IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RICHARD BIRKHEAD — APPELLANT

V. — NO. 2007-KA-0666-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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V. **NO. 2007-KA-0666-SCT**

STATE OF MISSISSIPPI **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed 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 or recusal.

1. State of Mississippi
2. Richard Birkhead, Appellant
3. Honorable Joyce I. Chiles, District Attorney
4. Honorable Margaret Carey-McCray, Circuit Court Judge

This the 10th day of March, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

ISSUE FOUR:

WHETHER THE TRIAL COURT ERRED IN NOT DISMISSING JUROR BLACK WHEN HE WAS ASLEEP DURING INTEGRAL TESTIMONY IN THE STATE'S CASE.

ISSUE FIVE:

WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S MOTION FOR A MISTRIAL WHEN THE LEAD INVESTIGATOR IMPERMISSIBLY COMMENTED ON APPELLANT'S EXERCISE OF HIS POST-*MIRANDA* RIGHT TO REMAIN SILENT.

ISSUE SIX:

WHETHER THE TRIAL COURT ERRED WHEN IT GAVE JURY INSTRUCTION CR-12.

ISSUE SEVEN:
WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED THE APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

STATEMENT OF INCARCERATION

Richard Earl Birkhead, the Appellant in this case, is presently incarcerated in the Mississippi Department of Corrections.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to **Article 6, Section 146 of the Mississippi Constitution** and **Miss. Code Ann. 99-35-101.**

STATEMENT OF THE CASE

This appeal proceeds form the Circuit Court of Washington County, Mississippi, and a judgment of conviction for capital murder against Richard Earl Birkhead following a jury trial on March 5-8, 2007, honorable Margaret Carey-McCray, Circuit Judge, presiding. Mr.

Birkhead was subsequently sentenced to life imprisonment in the custody of the Mississippi Department of Corrections without the possibility of parole.

FACTS

In the early morning of July 13, 2003, police were dispatched to a disturbance at the Jubilee Casino in Greenville, Mississippi. (T. 243). When police officers responded to the dispatch, they drove by and saw a red Cadillac with one white male in the front seat and one black male in the back seat. (T. 243). Officers turned around and as they were approaching the Cadillac, saw an individual exit and walk and a rapid pace away from the vehicle. (T. 245-46).

Officers followed the man, and he was detained. (T. 249). Upon receiving the subject's identification, officer's identified him as Richard Earl Birkhead (hereinafter "Mr. Birkhead"). (T. 282). Police noticed that the individual had blood on his clothing. (T. 250-51).

While detaining Mr. Birkhead, the officers received a radio transmission that there had been a stabbing of the man in the Cadillac. (T. 282). Nearby, police discovered a knife under a vehicle in the path that the subject had walked. (T. 249).

Police who arrived at the Cadillac saw an elderly white male slumped over in the vehicle. (T. 330). The gentleman was bleeding from a chest wound. (T. 331). Officers Attempted to perform CPR on the gentleman while waiting for medical personnel to arrive. (T. 331). When paramedics arrived, they rushed the victim to the hospital where he was pronounced dead. (T. 334). This individual would be identified as Walter Lanier (hereinafter "Mr. Lanier.").

Upon being arrested, police recovered blood-stained money from the front left pocket of Mr. Birkhead. (T. 407). Analysis of the blood on the money indicated that it was that of Mr. Lanier. (T.760). The stains contained on Mr. Birkhead's pants also tested positive for Mr. Lanier's blood. (T. 763). Mr. Birkhead's DNA was found on Mr. Lanier's shirt. (T. 761). Mr. Birkhead's palm and fingerprints were also found at the scene. (T. 679-680).

Mr. Birkhead was subsequently indicted for the murder of Mr. Lanier. (C.P. 09, R.E. 14). The state originally sought the death penalty, however, the trial court concluded that the defendant was mentally handicapped and, therefore, granted Defendant's Motion to Preclude the State of Mississippi from Seeking the Death Penalty.

Mr. Birkhead was subsequently tried. The jury deliberated for approximately an hour and a half before returning a guilty verdict against Mr. Birkhead. (T. 873, C.P. 236, R.E. 15). Mr. Birkhead was subsequently sentenced to life without parole in the custody of the Mississippi Department of Corrections. (C.P. 238, RE 16).

On March 19, 2007, the defendant filed a Motion for New Trial and J.N.O.V., claiming that the verdict was contrary to law and contrary to the overwhelming weight of the evidence. (C.P. 244, R.E.18). Feeling aggrieved by the verdict of the jury and the sentence of the trial court, the Appellant timely filed a notice of appeal. (C.P. 240, R.E. 17)

SUMMARY OF THE ARGUMENT

The trial court erred when it ruled that there was no *prima facie* case of discrimination on the part of the State despite the fact that the State used all of its peremptory challenges against African-American members of the venire. The trial court inappropriately concluded that the *prima facie* analysis is concerned with both the members of the venire who were

accepted and the ones who were struck.

