGUMENT

Birkhead did not establish a prima facie case of discrimination in the State's selection of jury members and use of peremptory strikes. Furthermore, the record does not provide sufficient information regarding the racial makeup of the jury selected or jury panel. Additionally, the trial court did not abuse its discretion in allowing the victim's death certificate into evidence as it was not testimonial in nature and as it was properly allowed under the Mississippi Rules of Evidence.

The issue of whether the trial judge should have dismissed a particular juror is procedurally barred as the issue was not raised before the trial court. However, notwithstanding the bar, Birkhead is not entitled to a new trial as there was no indication from the record that the trial judge's decision not to dismiss the juror was "clearly wrong." Birkhead is also procedurally barred from arguing that jury instruction CR-12 should not have been given as he, not only, did not object to the Court's giving the instruction, but affirmatively stated on the record that there was no objection. Birkhead is also procedurally barred from raising the issue of cumulative error as he did not raise the issue before the trial court.

The trial court acted within its discretion in refusing to grant a mistrial based a comment regarding the defendant's exercise of his right to remain silent. The trial court addressed the matter via a cautionary instruction and properly presumed that the jury would disregard the testimony as they were instructed and therefore, no prejudice could result. Moreover, even if it were error for the trial court to deny the motion for mistrial, the error was harmless in light of the overwhelming evidence of Birkhead's guilt.

ARGUMENT

I. THE TRIAL JUDGE PROPERLY RULED THAT THE DEFENDANT FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION IN THE STATE'S SELECTION OF JURY MEMBERS AND USE OF PEREMPTORY STRIKES.

Birkhead first argues that "the trial court erred in finding that a prima facie case [that race was the criteria for the exercise of the State's peremptory strikes] had not been established." (Appellant's Brief p. 6). The standard of review in such cases is as follows:

> Our standard of review requires reversal only if the factual findings of the trial judge are "clearly erroneous or against the overwhelming weight of the evidence." *Tanner v. State*, 764 So.2d 385 (Miss. 2000). Any determination made by a trial judge under *Batson* is accorded great deference because it is "based, in a large part, on credibility." *Coleman v. State*, 697 So.2d 777, 785 (Miss. 1987). In the *Batson* context, the term "great deference" has been defined as meaning an insulation from appellate reversal of any trial findings which are not clearly erroneous. *Lockett v. State*, 517 So.2d 1346, 1349-50 (Miss. 1987).

Moore v. State, 914 So.2d 185, 189 (Miss. Ct. App. 2005). As noted by the Court of Appeals in *Knight v. State*, this Court has held that "[t]rust is placed in a trial judge to determine whether a discriminatory motive drives the reasons given for striking a potential juror" and that "[o]ne of the reasons the trial court is afforded such deference when a *Batson* challenge is raised is because the demeanor of the attorney making the challenge is often the best evidence on the issue of race neutrality." 854 So2d 17, 22 (Miss. Ct. App. 2003) (quoting *Walker v. State*, 815 So.2d 1209 (Miss.

2002)). "Some of the time the unspoken intangible may be the judge's perception of the prosecutor arising from past experience." *Collins v. State*, 817 So.2d 644, 656 (Miss. Ct. App. 2002).

Birkhead is not entitled to reversal on this ground for two reasons. First, the record does not adequately establish the racial makeup of the venire as a whole, the chosen jurors, or the potential jurors struck by the State. The only information in the record regarding the racial makeup of the selected jury and those potential jurors who were stricken by the State is as follows:

a. The jury was made up of Juror No. 6, a black woman, (Transcript p. 194); Juror No. 8, a black woman, (Transcript p. 194); Juror No. 14, a black woman, (Transcript p. 194); Juror No. 16, a black woman, (Transcript p. 194); Juror No. 17, a black man, (Transcript p. 194); Juror No. 20, a black woman, (Transcript p. 194); Juror No. 22, a black woman, (Transcript p. 194); Juror No. 23, a black woman, (Transcript p. 194); Juror No. 25, a white woman, (Transcript p. 194); Juror No. 31, race and gender unknown; Juror No. 34, a white male, (Transcript p. 196); and Juror No. 44, race and gender unknown. The race and gender of the alternates was not indicated in the record either.

b. The State's first five strikes were against black potential jurors.

