IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CORY JERMINE MAYE — APPELLANT

VS. — NO. 2007-KA-2147-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

II. DR. HAYNE'S TESTIMONY WAS PROPERLY ADMITTED.

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IX. DEFENSE COUNSEL'S PERFORMANCE WAS NOT CONSTITUTIONALLY DEFICIENT.

X. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE ANY SENTENCE LESS THAN LIFE WITHOUT THE POSSIBILITY OF PAROLE.

STATEMENT OF FACTS

On the evening of December 26, 2001, Prentiss Police Department Officer Ron Jones enlisted several officers from the Prentiss Police Department, Bassfield Police Department, Jefferson Davis County Sheriff's Department, and Pearl River Basin Narcotics Task Force to assist in executing two search warrants for a duplex located at 1728 Mary Street in Prentiss. Officer Jones had received information from a confidential informant who had within the preceding twenty-four hours seen a large amount of marijuana stored in the duplex. Exhibit 46. Officer Jones also had information from other sources that drugs were being sold out of the duplex. Exhibit 46. The search warrant for the left side of the duplex stated that Jamie Smith and/or Persons Unknown occupied and controlled the place to be searched, while the search warrant for the unit on the right side of the duplex listed only Persons Unknown. T. 19; Exhibits 45, 46. It was later determined that Cory Jermaine Maye occupied the unit on the right side of the duplex.

The officers split up into two teams. Agent Darrell Graves led Officers Mike Brown, Earl Bullock, Allen Allday, and Terrence Cooley in executing the search warrant on Smith's apartment, while Officer Ron Jones led officers Stephen Jones, Darrell Cooley, and Phillip Allday in executing the warrant for Maye's apartment. T. 246, 275. Phillip Allday secured the rear of Maye's apartment, while the rest of Ron's team announced themselves and sought access at Maye's front door. T. 275. The officer announced, "police department, search warrant," multiple times while attempting to gain access through Maye's front door, but no one came to the door. T. 34-35, 249, 253, 291, 297, 323, 407-08, 418. Officer Stephen Jones then saw the blinds "crack open," reveling that an interior light was either already on or just being turned on as someone "cracked open" the blinds. T. 35, 50, 58, 250, 262-63, 267, 408, 414, 423. The officers then approached the rear door to Maye's apartment, announced themselves, and attempted to gain access through the locked door to no avail. T. 35, 41,

252. Officer Ron Jones and Stephen Jones were walking back toward the front of the house to see if they could gain access through a window when they heard Officer Phillip Allday kick in the back door. T. 36-37, 252-53. Officer Ron Jones ran back to the rear door of the apartment, up the stairs, and into the door, announcing "Police, search warrant," when shots were fired at the officers. T. 253. Ron stumbled out of the door, telling Stephen that he had been shot. T. 254. Officer Stephen Jones helped Officer Ron Jones out of the apartment, while Officer Cooley apprehended Maye. T. 273. Ron was transported to the hospital, where he died shortly after arrival. Hours later, a search warrant was executed in Maye's apartment, where marijuana was found.

In January of 2004, Maye was ultimately tried and convicted of capital murder and sentenced to death by lethal injection. After his conviction, Maye fired defense counsel. Over the next two years, Maye's new counsel filed numerous motions for a new trial. Hearings on Maye's post-trial motions were held on September 21-22, 2006, December 13, 2006, and November 2, 2007. The trial court ultimately found that all but one of Maye's issues were without merit. The trial court did find that defense counsel provided ineffective assistance during the sentencing phase of Maye's trial. However, at the sentencing hearing, the State announced that at the request of the victim's family, the State wished to remove the death penalty from consideration. Accordingly, the trial court sentenced Maye to the only other available sentence for a conviction of capital murder - life without the possibility of parole.

SUMMARY OF ARGUMENT

The State proved each element of the crime of capital murder beyond a reasonable doubt, and the jury's verdict is not against the overwhelming weight of the evidence. The only element of capital murder disputed at trial was whether Maye knew that the victim was a police officer. The State presented ample evidence to show that Maye both saw the uniformed officers and heard them announce themselves as police officers.

Maye is procedurally barred from assigning as error testimony which he elicited from Dr. Hayne. Additionally, Dr. Hayne did not testify about Maye's or Officer Jones' absolute positions at the time of the shooting as Maye claims on appeal. However, had Dr. Hayne believed that he had sufficient data to give such an opinion, case law would support the trial court accepting such an opinion. Maye's allegations that Dr. Hayne lied about his qualifications are simply not supported by the record.

Maye has not presented newly discovered evidence which would entitle him to a new trial. The bulk of Maye's alleged newly discovered evidence is best characterized as impeachment evidence, which is legally insufficient to warrant a new trial. Additionally none of the new evidence would have resulted in a different outcome had it been presented at trial.