Furthermore, a death certificate containing the victim's "time of injury" was inadmissible because it was violative of both the Appellant's constitutionally-mandated right of confrontation and the Mississippi Rules of Evidence.

Moreover, the trial court erred when it did not dismiss a juror when the juror was noticeably asleep during the testimony of the lead detective in the investigation. It was impossible for the juror to properly weigh the evidence presented against the Appellant, and, therefore, the Appellant was prejudiced.

The trial court further erred when it denied defense counsel's motion for a mistrial after the same witness impermissibly commented on the Appellant's exercise of his post-*Miranda* right to remain silent, consequently prejudicing the Appellant.

There was further error when the trial court gave jury instruction CR-12 which improperly commented on the believability and credibility of the proceedings and resulted in a prejudicial outcome. Lastly, these errors, when taken separately, or in concert, warrant reversal and remand for a new trial.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE DEFENSE HAD NOT ESTABLISHED A *PRIMA FACIE* CASE OF DISCRIMINATION ON THE PART OF THE STATE DESPITE THE STATE USING ALL OF ITS PEREMPTORY STRIKES AGAINST AFRICAN-AMERICAN MEMBERS OF THE VENIRE.

I. Standard of Review.

"[A] trial court's determination of whether a showing of racial discrimination has been made will not be reversed unless it is 'clearly, erroneous, or against the overwhelming weight

of the evidence.'" ***Johnson v. State***, 792 So. 2d 253, 256-57 (Miss. 2001)(citing ***Stewart v. State***, 662 So. 2d 552, 558 (Miss.1995)). The Court "will not overrule a trial court on a ***Batson*** ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence." ***Manning v. State***, 765 So. 2d 516, 519 (Miss. 2000)(citing ***Thorson v. State***, 721 So.2d 590, 593 (Miss.1998).

ii. ***The Trial Court Erred in Finding That a Prima Facie Case Had Not Been Established.***

Trial counsel then made a ***Batson*** challenge as to the jurors struck by the state: "Your Honor, at this time the defense would raise a Batson challenge. All of the jurors that the State has struck have been black. . . . and we ask for a race neutral reason as to why those jurors were struck." (T. 193-94).

The trial court then, on its on accord, asked "What's the present makeup of the jury?" (T. 194). After some dialogue between the two sides, the following dialogue occurred:

> MS. WHITE-RICHARD: I thought ***Batson*** was based on the race of the people that you strike.
>
> **THE COURT:** It's also based on the composition of the jury as well. You take all of that into consideration. And I'm not going to find that that's a *prima facie* case. (T. 194-95, R.E. 20-21).

The trial court's ruling was clearly erroneous, and the prosecutor should have been required to give his reasons for exercising the challenges in question. When a party makes a ***Batson*** claim, he or she "must first make a *prima facie* showing that race was the criteria for the exercise of the peremptory strike." ***McFarland v. State***, 707 So. 2d 166, 171 (Miss.1997) (citing ***Batson***, 476 U.S. at 96-97). "Once the *prima facie* case has been made, the prosecution must supply race-neutral reasons for using peremptory challenges on

minority members. ***Bush v. State***, 585 So. 2d 1262, 1268 (Miss.1991)(citing ***Batson***, 476 U.S. at 98)." ***Walker v. State***, 740 So. 2d 873, 880 (Miss. 1999). Once the prosecutor gives a non-discriminatory reason for exercising the strike, the opponent of the strike then is given an opportunity to show that the reason given by the prosecutor is merely a pretext for discrimination. ***Berry v. State***, 802 So. 2d 1033, 1036 (Miss. 2001).

In order to establish a prima facie case of discrimination in the exercise of peremptory challenges, a party must demonstrate:

> (1) that he is a member of a cognizable racial group; (2) that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; (3) and that the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities. ***Walker v. State***, 740 So. 2d 873, 880 (Miss. 1999)(quoting ***Batson v. Kentucky***, 476 U.S. 79, 80(1986)).[1]

In this case, the fact "[t]hat the prosecutor accepted other black persons as jurors is no defense to a ***Batson*** claim." ***Chisolm v. State***, 529 So. 2d 635, 637 (Miss.1988)(quoting ***Batson v. Kentucky***, 476 U.S. 79, 94-96, ns. 18 & 19 (1986)). *See also* ***Conerly v. State***, 544 So. 2d 1370, 1372 (Miss.1989). Therefore, the trial court was in error when it looked towards the racial composition of those members of the jury that the State did not strike in determining whether there was a *prima facie* case of racial discrimination.