There was no indication in the record regarding the race of the other potential jurors struck by the State. Thus, there is insufficient information in the record to support Ramsey's assignment of error on appeal. *See Mason v. State,* 440 So.2d 318, 319 (Miss. 1983); *Jackson v. State,* 684 So.2d 1213, 1223 -1224 (Miss.1996); and *Hansen v. State,* 592 So.2d 114, 127 (Miss. 1991). Furthermore, "there is a presumption that the judgment of the trial court is correct and the burden is on the Appellant to demonstrate some reversible error to this Court." *Acker v. State,* 797 So.2d 966, 971 (Miss. 2001) (quoting *Branch v. State*, 347 So.2d 957, 958 (Miss.1977)).[1]

---

[1] Birkhead also argues that the trial court's reasoning behind its holding that there was no prima facie case was flawed because the court considered the racial makeup of the selected jurors. (Appellant's Brief p. 6 - 7). However, the court, itself, indicated that it did not rely solely on the racial makeup of the selected jury but instead, after being asked if *Batson* was based on the race of the potential jurors struck, noted that "it's also based on the composition of the jury as well. You take all of that into consideration." (Transcript p. 194 - 195).

Second, Birkhead failed to establish there was a prima facie case of discrimination. In order to establish a prima facie case, Birkhead "was required to show: (1) that he is a member of a 'cognizable racial group;' (2) that the proponent has exercised peremptory challenges toward the elimination of veniremen of his race; and (3) that facts and circumstances raised an inference that the proponent used his peremptory challenges for the purpose of striking minorities." *Puckett v. State*, 788 So.2d 752, 756 (Miss. 2001) (quoting *Batson v. Kentucky*, 476 U.S. 79, 97, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986)).[2] "The pivotal question is 'whether the opponent of the strike has met the burden of showing that proponent has engaged in a pattern of strikes based on race or gender, or in other words, the totality of the relevant facts gives rise to an inference of discriminatory purpose.'" *Id.* at 757. As the Court of Appeals noted in *Chandler v. State*, the Fifth Circuit has held that:

> To establish a prima facie case, a party is required to show that the circumstances surrounding the peremptory challenges raise an inference of purposeful discrimination. The trial court should consider all relevant circumstances in determining whether a prima facie *Batson* violation can be established. Factors that give rise to an inference of discrimination include, among others, a pattern of strikes against jurors of a certain race and the party's statements and questions during voir dire. "A prima facie case of racial discrimination requires a defendant to 'come forward with facts, not just numbers alone.' " In this circuit, a trial court's determination that a party has failed to make a prima facie showing is accorded a "presumption of correctness, which can only be rebutted by 'clear and convincing evidence.' "

967 So.2d 47, 52-53 (Miss. Ct. App. 2006) (quoting *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 561 (5th Cir. 2001)) (*Emphasis added*). Birkhead's only argument in support of his contention that the State was discriminatory in its use of peremptory strikes was the fact that the State "used its first five

---

[2] As noted by this Court in *Puckett v. State*, the holding of *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed. 411 (1991) eliminated the first two factors required by *Batson*. 788 So.2d 752, 756-57 (Miss. 2001) (citing *Bush v. State*, 585 So.2d 1262, 1267-68 (Miss. 1991)).

challenges against African Americans." (Appellant's Brief p. 10). However, as the Court of Appeals held in *Gilbert v. State*, "[t]he number of peremptory strikes which the State used against the minority members, standing alone, is insufficient to establish an inference to a pattern of purposeful discrimination." 934 So.2d 330, 337 (Miss. Ct. App. 2006) (quoting *Dennis v. State*, 555 So.2d 679, 681 (Miss. 1989)). Moreover, as noted in *Collins v. State*, the test is simply whether Birkhead has shown that the State had an established "pattern of striking all or almost all of a certain racial group." 817 So.2d 644, 656 (Miss. Ct. App. 2002). Birkhead did not as evidenced by the fact that jury was made up of predominantly African Americans.

Accordingly, Birkhead's first issue is without merit as the record does not adequately establish the racial makeup of the venire as a whole, the chosen jurors, or the potential jurors struck by the State and as Birkhead failed to establish that there was a prima facie case of discrimination.