The trial court did not abuse its discretion in denying Maye's second motion for a change of venue back to Jefferson Davis County. Maye had already proven to the trial court that he could not empanel an impartial jury in Jefferson Davis County. The trial court would have abused its discretion in granting Maye's request.

The trial court properly refused Maye's self-defense instructions as being fairly covered elsewhere. The two granted self-defense instructions properly defined self-defense and informed the jury of its duty to acquit if it found that Maye acted in self-defense.

Maye has failed to show that Officer Ron Jones procured the search warrant through a fraud. Additionally, the trial court properly denied Maye's motion to suppress. Officer Jones clearly had probable cause to believe that illegal activity was occurring in Maye's home.

The record does not support Maye's claim of prosecutorial misconduct. The prosecutor fairly summed up the evidence presented at trial. Furthermore, Maye failed to object to the alleged misconduct, and is procedurally barred from raising the issue for the first time on appeal.

Maye's ineffective assistance of counsel claim is without merit as he fails to show how the alleged deficiencies resulted in prejudice.

Maye is also barred from raising a disproportionality argument for the first time on appeal. Furthermore, Maye received the minimum sentence available for a conviction of capital murder.

ARGUMENT

I. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT.

In determining whether the State proved each element of the offense beyond a reasonable doubt, all evidence supporting the guilty verdict must be accepted as true. *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006). Additionally, the State is given the benefit of all inferences which may reasonably be drawn from the evidence. *Id.*

The basis for Maye's first assignment of error is a claim that there was no evidence that he knew Officer Jones was a police officer prior to the shooting. First, Maye claims that an "absence of sight lines" prevented him from seeing the officers. He further asserts that none of the State's witnesses testified that he looked out of the front window. The following evidence presented at trial refutes Maye's claims. On direct examination, Officer Stephen Jones was asked if he saw any activity inside the house when the officers were attempting to gain access through the front door. T. 149. Officer Jones replied, "The blinds opened, it appeared that somebody opened the blinds and looked out." T. 249. Jones was then asked whether he saw a light on in Maye's apartment. Jones responded, "When the blinds were opened, I did notice a light inside." T. 250. Jones also testified on cross-examination that "there were no lights visible from inside the apartment until the blinds were opened." T. 262-63. Shortly thereafter, the following exchange occurred between defense counsel and Officer Jones.

> Q. And I don't want to belabor the point, but you said something about a light on towards the bathroom?
>
> A. Yes.
>
> Q. Were you able to see from the outside which room was the bathroom?

A. I said in that area.

Q. Well, how would you know from right here what area the bathroom would've been in?

A. I did not know until I entered the apartment.

Q. Okay. So this was after you entered the apartment.

A. Yes.

Q. Okay. Not before.

A. When the blinds that were there that I remember seeing that night, I was standing to the right of the door, and I told the other officers there, I said, "There's a light inside to the left."

Q. Okay. Where were you standing?

A. I was standing to the right of the door, between the door or right there at the window on the of the door.

Q. You were standing where? Here?

A. Yes.

Q. Okay. And what did you just say?

A. When we were trying to gain access, I noticed a light in the rear, left rear.

Q. How could you see inside if you're standing here at this wooden post?

A. Through the window.

Q. You looked in the window?

A. When I was standing there --

Q. Right here.

A. -- when the blinds were cracked open, I noticed a light.

Q. Are you telling the ladies and gentlemen of this jury that someone

stood up and opened the blinds so that you could see inside?

A. I'm not saying that, I'm saying that the blinds were open.

. . . .

Q. So you stood here, looked inside this window without any blinds and you were able to see what?

A. When we were trying to gain access, the blinds cracked open where I could see a light inside.

T. 265-67. Officer Darrell Cooley corroborated Officer Jones' testimony. Officer Cooley stated that while attempting to gain access through Maye's front door, "Stephen Jones said, 'There's a light,' and I looked back in towards the window on the door, and I could see a light back to the left side of the door." T. 408. Officer Cooley had not seen a light in the apartment before that time. T. 408. On cross-examination, Officer Cooley was asked if there was any indication that anyone was actually present inside Maye's apartment, to which Officer Cooley responded, "When the light come on." T. 423. The evidence also established that only Maye and his fourteen-month-old daughter, Ta'Corianna, were present in Maye's apartment, and that Ta'Corianna was asleep in the back bedroom while the officers attempted to gain entry. Based on the aforementioned facts in evidence, the jury could have reasonably inferred that Maye cracked the blinds and saw the uniformed officers as they beat on his door and announced their presence.