Indeed, "'A single invidiously discriminatory governmental act' is not 'immunized

---

[1] This test is somewhat outdated in that it has been held that the party opposing the use of the peremptory challenge is no longer required to show that he or she is a member of a cognizable racial group or that the juror and the party share the same race. ***Puckett v. State***, 737 So.2d 322 (Miss.1999). However, the courts continue to quote these requirements to establish a prima facie case of discrimination. *See* ***Flowers v. State***, 947 So.2d 910, 917 (Miss. 2007).

by the absence of such discrimination in the making of other comparable decisions.'" ***Chisolm v. State***, 529 So. 2d 635, 637 (Miss.1988)(quoting ***Batson v. Kentucky***, 476 U.S. 79, 95 (1986)); ***McGee v. State***, 953 So. 2d 211, 214 (Miss. 2007).

In ***McGee***, Justice Dickinson in a specially concurring opinion stated that "the United States Supreme Court made it crystal clear that to prevail on a '***Batson*** challenge,' a defendant is not required to demonstrate a pattern or multiple instances of discrimination. ***McGee v. State***, 953 So. 2d 211, 217-18 (Miss. 2007)(Dickinson, J., specially concurring). "[T]his Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case." ***Id.***

Therefore, the fact that the State had not exhausted it peremptory challenges or the fact that it left an African-American on the jury panel tendered to the defense does not relieve the State from the ***Batson*** issue at hand because the ***Batson*** issue "is concerned exclusively with discriminatory intent on the part of the lawyer against whose peremptory strikes the objection is interposed. ***Johnson v. State***, 792 So. 2d 253, 256-57 (Miss. 2001)(citing ***Powers v. Ohio,*** 499 U.S. 400, 406 (1991); ***Batson v. Kentucky***, 476 U.S. 79, 93-94 (1986)).

In ***Walker v. State***, "[T]he prosecutor used seven out of nine peremptory challenges to exclude black persons. The final jury resulted in ten whites and two blacks. . . ." ***Walker v. State***, 740 So.2d 873, 880 (Miss., 1999). The ***Walker*** Court concluded "that an inference of racial discrimination was presented by Walker and that the lower court erred in failing to conduct a ***Batson*** hearing." ***Id.***

In ***Berry***, the Court remanded for a ***Batson*** hearing where the State used all "twelve of its peremptory strikes. . . . Seven white prospective jurors and five African American prospective jurors were stricken, resulting in a jury composed of eleven white jurors and one African American juror." ***Berry***, 802 So.2d at 1036. While in ***Scott v. State***, 2007 WL 1677944, *5 (Miss. Ct. App. 2007), the prosecution used ten of its eleven peremptory challenges on black members. There, the Court held, "The prosecution exercised ten of its eleven peremptory challenges against black members of the venire. Said differently, the prosecution used approximately 91% of its challenges against black members of the venire. Those statistics alone raise an inference of discrimination." ***Id.***

In another case, the prosecution used seven of those twelve challenges to exclude black jurors. ***Chisolm v. State***, 529 So. 2d 630, 631 (Miss.1988)(***Chisolm I***). The Court noted that under those facts, that "[q]uite apparently Chisolm made a *prima facie* showing meeting the ***Batson*** criteria." ***Id.*** at 632. Thus, the Court in ***Scott***, *supra*, reasoned,

> "If a prima facie showing was 'quite apparent' where the prosecution used seven of twelve challenges against black veniremen and, as a result, the jury was comprised of ten white jurors and three black jurors, it is equally apparent where the prosecution uses ten of eleven peremptory challenges against black veniremen to end up with a jury of ten white jurors and three black jurors." ***Scott v. State***, 2007 WL 1677944, *5 (Miss. Ct. App. June 12, 2007).

The Supreme Court again found a prima facie case was established in ***Chisolm v. State***, 529 So. 2d 635, 639. (Miss.1988) (***Chisolm II***), where "the prosecution used ten peremptory challenges-nine against black members of the venire." ***Id.*** at 637. There, the Court found "[a]s in ***Chisolm I***, there can be no doubt that Chisolm made his prima facie

showing of purposeful discrimination in the selection of the jury." ***Id.***

The Court has found an inference of discrimination where the prosecutor exercised seven peremptory challenges against African American jurors. ***Thorson***, 653 So. 2d at 896. An inference of discrimination was also found where the prosecutor used of nine of eleven peremptory challenges against African Americans. ***Manning v. State***, 735 So. 2d 323, 339 (Miss. 1999).