II. ADMISSION OF THE VICTIM'S DEATH CERTIFICATE WAS NOT A VIOLATION OF THE CONFRONTATION CLAUSE.

Birkhead argues that "the Appellant's constitutional right to confrontation was violated by the admission into evidence of the victim's death certificate which purported his 'time of injury'." (Appellant's Brief p. 10). However, the Fifth Circuit has held that "public records are not testimonial in nature." *U.S. v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007). *See also U.S. v. Lopez-Moreno*, 420 F.3d 420, 437 (5th Cir. 2005) (holding that "the Supreme Court stated that business records, which are analogous to public records, are 'by their nature . . . not testimonial' and not subject to the requirements of the Confrontation Clause"). As the Court of Appeals noted in *Frazier v. State*, "non-testimonial hearsay does not trigger the need for confrontation to be admissible." 907 So.2d 985, 997 (Miss. Ct. App. 2005). Thus, admission of the death certificate into evidence did not violate Birkhead's right to confront the witnesses against him.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE DEATH CERTIFICATE INTO EVIDENCE.

Birkhead also argues in the alternative that the death certificate was inadmissable under the Mississippi Rules of Evidence. (Appellant's Brief p. 14). "The admissibility of evidence is within the discretion of the trial court, and absent abuse of that discretion, the trial court's decision on the admissibility of evidence will not be disturbed on appeal." *Porter v. State*, 869 So.2d 414, 417(Miss. Ct. App. 2004) (citing *McCoy v. State*, 820 So.2d 25, 30 (Miss. Ct. App.2002)). "When the trial court stays within the parameters of the Rules of Evidence, the decision to exclude or admit evidence will be afforded a high degree of deference." *Id.*

Mississippi Code Annotated § 41-57-9 states as follows:

> Any copy of the records of birth, sickness or death, when properly certified to by the state registrar of vital statistics, to be a true copy thereof, shall be prima facie evidence in all courts and places of the facts therein stated. A facsimile signature of the registrar shall be sufficient for certification when the certificate shall have impressed thereon the seal of the Mississippi Department of Public Health.

Additionally, Mississippi Rule of Evidence 803(9) states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> * * *
> (9) Records of Vital Statistics. Records or data compilations of vital statistics, in any form, if the report thereof was made to a public officer pursuant to requirements of law.

This Court held in *Shell v. State,* that "a death certificate clearly falls under the language of this hearsay exception." 554 So.2d 887, 898 (Miss. 1989) *(rev'd on other grounds).* Accordingly, the death certificate was admissible.

However, Birkhead correctly notes that this Court in *Flowers v. State*, held that the introduction of a death certificate in a criminal case is permitted, but the use of the certificate is limited to physical cause of death. 243 So.2d 564, 565 (Miss. 1971). Birkhead then argues that the

"death certificate was introduced to show more than the physical cause of death" noting that it "contained a 'time of injury' statement which alleged the time in which the victim was assaulted." (Appellant's Brief p. 17). While Birkhead did object to the admission of the birth certificate on this ground, when the trial judge properly held that under the Mississippi Rules of Evidence the certificate was admissible, Birkhead failed to ask that the now complained of portion of the certificate be redacted or that the judge give a limiting instruction regarding the complained of portion of the certificate. Thus, Birkhead cannot now complain that the jury was allowed to see this portion of the certificate as the issue of redaction or a limiting instruction was never brought before the trial court.

IV. THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING THE ISSUE OF DISMISSAL OF A JUROR AS THE ISSUE WAS NOT BROUGHT BEFORE THE TRIAL COURT.

Birkhead next argues that "Juror Brown was sleeping during an imperative point of testimony during trial, and therefore, should have been dismissed." (Appellant's Brief p. 18). However, Birkhead is procedurally barred from raising this issue as the issue was not brought before the trial court. During trial, the prosecutor informed the court that one of the jurors was asleep. (Transcript p. 585). The record indicates that the juror woke up just before the court sent a bailiff to give him a glass of water. (Transcript p. 586). The court indicated that it would watch this particular juror closely from that point forward and the prosecutor continued with his direct examination of the witness. (Transcript p. 586). At no point during the trial did Birkhead request that this juror be dismissed. The issue was also not addressed in his motion for new trial. It is well established Mississippi law that "failure to raise an issue at trial bars consideration on an appellate level." *Walker v. State,* 913 So.2d 198, 224 (Miss. 2005).