Maye also argues, "no witness testified that Mr. Maye could and did hear and comprehend the alleged announcement." Appellant's Brief at 23. However, pages earlier, in discussing whether Maye knew that the victim was a police officer, Maye concedes, "It is, of course, impossible for a jury to learn through direct evidence what Mr. Maye knew . . ." Appellant's Brief at 17. Of course, only Maye knows whether or not he actually heard the officers announce themselves, and, as could be expected, he testified that he did not. The State presented ample evidence, however, to show that

the officers announced themselves several times at the front and back door before ever entering Maye's apartment. They announced "police, search warrant" no less than three times at the front door, in addition to beating on the door. T. 34-35, 249, 253, 291, 297, 323, 407-408, 418. Not only did the officers executing the search warrant on Maye's apartment testify that they announced themselves as police officers, but also the officers executing the search warrant on Smith's apartment testified that they saw and heard the officers announcing themselves at Maye's door. T. 291, 297, 323. When no one answered, the officers approached the back door and Officer Ron Jones announced, "search warrant, police, search warrant," before Allday kicked the door in. T. 252. The victim also announced either "police, search warrant" or either just "police" upon entering the apartment. T. 253,409.

Mississippi Code Annotated §97-3-19(2)(b) requires that the defendant kill "with knowledge that the victim was a peace officer" in order to be guilty of capital murder. Whether the defendant knew that the victim was a peace officer can of course only be determined from an objective standpoint, unless the defendant admits that he knew the victim was an officer. In discussing this particular variety of capital murder, the supreme court has stated the following.

> This statute reflects the [S]tate's special interest in protecting law enforcement officers. To bring a case within the statute, the evidence must reflect that the victim was a peace officer acting in the course of his official duties and that, at the time of the killing, the defendant knew **or should have known** of this fact.

Stevenson v. State, 733 So.2d 177, 186 (¶32) (Miss. 1998) (quoting *Hansen v. State*, 592 So.2d 114, 146 (Miss. 1991) (emphasis added)). Although Maye claims that he did not hear the officers' several announcements identifying them as police officers, Maye certainly should have known, based on substantial testimony, that the victim was a police officer. In addition to ample testimony regarding the officers' announcements at Maye's front and back door, the evidence also showed that similar

announcements were made outside of Smith's apartment, and the occupants of that apartment heard the announcement and opened the door. T. 314.[1] Viewing the evidence in the light most favorable to the verdict, it is clear that the State proved beyond a reasonable doubt that Maye knew that the victim was in fact a police officer.

Maye claims that the case of *Wheeler v. State*, 536 So. 2d 1341 (Miss. 1988), necessitates a finding that the State did not prove beyond a reasonable doubt that Maye knew Officer Jones was a police officer. *Wheeler* is readily distinguishable from the case *sub judice*. In *Wheeler*, Officer Jackie Dole Sherrill arrived at Wheeler's home with an arrest warrant for child neglect. *Id.* at 1342. Officer Sherrill was dressed in civilian clothes, but her badge and service weapon were visible. *Id.* at 1344. Officer Sherrill went to the back of Wheeler's home, while three other officer, two of which were in police uniform, went to Wheeler's front door. *Id* at 1342. The three officers informed Wheeler that they had a warrant for his arrest, and Wheeler became hostile. *Id.* As the officers attempted to enter the home, a struggle ensued between Wheeler and the officers, and Wheeler fought one of the officer's for his gun. *Id.* After two random shots were fired, Officer Sherrill ran to the front of the house, where a third errant bullet struck and killed her. *Id.* In deciding whether the State presented legally sufficient evidence to support the jury's verdict of capital murder, the reviewing court opined that the issue turned on "whether or not Noah Wheeler saw Jackie Sherrill at the time he fired the fatal shot or, at anytime before, or had a sufficient sight of her to realize that she was a police officer." *Id.* at 1343. The Court ultimately determined that the evidence did not

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[1]Even Audrey Davis's affidavit, which contradicts several officers' sworn testimony, supports the fact that the officers knocked and announced at Maye's door. Davis claims that she heard the officers before they had a chance to knock and announce on Smith's door. This corroborates Officer Darryl Graves' testimony that Ron's team made it to Maye's door and began announcing seconds before Grave's team approached Smith's door. C.P. 1196; T. 323.

establish beyond a reasonable doubt that Wheeler ever saw Sherrill, much less recognized her as a police officer. *Id.* at 1344. In the case *sub judice*, there was ample evidence that someone cracked the blinds while the officers were at the front door. Unlike Officer Sherrill, Officer Ron Jones was in uniform, and was not separated from a group of known officers. In Wheeler, shots had already been fired before Officer Sherrill ever came into the vicinity in which Wheeler was firing. The supreme court's opinion also suggests that Wheeler was shooting indiscriminately, and that an errant bullet hit Officer Sherrill. The bullet that killed Officer Ron Jones was not an errant bullet fired during a struggle for a gun obtained from a separate group of officers. Instead, Maye testified that he armed himself and intentionally fired at the "intruder." Also, in *Wheeler*, the issue turned only on whether Wheeler saw Officer Sherrill. In the case *sub judice*, there was overwhelming testimony to support the fact that Maye heard the officers announcing themselves. Whereas the *Wheeler* majority found little evidence to support a finding that Wheeler knew he was shooting a police officer, when the State is given all reasonable inferences which may be drawn from the evidence in the case *sub judice*, it is clear that Maye knew that Officer Ron Jones was a police officer when he shot him to death.