Thus, even though the prosecution in this case left African-American jurors on the panel, the fact that the prosecutor used its first five challenges against African-Americans merits a finding of an inference of discrimination. In fact, the Court of Appeals has noted that it would be "egregious" to use all peremptory challenge against a particular racial group." ***Scott v. State***, 2007 WL 1677944, *7 (Miss. Ct. App. 2007).

iii. Conclusion

Accordingly, the Appellant asserts that the trial court erred in finding that there was not a *prima facie* case of discrimination on the part of the State, and this honorable Court should remand for a ***Batson*** hearing.

ISSUE TWO: WHETHER 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?"

I. Standard of Review

The standard of review for the admission of evidence is abuse of discretion. ***Smith v. State,*** 839 So. 2d 489, 494 (Miss. 2003)(citing ***Farris v. State***, 764 So. 2d 411, 428 (Miss. 2000)). However, when a question of law is raised, the applicable standard of review is *de*

novo. ***Biglane v. Under the Hill Corp.***, 949 So. 2d 9, 14 (Miss. 2007)(citing ***Cummings v. Benderman***, 681 So. 2d 97, 100 (Miss. 1996)).

ii. There is a constitutional right for criminal defendants to confront the witnesses against them.

Part of the Sixth Amendment of the United States Constitution, the Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." ***U.S. Const. Amend. VI.***

The right of confrontation is deeply rooted in both the common law and in Roman law. The principle that the accused should be permitted to confront his accusers can be found as far back as the Bible. In Acts 25:16, the Roman Governor Festus, when discussing the proper treatment of his prisoner, Paul, stated: "It is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face-to-face, and has been given a chance to defend himself against the charges." ***Acts* 25:16.**

Due to its incorporation via the Due Process Clause of the Fourteenth Amendment, this procedural right applies to both federal and state prosecutions. *See* ***Pointer v. Texas***, 380 U.S. 400 (1965). The right to confrontation is an essential right of criminal defendants, noted by the United States Supreme Court as a "bedrock constitutional guarantee." ***Crawford v. Washington***, 541 U.S. 36, 42 (2004).

The Confrontation Clause exists for several purposes. First, in ensures an adversarial criminal process by allowing for cross examination, "'the greatest legal engine ever invented for the discovery of the truth.'" ***California v. Green***, 399 U.S. 149, 158 (1970)(quoting **5 John Henry Wigmore, Evidence § 1367** (3d ed. 1940)). Secondly, by requiring that

witnesses make their statements under oath, in court, and in front of the accused, the confrontation right promotes the truthfulness of witnesses. *See,* ***Maryland v. Craig,*** 497 U.S. 836, 846 (1990). Thirdly, in contrast to an *ex parte* affidavit, in-court examination allows the jury to observe the witness' demeanor, "thus aiding the jury in assessing his credibility." ***Green***, 399 U.S. at 158; *See also,* ***Mattox v. United States***, 156 U.S. 237, 242-43 (1895).

iii. The "time of injury" aspect of the death certificate constitutes as testimony under Crawford.

At trial, the State offered into evidence the death certificate of the victim, Mr. Lanier, which indicated his time of death was at 3:50 a.m. and the time of his injury was at 3:38 a.m. When it was offered, the following dialogue occurred.

> **THE COURT:** Is there any objection?
>
> MS. WHITE-RICHARD: Your honor, may we approach?
>
> **THE COURT:** Yes
>
> (CONFERENCE AT THE BENCH, OUT OF HEARING OF THE JURY AS FOLLOWS:)
>
> MS. WHITE-RICHARD: On the report they have the hour of injury as being 3:38 a.m. I don't know that they have established that. They have the hour of death as being 3:50 a.m. I don't think they have established that. We will object to it being introduced.
>
> MS. BRIDGES: It's a state official record, Your Honor, certified under the laws of the State of Mississippi.
>
> **THE COURT:** I will allow it.
>
> MS. WHITE-RICHARD: I have a question. Is anybody coming to testify about that death certificate?

MS. BRIDGES: I'm sorry, what was the question?

MS. WHITE-RICHARD: Is anybody coming to testify about that death certificate?

MS. BRIDGES: It's a certified copy. It's admissible under the rules. (T. 346-47, R.E. 22-23).

The Court's opinion in ***Crawford*** did not define what constitutes "testimonial." A statement is likely to be determined as testimonial if government officials were involved in its creation "with an eye toward" using it at trial. *See* ***Crawford***, 541 U.S. at 56 n.7.

"At a minimum [testimonial includes] prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [also includes] police interrogations." ***Id.*** At 68. On the other hand, business records and statements in furtherance of a conspiracy are not testimonial. ***Id.*** at 56.

The "time of injury" section of the death certificate contained information that, absent any testimony otherwise at trial, could only have been provided to the doctor signing the death certificate. This information was likely given to the doctor through police officers. Mr. Birkhead was arrested shortly after the police arrived on the scene. Police were well aware that they had a subject in custody at the time that Mr. Lanier arrived at the hospital. Therefore, the statement regarding "time of injury" was made with an eye toward being used in a future criminal proceeding against Mr. Birkhead.