Furthermore, this Court held in *Norris v. State*, that there was no reversible error not only

because the trial judge gave a sufficient justification for leaving the [sleeping] juror on the jury" but also because "there was no timely complaint by counsel to the juror continuing to serve." 490 So.2d 839, 846 (Miss. 1986). In the case at hand, there was no complaint at all made by Birkhead to the trial judge regarding the juror in question continuing to serve; therefore, the trial judge did not state for the record his reasons for not dismissing the juror. However, "the trial judge observed the matter first hand and was in a better position to determine whether or not the juror was asleep" and/or how long he had been asleep. *Williams v. State*, 919 So.2d 250, 253 (Miss. Ct. App. 2005). Additionally, "[t]he judicial determination of whether a juror is fair and impartial will not be set aside unless such determination is clearly wrong." *Magee v. State,* 966 So.2d 173, 182 (Miss. Ct. App. 2007) (quoting *Smith v. State*, 802 So.2d 82, 86 (Miss. 2001)). There is nothing in the record which indicates that the trial court's decision to leave the juror in question on the panel was "clearly wrong." Unlike in *Church v. Massey,* 697 So.2d 407, 413 - 414 (Miss. 1997), the case relied on by Birkhead, in which the record clearly indicated that the juror in question slept through much of the trial, the record in this case shows that this juror was only asleep temporarily and was awakened immediately upon the Court's realization that he was asleep. Moreover, the Court noted on the record that it would closely watch the juror in question and there was no indication on the record that there were additional problems with this juror.

As Birkhead failed to raise this issue before the trial court, the issue is procedurally barred. Notwithstanding the bar, however, Birkhead is not entitled to a new trial as there was no indication from the record that the trial judge's decision not to dismiss the juror was "clearly wrong." Thus, this issue is without merit.

V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO GRANT A MISTRIAL BASED A COMMENT REGARDING THE DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

Birkhead also argues that "the lead investigator in the case improperly commented on the Appellant's exercise of his *Miranda* rights" and that therefore, the trial judge should have granted a mistrial. (Appellant's Brief p. 21). "This Court has held that whether to grant a motion for mistrial is within the sound discretion of the trial court." *Rollins v. State,* 970 So.2d 716, 720 (Miss. 2007) (quoting *Carpenter v. State*, 910 So.2d 528, 533 (Miss.2005)). "Furthermore, the standard of review for denial of a motion for mistrial is abuse of discretion." *Id.*

The trial court did not abuse its discretion in refusing to grant a mistrial based on the investigator's comments. After defense counsel moved for a mistrial, the trail court held as follows:

> I'm not going to grant a mistrial, but I'm going to give an instruction right now reminding them that there is a constitutional right to remain silent and that that - - and that applies at any kind of criminal proceeding and that is not to be used against the defendant or considered against the defendant in any way.

(Transcript p. 596). The trial court gave the following instruction:

> This witness has just testified about the defendant's exercise of his constitutional right to remain silent. It's a right that all of us would have if we were criminal defendants in a case, and that is not to be considered against the defendant in any way. It's a right that he has that he can exercise. So I want you to disregard that statement entirely and certainly not give it any consideration or weight in this case.

(Transcript p. 597). It is well-established Mississippi law that jurors are presumed to have followed the court's instructions. *See Gossett v. State*, 660 So.2d 1285, 1292 (Miss. 1995) (holding that the trial court was within its authority in denying the defendant's motion for mistrial after testimony that the defendant exercised his *Miranda* rights as the trial judge gave a cautionary instruction and as "the jury is presumed to have followed the court's instructions"). *See also Higgins v. State*, 502 So.2d 332, 335 (Miss. 1987) (holding that "the court admonished the jury to disregard [the comments on

the defendant's intention to remain silent] and it is presumed that the jury followed the instruction of the law"); *Dixon v. State*, 519 So.2d 1226, 1229 (Miss. 1988) (holding that the Court found "no error where the jury is presumed, upon instruction, to disregard"); *Long v. State,* 934 So.2d 313, 316 (Miss. Ct. App. 2006) (holding that "jurors are presumed to follow the instructions of the court" and that "to presume otherwise would be to render the jury system inoperable"). The trial court addressed the matter via a cautionary instruction and refused to grant a mistrial. The trial court properly presumed that the jury would disregard the testimony as they were instructed and therefore, no prejudice could result. Thus, the trial court acted within its discretion in denying the motion for mistrial.