Maye also claims that the so-called *Weathersby* rule requires that his conviction and sentence be reversed. In *Weathersby*, the Mississipi Supreme Court held as follows.

> [W]here the defendant or the defendant's witnesses are the only eyewitnesses to the homicide, their version, if reasonable, must be accepted as true, unless substantially contradicted in material particulars by a credible witness or witnesses for the state, or by the physical facts or by the facts of common knowledge.

Weathersby v. State, 165 Miss. 207, 209, 147 So. 481, 482 (1933). First, and most obviously, *Weathersby* does not apply because Maye was not the only witness to the murder. Although Officers Stephen Jones and Darrell Cooley may not have actually seen Maye fire the fatal shot, whether Maye

fired the fatal shot is not the disputed element, as Maye acknowledged such at trial. The only disputed element of capital murder was and is whether Maye acted with knowledge that Officer Ron Jones was a police officer. Officers Stephen Jones and Darrell Cooley testified as eyewitnesses to the events leading up to the murder. The testimony of both officers establishes that Maye saw the uniformed officers through the blinds, and heard the several announcements identifying them as police officers. Even if this Court finds that the officers were not eyewitnesses to the murder, their testimony certainly contradicts Maye's testimony that the officers did not announce themselves. Accordingly, *Weathersby* is wholly inapplicable to the present case.

The Appellant optimistically argues that the evidence was also insufficient to support a charge of depraved heart murder or culpable negligence manslaughter. A legal sufficiency analysis requires this Court to determine whether the evidence was legally sufficient to support the jury's verdict. As argued in the preceding paragraphs, the evidence is legally sufficient to support the charge of capital murder. No argument was made either for or against instruction 7 during the jury instruction conference in the record, and the clerk's papers indicate that instruction 7 was offered by the court. C.P. 384. Neither depraved heart murder nor culpable negligence manslaughter was a theory advanced by either the State or defense. In any event, because the jury did not return a verdict for either depraved heart murder or culpable negligence manslaughter, the State will pretermit a legal sufficiency analysis as to these uncharged offenses.

Recognizing that weight and sufficiency are separate and distinguishable legal concepts, the State will address the appellant's weight of the evidence argument in the first issue simply to mirror the appellant's framing of the issues. Reviewing courts examine the evidence in the light most favorable to the verdict in determining whether a verdict is against the overwhelming weight of the evidence. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005) (citing *Herring v. State*, 691 So.2d

948, 957 (Miss.1997)). Maye maintains that "the State offered no substantial evidence in support of its allegation that Mr. Maye knew that Jones was a police officer." Appellant's Brief at 31. With this assertion, Maye either completely ignores the officers' testimony regarding the opening of the blinds and their repeated announcements, or Maye is calling into question the credibility of the officers' testimony. However, determination of witness credibility lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). The jury is also responsible for resolving any conflicts in witness testimony which may arise. *Id.* The jury was presented with the testimony of four officers who testified that the officers repeatedly announced themselves, and that it appeared that someone "cracked" the blinds at the front door, and the testimony of Maye who claimed that the officers did not announce themselves. As evidenced by the jury's verdict, the jury resolved the conflicting testimony in favor of the State. The overwhelming weight of the evidence supports a finding that Maye knew or should have known that Jones was a police officer. Accordingly, Maye's argument that the evidence is against the overwhelming weight of the evidence must fail.

II. DR. HAYNE'S TESTIMONY WAS PROPERLY ADMITTED.

On appeal, Maye seeks to discredit Dr. Hayne's expert testimony. Specifically, Maye takes issue with Dr. Hayne's testimony that Maye's weapon was likely in a relatively higher position than the entrance of the gunshot wound, based on the path of the wound. Hayne testified that the entrance wound was on the left lower abdominal wall, slightly lower than the belly button, and that the wound path then went downward approximately twenty degrees and to the back between thirty and thirty-five degrees. T. 436-38. On cross-examination, defense counsel proceeded to ask Dr. Hayne about the position and posture of Maye and the victim. Hayne repeatedly testified that he could not testify to their positions and postures. On redirect, Hayne testified, "With the decedent in an upright position or even leaning slightly forward, I would expect the weapon to be in a relatively higher position than the entrance gunshot wound." T. 477. At no time did Dr. Hayne speculate as to Maye's and the victim's absolute positioning and posture, as Maye suggests on appeal. The following record excerpts make up the entirety of the testimony on this issue. The following exchange occurred between Dr. Hayne and defense counsel on cross.