If a police officer knew that the victim in the case had deceased, then any statement which produced a document which would reasonably be relied upon at trial as evidence against the defendant, should be considered testimonial.

iv. Conclusion

Mr. Birkhead was confronted with testimonial hearsay and prevented from cross examination. The United States Supreme Court in ***Crawford*** mandated that when an out of court statement or document is being used as evidence against the accused, and that statement or document is testimonial in nature, such evidence is violative of the Sixth Amendment confrontation right.

The death certificate in the case *sub judice* is certainly testimonial and is constitutionally barred when the right to cross examine has not been afforded to the defendant. Consequently, it is inarguable that Mr. Birkhead was confronted with inadmissable evidence affecting a constitutional right. Besides wholly running afoul the rights afforded to the citizens of this nation by the United States Constitution, this inadmissible death certificate directly contradicted the Appellant's theory of defense at trial and provided no ability to cross-examine, and thus adequately defend himself.

ISSUE THREE: IN THE ALTERNATIVE, IF THE "TIME OF INJURY" STATEMENT CONTAINED IN THE DEATH CERTIFICATE WAS NOT "TESTIMONIAL," THE DEATH CERTIFICATE WAS STILL INADMISSIBLE UNDER THE MISSISSIPPI RULES OF EVIDENCE.

I. Standard of Review

The standard of review on appeal regarding the admissibility of evidence is abuse of discretion. ***Johnston v. State***, 567 So. 2d 237, 238 (Miss. 1990). Unless a trial court abuses its discretion in admitting the specific evidence, the appellate court will not find error. ***Shearer v. State***, 423 So.2d 824, 826 (Miss. 1983).

ii. The death certificate was inadmissible under Mississippi Rule of Evidence 803(8).

Mississippi Rule of Evidence 803 provides in relevant part,

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

> **(8) Public Records and Reports.** Records, reports, statements, or data compilations in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases, matters observed by police offices and other law enforcement personnel, or © in civil actions and proceedings against the state in criminal cases, factual resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. **Miss. R. Evid. 803(8).**

Mississippi Rule of Evidence 902 further provides in pertinent part:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:...
>
> > **(4) Certified Copies of Public Records:** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilation in any form, certified as correct by the custodian or other person authorized to make the certification... **Miss. R. Evid. 902(4).**

Comment 11 to the rule, however, provides: "When self-authenticating records are offered against the defendant in criminal cases, the rights of the defendant under the confrontation clauses of Federal and State Constitutions must be considered." ***Id.*** Comment 11 (emphasis added).[2]

The comment under **Miss. R. Evid. 803(8)** states in pertinent part:

> The experience in other jurisdictions which have adopted an identical rule has been that judges are exercising great caution in admitting these reports. Often they are being excluded if

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[2]See issue two, *supra*.

> based on hearsay or the opinions of those not involved in the preparation of the report. The rule expressly gives judges discretion to exclude such reports. **Miss. R. Evid 803(8) Comment**

In ***Redhead v. Entergy Mississippi, Inc.***, a unanimous Court of Appeals held that the trial court did not err in excluding from evidence under **Miss. R. Evid. 803(8)**, a county forester's report reflecting the cause of the fire which damaged the plaintiff's tree farm. ***See, Redhead v. Entergy Mississippi, Inc.***, 828 So. 2d 801 (Miss. Ct. App. 2001). In ***Jones v. State***, the Mississippi Supreme Court concluded that the trial court did not err in excluding a coroner's report's admission into evidence when parts of the report were arguably a result of hearsay statements made to the declarant. ***Jones v. State***, 919 So. 2d 1222, 1232-33 (Miss. 2005).

In ***Jones***, the court found that,

> "other information in the coroner's report show that [the declarant] would have had to rely on hearsay information to complete the report, and it is at least arguable, since [the declarant] was unavailable to testify due to his unfortunate death prior to trial, that [the declarant] also relied on this other hearsay information to aid him in estimating the time of death." ***Id.*** at 1232.

The concerns noted by the court in ***Jones*** are only heightened with the holding in ***Crawford***, discussed *supra.*

The public records hearsay exception specifically excludes matters observed by police officers and other law enforcement personnel. The time of injury information that existed on the death certificate could only have been concluded based on information provided by police officers. The doctor that signed the death certificate could only have determined the

"time of injury" by being told so by the police officers. This secondhand information is illustrative of the type of evidence the rules of evidence are intended to combat against.

iii. The death certificate was inadmissible under Mississippi Rule of Evidence 803(9).

Mississippi Rule of Evidence 803 provides in relevant part,

> 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.