Birkhead also notes that "compounding the problem was the trial court's limiting instruction which did nothing more than spotlight the fact that Mr. Birkhead exercised his rights under both the federal and state constitutions." (Appellant's Brief p. 23). However, Birkhead did not object to the trial court's giving this limiting instruction during the trial and in fact, said "okay" after the trial judge indicated that she planned to give the limiting instruction. (Transcript p. 596). Thus, Birkhead cannot now complain of it. *See Bynum v. State,* 929 So.2d 324, 333 (Miss. Ct. App. 2005).

Furthermore, even if it were error for the trial court to deny the motion for mistrial, the error was harmless in light of the overwhelming evidence of Birkhead's guilt. *See Gossett v. State*, 660 So.2d 1285, 1291 - 92 (Miss. 1995) and *Austin v. State*, 384 So.2d 600 (Miss. 1980). In the case at hand the evidence that Birkhead killed Mr. Lanier while robbing him was overwhelming and included, but was not limited to, DNA evidence as well as testimony from a police officer that Birkhead was seen at the scene of the crime just after the crime was committed. (Transcript p. 243 - 246, 761, and 763). Thus, any error in refusing to grant a mistrial was harmless.

VI. THE DEFENDANT IS PROCEDURALLY BARRED FROM ARGUING THAT JURY INSTRUCTION CR-12 PREJUDICED THE JURY AS HE FAILED TO OBJECT TO THE INSTRUCTION.

Birkhead also contends that "jury instruction CR-12 prejudiced the jury." (Appellant's Brief p. 24). However, Birkhead is procedurally barred from raising the issue as he did not object to the trial court giving the instruction and in fact affirmatively stated on the record that there was no objection to the instruction. (Transcript p. 824). The Mississippi Court of Appeals held in *Bynum v. State* that the defendant waived appellate review by not objecting to the jury instruction at trial and, similarly to the case at hand, the Court noted that not only did the defendant fail to object but also affirmatively stated that there was no objection. 929 So.2d 324, 333 (Miss. Ct. App. 2005). *See also Wells v. State*, 849 So.2d 1231, 1237(Miss.2003) (holding that "the failure of an offended party to properly object to a jury instruction bars the issue on appeal"). Accordingly, this issue is without merit.

VII. THE DEFENDANT IS PROCEDURALLY BARRED FROM ARGUING CUMULATIVE ERROR AS THE ISSUE WAS NOT BROUGHT BEFORE THE TRIAL COURT.

Lastly, Birkhead argues that he is entitled to a new trial pursuant to the cumulative error doctrine. (Appellant's Brief p. 25). However, he is procedurally barred from raising this issue on appeal as it was not raised before the trial court. *See Gibson v. State,* 731 So.2d 1087, 1098 (Miss. 1998); *Maldonado v. State,* 796 So.2d 247, 260 -261 (Miss. Ct. App. 2001); and *White v. State,* 958 So.2d 241, 246 (Miss. Ct. App. 2007).

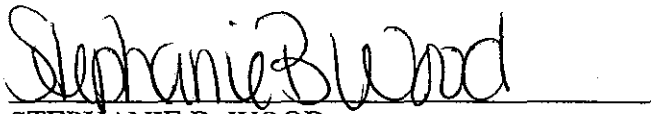
Procedural bar notwithstanding, "where there is no reversible error in any part, [there can be] no reversible error to the whole." *Doss v. State*, 709 So.2d 369, 401 (Miss.1996) (citing *McFee v. State*, 511 So.2d 130, 136 (Miss.1987)). Thus, as the trial court committed no errors, Birkhead's cumulative error argument is without merit.

CONCLUSION

The State of Mississippi respectfully requests that this Honorable Court affirm the conviction and sentence of Richard Earl Birkhead as the trial court committed no reversible errors.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: 

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Stephanie B. Wood, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Margaret Carey-McCray
Circuit Court Judge
P. O. Box 1775
Greenville, MS 38072-1775

Honorable W. Dwayne Richardson
District Attorney
P. O. Box 426
Greenville, MS 38702

Justin T. Cook, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 21st day of May, 2008.

STEPHANIE B. WOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680