> Q. Okay. Now, I just want to establish some things that went into your opinion[2], Dr. Hayne. Now, do you know the distance between Ron Jones as he entered the apartment and Cory Maye as he lay on the floor of his apartment?
>
> A. I do not know that distance.
>
> Q. Okay. Do you know how far Ron Jones was from Cory Maye at the time he was shot?
>
> A. I do not know that.
>
> Q. And do you know whether or not Ron Jones stood erect or was any way crouched or bent down at the time he was shot?

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[2]The only opinion that Hayne had given prior to questioning by defense counsel was the cause and manner of death. He had also reported the external and internal findings from the autopsy.

A. I do not know that, counselor.

Q. Do you know how high the gun was above Cory Maye's head as he lay on the ground?

A. How high the gun --

Q. How high the gun was raised.

A. I do not know that, counselor.

Q. And do you know whether or not the gun was at an angle?

A. It was only at an angle in relationship to the decedent. If the decedent were in a standing position, the weapon would have been held above at approximately 20 degrees and also forward at approximately 30 to 35 degrees facing from the left side.

Q. Okay.

A. I can only give the relative positions; I don't know the absolute positions.

Q. The relative position of the entry of the gun.

A. Of the bullet --

Q. Bullet, I'm sorry.

A. -- striking the decedent and placing the decedent in a standing position. All the trajectories are measured from that anatomically correct position.

Q. Okay. So the trajectories don't take into account that the decedent may have scaled a flight of -- well, scaled three stairs and then entered in a crouched position. Are you saying your trajectory does not take that into consideration?

A. The hypothesis that one might ask about that, one could address. The issues of how many stairs a person climbed would be indecipherable.

Q. Okay. Well, we can strike the stairs. I guess I was just trying to recreate Mr. Jones entering that unit. But, again, my question is, does your opinion take into consideration that Ron Jones may have been crouched at the time he was shot?

A. I do not know the position that Mr. Jones was in when the shot was delivered.

Q. Okay.

A. Only the trajectory of the bullet in the body the body is placed in an anatomically correct position.

Q. Which is standing.

A. Standing position, arms to the side, palms forward, feet together.

Q. Okay. The perfect position, or the military position, so to speak.

A. That is correct. And those are the trajectories that are measured from that. Doesn't indicate the exact position he was in when the shot was fired. All I'm saying is that those are the trajectories of the projectile as it courses into the body in the anatomically correct position.

Q. Okay. So we cannot exclude or rule out for the ladies and gentlemen of the jury that Ron Jones was not standing erect, but could have been crouched

A. I don't know that. It could be either. And that, of course, would go to relationship of the shooter in relationship to the decedent.

Q. Sure. So there are many factors that could alter this trajectory, or that you have to consider?

A. It would not alter the trajectory.

Q. Okay.

A. I'm only placing him in the anatomically correct position. It is a relative trajectory.

Q. Okay.

A. It is the trajectory in the body with him in that position.

Q. Standing.

A. I don't know the position of the decedent in relationship to the ground.

Q. You don't know the position of the decedent in relationship to the ground.

A. That's correct.

T. 441-444. Hayne then testified as follows on redirect.

Q. Of course, you have not heard the rest of the testimony in the case, you don't know the testimony in the case, and I understand what you say about the relative positions of the body of the deceased at the time the wound was inflicted. But the trajectory of the bullet through the body is the trajectory of the bullet through the body. Is that correct?

A. That is correct. The trajectory does not change as the bullet went through the body in relationship to the hypothesis.

Q. And you would know that certainly the deceased could not have been bent over so much that he would have crossed the plane of the trajectory of the bullet.

MS. COOPER: Objection, Your Honor. Dr. Hayne cannot speak to that. He's already testified he doesn't know the position of the decedent, he knows anatomically the measurements and the trajectory.

MR. McDONALD: Ms. Cooper, I think what I'm getting to –

THE COURT: I'm going to overrule the objection.

MS. COOPER: Thank you, Your Honor.

Q. Do you understand my question, Doctor?

A. You're talking about the horizontal plane of the ground?

Q. Well, what I'm talking about is that if the trajectory is like this, and I'm bent over very far, I wouldn't have been hit where -- I wouldn't have been hit here, I would've been hit somewhere in the upper part of the body because my body would've crossed the plane of how the trajectory went.