If the death certificate was admitted under ***Mississippi Rule of Evidence 803(9),*** it should have come in for the sole purpose of establishing the vital statistic which it purports to – that an individual is, in fact, dead, and that there exists a specific cause for that death..

Comment 9 of the ***Miss. R. Evid. 803(9)*** provides: "This rule is similar to pre-existing Mississippi law. For example, ***Miss Code Ann. § 41-47-9*** formerly provided for the admission of certified copies of birth and death..."

Under the old law, the introduction of a death certificate was permitted, but its use was limited to the physical cause of death. *See,* ***Flowers v. State***, 243 So. 2d 564 (Miss. 1971).

In the case *sub judice*, the death certificate was introduced to show more than the physical cause of death. It contained a "time of injury" statement which alleged the time in which the victim was assaulted. Furthermore, it is unclear as to why the death certificate was necessary for the State's case. Dr. Stephen Hayne was called to testify on behalf of the State in order to indicate the cause of death.

iv. Conclusion

The death certificate's admission into evidence purports to indicate the time of injury inflicted upon the victim, without any testimony regarding what might have led to that conclusion. Because Mr. Birkhead's defense at trial was that he had simply stumbled upon the body of the victim and taken money from his person, the unsubstantiated statement of time of injury contained in the death certificate, when taken combined with the evidence presented at trial, significantly impaired Mr. Birkhead's defense.

ISSUE FOUR: WHETHER THE TRIAL COURT ERRED IN NOT DISMISSING JUROR BLACK WHEN HE WAS ASLEEP DURING INTEGRAL TESTIMONY IN THE STATE'S CASE.

I. Standard of Review.

In ***Woodward v. State***, the Mississippi Supreme Court espoused the standard of review on competency of jurors:

> We have stated that "It is well founded that the trial judge has the discretion to excuse potential jurors for cause if the court believes the juror could not try the case impartially." ***Burt v. State***, 493 So.2d 1325, 1327 (Miss.1986). "This Court will not lightly interfere with a finding of fact made by the trial judge in a criminal case, and it will reverse only when it is satisfied that the trial court has erred in holding a juror competent, when this Court is clearly of the opinion that he was not a competent juror."

Woodward v. State, 533 So.2d 418, 424 (Miss.1988), *cert. denied*, 490 U.S. 1028 (1989).

ii. Juror Brown was sleeping during an imperative point of testimony during trial, and, therefore, should have been dismissed.

During the testimony of the State's key witness, lead investigator Misty Litton, the prosecution noticed that a juror was sleeping. The State approached the trial judge and the

following dialogue occurred:

> MR. RICHARDSON: Mr. Black is knocked out.
>
> **THE COURT:** Who?
>
> MR. RICHARDSON: Mr. Black.
>
> **THE COURT**: I didn't notice.
>
> MR. RICHARDSON: I'm sure they'll accuse me of that, but I didn't want to tell the jury bailiffs myself to give him some water. Or do you want to give them a break or something? Is he up now?
>
> **THE COURT**: Yes.
>
> MR. RICHARDSON: Because when I did like this (indicating), I was trying to wake him up.
>
> **THE COURT**: I'm going to ask the jury bailiff to send him some water.
>
> MR. RICHARDSON: Okay.
>
> **THE COURT**: And I'll just watch him closely.
>
> MR. RICHARDSON: Thank you. (T. 585-86, R.E. 24-25).[3]

The Mississippi Supreme Court has stated that the issue of sleeping jurors causes it great concern. ***Church v. Massey***, 697 So.2d 407, 414 (Miss. 1997).

In ***Church***, the Mississippi Supreme Court observed:

> In ***Woodward***, the trial court dismissed a juror who had been constantly falling asleep and was heavily medicated during the

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[3] It's not clear, given the dialogue that occurred, whether defense counsel was present at during the communications between the State and the trial court. The trial judge never asked defense counsel's opinion on the proper remedy regarding the juror being "knocked out," nor was there any comment made by defense counsel.

> trial. ***Woodward***, 533 So.2d at 424. In ***Hines v. State***, this Court upheld the trial court's determination that even though the juror looked to be asleep he was actually awake enough to hear the testimony of the case. In ***Norris v. State***, this Court did not even require an affirmative finding that the juror was indeed awake. ***Church,*** 697 So.2d at 414. (internal citations omitted).