MS. COOPER: Same objection, Your Honor.

THE COURT: Overruled, if he understands.

A. I would expect it to strike higher given that scenario.

Q. That's my point. And at whatever position the shooter was in, you would have expected the barrel of the gun to have been higher than that entrance wound. Is that correct?

MS. COOPER: Objection, Your Honor.

THE COURT: Overruled.

A. With the decedent in an upright position or even leaning slightly forward, I would expect the weapon to be in a relatively higher position than the entrance gunshot wound.

T. 447-48. On recross, Dr Hayne testified as follows.

Q. Dr. Hayne, as the prosecution just illustrated with your stick, in order for that gunshot entry to have been higher, wouldn't the decedent have to have been extremely bent over? What I'm trying to get the jury to understand is -- you want to answer that first?

A. No, I understand the question.

Q. Because your opinion is based on the decedent standing erect. But in order for that entry to have been higher than as you've just testified, would not the decedent have to have been extremely crouched over?

A. He would have to be flexed markedly. Of course, I don't know the position of the shooter. I know the position relative in your hypothesis of the decedent. And if he were in a standing position and the shooter in some other position, I would expect either the shooter to be firing from above or, if the officer were in a marked flex position, which would be difficult since the flex point of the body would be slightly above the entrance gunshot wound. So he would have to be markedly flexed over, almost on one's knees, to achieve that trajectory..

T. 449-50. Finally on further redirect, the following exchange occurred.

Q. Let's assume the shooter was laying down flat on the floor and the officer came in and the officer was standing upright. Would you expect the trajectory of the bullet to be like that?

A. No, it would be in an upward trajectory, not in a downward trajectory.

Q. If the officer was slightly bent over, would you expect the trajectory to be like that?

A. No, it would be an upward trajectory, not in a downward trajectory.

T. 451.

Maye's claim on appeal that the State led Dr. Hayne to draw conclusions about Maye's position in relation to the victim at the time of the shooting is plainly contradicted by the record. Dr. Hayne gave absolutely no testimony on direct regarding either Maye's or the victim's position or posture at the time of the shooting. Rather, defense counsel attempted to elicit this information. After repeatedly stating that he could not draw a firm conclusions about either person's position or posture, he finally testified that he did have an opinion as to the relative position of the gun based on the wound path and the assumption that the victim was in a standing position. It is well-settled that an appellant may not complain of alleged errors which he invited. *Singleton v. State*, 518 So.2d 653, 655 (Miss. 1988). "[T]his principle negates any merit that the appellant's contention may have had." *Alexander v. State*, 811 So.2d 272, 282 (¶27) (Miss. Ct. App. 2001) (quoting *Edwards v. State*, 441 So.2d 84, 90 (Miss.1983)). Accordingly, even if Hayne's testimony regarding the relative position of Maye's gun and the victim was erroneous, such error was invited by defense counsel, barring Maye from raising the issue on appeal.

Without abandoning its position that Maye is procedurally barred from attacking Hayne's testimony, the State would also argue that the testimony was not admitted in error. Maye grossly mischaracterizes Dr. Hayne's testimony in alleging that Dr. Hayne testified as to Maye's and Officer Jones' positioning and posture. Even a superficial reading of the record shows that he actually refused to do so. Even Maye's own expert, Dr. Jack Daniels, who testified at the hearing on Maye's motion for new trial, acknowledged that Dr. Hayne never claimed to know the position and posture of Maye or Officer Ron Jones at the time of the shooting. T. 910-11, 916, 923, 935. On redirect, Dr. Hayne was only presented with a hypothetical in which he was asked, considering the wound path and regardless of the position of the shooter, would not he expect the entry wound to have been higher if the victim were in any position other than standing erect. T. 447-49. Dr. Hayne opined that

if the victim had been crouching or bent over, he would expect the entry wound to have been higher. T. 448. There is no question that it is wholly permissible to use a hypothetical to elicit expert testimony. *Williams v. State*, 937 So.2d 35, 42-43 (¶20) (Miss. Ct. App. 2006) (citing *Williams v. State*, 544 So.2d 782, 787 (Miss. 1987)). Even if Dr. Hayne's testimony could somehow be read to support Maye's claim that Dr. Hayne actually gave an opinion regarding Maye's and Officer Jones' absolute positions and postures at the time of the shooting, our reviewing courts have held that Dr. Hayne is qualified to give such testimony. In *Bell v. State*, 725 So.2d 836, 853 (¶47) (Miss. 1998), the appellant argued that the trial court erred in allowing Dr. Hayne to testify that the victim had his hands in front of his face at the time of the fatal shooting. The Mississippi Supreme Court found that Hayne was properly qualified to testify as to the victim's position at the time he was shot. *Id.* at 854-55 (¶51). In another case, this Court found that a forensic pathologist is qualified to give an opinion as to decedent's position at time fatal wounds were received. *White v. State*, 964 So.2d 1181, 1186 (¶11)(Miss. Ct. App. 2007). In *Williams v. State*, this Court found that the trial court did not err in allowing Dr. Hayne to testify that the victim's left forearm was raised when she was shot. 964 So.2d 541, 544 (¶9) (Miss. Ct. App. 2007). Also in *Ross v. State*, this Court found that Dr. Hayne was qualified to testify about the victim's posture at the time of death and the trajectory of the bullet, based on his autopsy findings. 883 So. 2d 1181, 1183-85 (¶¶4-10) (Miss. Ct. App. 2004). While coming under a weight of the evidence analysis, this Court found in *Conway v. State,* that the jury properly considered Dr. Hayne's testimony about the trajectory of the bullet in concluding that the appellant had not been acting in self-defense. 915 So.2d 521, 526 (¶21) (Miss. Ct. App. 2005). These are but a select few of the many cases in which our reviewing courts have approved of Dr. Hayne's testimony regarding the position of the victim or the trajectory of the bullet, when those opinions were based on his autopsy findings.

Again, Maye is procedurally barred from assigning as error testimony which he elicited. Additionally, Dr. Hayne did not testify about Maye's or Officer Jones' absolute positions at the time of the shooting. However, had Dr. Hayne believed that he had sufficient data to give such an opinion, case law would support the trial court accepting such an opinion.

Maye next claims that he is entitled to a new trial based on an allegation that Dr. Hayne lied about his credentials. The Appellant's claim that "Dr. Hayne's claim to be board certified in forensic pathology has been demonstrated false . . ." is apparently based on former Justice Diaz's concurring opinion in *Edmonds v. State*, 955 So. 2d 787, 802 (¶¶46-50), which is obviously not controlling law. Justice Diaz's concurrence stated that because Dr. Hayne was not certified by the American Board of Pathology, he is not qualified to serve as the State Medical Examiner. *Id.* at (¶47). However, in the case *sub judice*, Dr. Hayne never claimed to be certified by the American Board of Pathology, nor did he represent himself as the State Medical Examiner. Instead, he stated that his title was State Pathologist with the Department of Public Safety, and he did not specify as to his certification. T. 432. There is no requirement that a state pathologists not serving as the State Medical Examiner be certified by the American Board of Pathology. Miss. Code Ann. §41-61-77(3). Furthermore, the majority opinion in *Edmonds* unequivocally stated that Dr. Hayne is qualified to proffer expert opinions in the field of forensic pathology. Edmonds, 955 So. 2d at 792 (¶8). Accordingly, the Appellant has failed to show that Dr. Hayne lied about his credentials.

Finally, Maye claims that the trial court erred in denying his request for post-conviction discovery. However, Maye's current counsel admitted at a post-trial hearing that the State had complied with discovery rules prior to trial, but current counsel for Maye was not confident that defense counsel had provided everything obtained through discovery to current counsel. T. 1176. Appellate counsel for Maye then admitted that after such suspicion pertaining to defense counsel

arose, the State gave counsel opposite the opportunity to again inspect all discovery within the State's possession. T. 1179-80. The complaint at the hearing was that although the State had provided discovery after conviction, it had done so voluntarily, and counsel opposite would have more confidence that the State had turned over all discovery in its possession if the court would order the State to do so. T. 1180. While paying lip service to *Brady* and *Giglio* on appeal, Maye does not bother to present a serious *Brady* analysis for obvious reasons. The four part test required to show a *Brady* violation requires, at a minimum, to at least articulate what "favorable evidence" the government has suppressed. To this day, Maye has failed to do so. Instead, Maye relies on concurring opinions and wild speculation to insinuate that the State is in possession of some exculpatory evidence regarding Dr. Hayne's qualifications.

The appellant failed to cite any authority to support his position that a criminal defendant already convicted of a crime is entitled to discovery after conviction.[3] As such, this Court is under no obligation to consider the issue. *Jones v. State*, 740 So.2d 904, 911 (¶22) (Miss. 1999). Additionally, Maye has absolutely no basis in law for asking this Court to grant a motion for discovery on direct appeal.

[3]Defendants may, however, be entitled to post-conviction discovery during the course of post-conviction relief proceedings. Miss. Code Ann. 99-39-15.