The Court went on to voice its great concern regarding the issue of a sleeping juror:

> The matter of the sleeping juror causes us great concern. Due to the great responsibilities placed by our system of jurisprudence on the shoulders of our jurors, it is imperative that their duties be taken seriously. It is also of extreme importance that the attorneys and the court consider carefully the awareness of the jury. In this case, we need not address whether the juror in question was actually asleep since we reverse on other grounds and we presume that the same juror will not be reseated for service on remand. ***Id.***

Juror Black's inability to stay awake during the direct examination of one of the State's key witnesses undoubtedly prejudiced Mr. Birkhead. The juror was unable to effectively weigh the credibility of the witness's testimony, because it is impossible for someone to weigh the testimony of a witness that they had not watched testify.

iii. Conclusion

The Court has previously held that a sleeping juror is a very serious matter. ***Church.*** There is nothing in the record which disputes the fact that the juror was sleeping during the trial. ***Church*** holds that the trial court and opposing attorneys were also responsible to ensure the jury's awareness. That was not done in this case, and it is undisputed that Juror Brown was sleeping during the trial. Therefore, the Court should reverse and remand for a new trial.

ISSUE FIVE: WHETHER THE TRIAL COURT ERRED IN DENYING DEFENSE

COUNSEL'S MOTION FOR A MISTRIAL WHEN THE LEAD INVESTIGATOR IMPERMISSIBLY COMMENTED ON APPELLANT'S EXERCISE OF HIS POST-*MIRANDA* RIGHT TO REMAIN SILENT.

I. Standard of Review

The standard of review for denial of a motion for mistrial is abuse of discretion. ***Caston v. State***, 823 So. 2d 473, 492 (Miss. 2002). "A mistrial is reserved for those instances where the trial court cannot take any action which would correct improper occurrences..." ***Easter v. State***, 879 So. 2d 10, 21 (Miss. 2004).

ii. The lead investigator in the case improperly commented on the Appellant's exercise of his Miranda rights.

The Fifth Amendment of the United States Constitution provides that "No person shall .... be compelled in any criminal case to be a witness against himself..." **U.S. Const. amend V**. The Mississippi Constitution further provides that "In all criminal prosecutions the accused...shall not be compelled to give evidence against himself;...." **Art. III § 26, Miss. Const.** The privileges against self-incrimination are embedded in framework of both the State and Federal Constitutions, serving as bedrock constitutional principles under which our system of criminal justice functions.

On direct examination, the lead investigator, Misty Litton, said the following: "He was advised of his Miranda rights, and he refused to give a statement or say anything." (T. 594). Defense counsel objected and following dialogue occurred at the bench:"

> MR. SIMMONS: Your Honor, the witness has just testified, I mean, in direct violation of this defendant's constitutional right to remain silent.
>
> **THE COURT**: I don't know why it was necessary to elicit that testimony.

MR. SIMMONS: It was so prejudicial, Your Honor, under rules.

THE COURT: Well, I don't think it would require a mistrial, but I don't understand why you would elicit that testimony.

MR. RICHARDSON: And I wasn't eliciting it, I was actually asking as far as the – I thought he was there when they took the money and when they took the pictures. There's pictures of him in the investigation division where they took a picture of his pants and they saw the blood in his pants. That's why I was actually looking for the picture so I can take her where I'm trying to go.

MS. WHITE-RICHARD: The State should know better. Misty should know better. I mean, to me, Misty should know better than that.

THE COURT: I don't remember the question, but I think the question lead there.

MR. SIMMONS: Can I have the Court's indulgence one moment?

THE COURT: Yes.

MR. SIMMONS: Your Honor, just for the record, we object to the witness making that statement and we ask for a mistrial.

THE COURT: 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. (T. 595-96, R.E. 26-27).

The trial court, then immediately gave the following limiting instruction to the jury,

THE COURT: This witness has just testified about the defendant's exercise of his constitutional right to remain silent. It's a criminal 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. (T. 597, R.E. 28).

In ***Quick v. State***, the Mississippi Supreme Court concluded, "[i]t is improper and, ordinarily, reversible error to comment on the accused's post-***Miranda*** silence." ***Quick v. State***, 569 So. 2d 1197, 1199 (Miss. 1990). The ***Quick*** court further noted,

> "[i]n ***Doyle***, the U.S. Supreme Court held that if an accused under arrest was given a ***Miranda*** warning and told that he had a right to remain silent, and the accused did remain silent, that the government thereafter could not use his choice of remaining silent as a weapon during his trial testimony cross-examination to cast suspicion on his guilt or innocence. Simply put, the government cannot use an accused's exercise of a Constitutional right as a weapon to convict him." ***Puckett v. State***, 737 So.2d 322, 351 (Miss. 1999)(citations omitted).

The constitutional right against self incrimination includes the right not to have the State comment on the exercise of that right. ***Whigham v. State***, 611 So. 2d 988, 995 (Miss. 1992)

In the case *sub judice*, as noted by the trial court, the prosecutor's question led towards the improper comment by the witness. 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.

iii. Conclusion

Because the comment regarding Mr. Birkhead's assertion of his constitutional right was incurable, the trial court erred when it did not grant defense counsel's motion for a mistrial. For this reason, this honorable court, should reverse Mr. Birkhead's conviction and remand for a new trial where he is afforded the protections of the state and federal

constitutions.

ISSUE SIX: WHETHER THE TRIAL COURT ERRED WHEN IT GAVE JURY INSTRUCTION CR-12

I. Standard of Review.

"[I]f the [jury] instructions fairly announce the law of the case and create no injustice, no reversible error will be found." ***Williams v. State***, 803 So. 2d 1159, 1161 (Miss. 2001) (citing ***Hickombottom v. State***, 409 So. 2d 1337, 1339 (Miss. 1982)). "If all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law, no error results." ***Milano v. State***, 790 So. 2d 179, 1984 (Miss. 2001).

ii. Jury instruction CR-12 prejudiced the jury.

In jury instruction CR-12, the trial court improperly gave prominence to particular portions of evidence when it instructed,

> "Notes of an attorney are not evidence. An attorney's notes cannot be used to substitute for your independent recollection or judgment of the evidence.
>
> When you consider the weight, importance or believability of any part of a witnesses' [sic] testimony, you must not be influenced by the notes taken and displayed to the jury by an attorney during that witness' testimony. An attorney's notes taken and displayed to you during a witness' testimony are not a verbatim record of the full testimony and may include evidence you give little importance to or find unbelievable and may exclude information that you give greater weight and find to be credible.
>
> Thus, do not assume simply because something was written in an attorney's notes that it necessarily took place in Court; nor that something did not occur or was not said simply because an attorney did not write it in his/her notes" (CP 233, R.E. 19).

A trial judge shall not grant jury instructions that give undue prominence to particular portions of evidence. ***Lett v. State***, 902 So. 2d 630, 635 (Miss. Ct. App. 2005). Jury instructions that emphasize any particular part of the testimony in such a matter as to comment upon the weight

of the evidence are improper. ***See Sanders v. State***, 586 So. 2d 792 (Miss. 1992); ***Duckworth v. State***, 477 So. 2d 935, 938 (Miss. 1985).

"The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory and sincerity." ***Noe v. State***, 616 So. 2d 298, 303 (Miss. 1993). Jury instruction CR-12 was unbalanced. It commented that the attorney's notes "may exclude information that you give greater weight and find to be credible." This instruction did not say that some of the things that defense counsel had written down could be credible. It merely said that the information may not be credible.

iii. Conclusion

The trial court improperly instructed the jury in a manner that gave undue prominence to the State's questioning of witnesses rather than that of the defense. For that reason, this Honorable Court should reverse Mr. Birkhead's conviction and remand for a new, fair, trial where a jury of his peers may properly weigh the testimony against him.

ISSUE SEVEN: WHETHER THERE WAS CUMULATIVE ERROR THAT DEPRIVED APPELLANT OF HIS RIGHT TO A FUNDAMENTALLY FAIR AND IMPARTIAL TRIAL.

The cumulative error doctrine stems from the doctrine of harmless error. ***Ross v. State,*** 954 So. 2d 968, 1018 (Miss. 2007). It holds that individual errors, not reversible in themselves, may combine with other errors to constitute reversible error. ***Hansen v. State***, 582 So. 2d 114, 142 (Miss. 1991); ***Griffin v. State***, 557 So. 2d 542, 553 (Miss. 1990). The question under a cumulative error analysis is whether the cumulative effect of all errors committed during the trial deprived the defendant of a fundamentally fair and impartial trial. ***McFee v. State***, 511 So. 2d 130, 136 (Miss.1987).

Relevant factors to consider in evaluating a claim of cumulative error include whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the

crime charge. ***Ross***, 954 So. 2d at 1018.

The trial court's failure to note a *prima facie* case of discrimination against African-American members of the venire by the prosecutor, a violation of the Appellant's constitutional right of confrontation, a violation of the Mississippi rules of evidence, failure for the trial court to dismiss a juror who was sleeping during the State's key witness, an constitutionally impermissible comment on the part of the lead investigator regarding the defendant's invocation of his ***Miranda*** rights, and an improper jury instruction which prejudiced the Appellant in the eyes of the jury, when taken in concert, deprived the Appellant of his right to a fundamentally fair and impartial trial.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial court and the Appellant's conviction and sentence should be reversed and vacated, respectively, and the matter remanded to the lower court for a new trial on the merits of the indictment on charges of capital murder, with instructions to the lower court. In the alternative, the Appellant herein would submit that the judgment of the trial court and the conviction and sentence as aforesaid should be vacated, this matter rendered, and the Appellant discharged from custody, as set out hereinabove. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless beyond a reasonable doubt.

CERTIFICATE OF SERVICE

I, Justin T Cook, Counsel for Richard Birkhead, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 10th day of March, 2008.

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