III. MAYE HAS NOT PRESENTED NEWLY DISCOVERED EVIDENCE WHICH WOULD ENTITLE HIM TO A NEW TRIAL.

Newly discovered evidence sufficient to warrant a new trial is "evidence which could not have been discovered by the exercise of due diligence at the time of trial, as well as being almost certainly conclusive that it would cause a different result." **Clark v. State**, 875 So.2d 1130, 1133 (¶12) (Miss. Ct. App. 2004). Newly discovered evidence does not include impeachment evidence. *Carr v. State*, 873 So.2d 991, 997 (¶3) (Miss.2004) (citing *Ormond v. State*, 599 So.2d 951, 962 (Miss.1992)). At best, Larry McCan and Dr. Jack Daniel's testimony could be considered impeachment evidence, which is not sufficient to warrant a new trial. More importantly, the so-called newly discovered evidence would not have effected the outcome of Maye's trial. The only element of capital murder in issue at trial was whether Maye knew Officer Ron Jones was a police officer when he shot and killed him. Maye hoped that McCan's and Daniels' testimony would corroborate his claim that he was lying on the ground when he shot Officer Ron Jones. However, even if the finder of fact were to believe that the "newly discovered evidence" supported that position, nothing in McCan's testimony or Dr. Daniels' testimony contradicts the State's evidence that someone cracked the blinds in the living room when multiple announcements were made. Also, nothing in McCan's or Daniels' testimony supports Maye's claim that he did not hear or see Officer Ron Jones as he entered through the back door.

McCan, a violent crime consultant, testified on direct that the trajectory of the bullet which killed Officer Ron Jones could be better determined from an examination of the bullet hole in the doorframe than an examination of the bullet hole in the victim's body. T. 750. Based on his trajectory opinion and after conducting various experiments, Daniels opined that Maye could have been lying on the floor when he shot Officer Jones. T. 762. Daniels went on to testify that although

Jones' wound path was at a downward angle, and the bullet hole in the doorframe was at an upward angle, "it would be very difficult for somebody to be standing up and shoot and then go down and shoot, or to shoot into the door frame upward and then jump up and shoot downward and then get back on the floor again." T. 763. Although the majority of McCan's opinion was based on his observations and measurements of the bullet hole in the doorframe, he admitted on cross-examination that he did not know the position the doorframe was in at the time of the shooting, and that his trajectory opinion would necessarily differ if the doorframe was in a different position during the shooting than it was in during his experiments. T. 777-78.[4] Finally, like Dr. Hayne, McCan testified that he could not state what position Maye or the victim was in at the time the fatal shot was fired. T. 784-85. McCan's testimony was simply not evidence that could have produced a different result. After McCan's admissions on cross about the value of his experiments, his testimony does not even support Maye's claim that he was lying on the ground during the shooting. Even if this Court were to find that his testimony supports Maye's claim, it does nothing to contradict the State's evidence that Maye both saw and heard the officers when they were at the front door and that Officer Ron Jones announced himself at the back door before he was shot.

Dr. Daniels, a medical doctor with a consulting firm, was hired by Maye to provide an opinion on whether or not the position of a shooter can be determined from the wound track in the body of the victim. T. 858. Apparently, Maye sought to impeach Dr. Hayne's testimony with such an opinion, but Dr. Daniels acknowledge that Dr. Hayne never opined as to the position of Maye or the victim. T. 923. Maye also attempted to discredit Dr. Hayne's testimony because he and the prosecutor apparently mixed terminology when speaking of the path of the fatal bullet. Dr. Daniels

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[4]The door had been kicked in prior to the fatal shooting, and the doorframe had been completely removed prior to McCan's experiments. T. 777.

clarified that the term "common bullet path" means the path of the bullet from the time it left the muzzle to the time it came to rest in the victim's body. T. 860. "Trajectory," according to Daniels, denotes the path of the bullet outside the victim's body, while "bullet track" is the path of the bullet inside the body. T. 860-61. Dr. Hayne used the term trajectory several times at trial, and Maye would like this Court to believe that Dr. Hayne testified to matters beyond his scope of expertise. However, Dr. Daniels acknowledged that although Dr. Hayne and the prosecutor used the word trajectory, is it clear from the context of the testimony that both were referring only to the bullet track or wound path. T. 894, 908-09. Finally, Dr. Daniels did not presume to know whether Maye was lying or standing when he shot and killed Officer Ron Jones. Ultimately, although Dr. Daniels testified that there were things he may have done differently than Dr. Hayne, Dr. Daniels did not call Dr. Hayne's findings into question. There is simply nothing about Dr. Daniels' testimony that could have produced a different result at trial.

Because Maye has presented only impeachment evidence which would not have produced a different result had it been introduced at trial, he has presented no newly discovered evidence sufficient to warrant a new trial.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING MAYE'S SECOND MOTION FOR CHANGE OF VENUE.

On February 21, 2003, Maye moved for a change of venue. C.P. 90. Maye's motion for change of venue stated that he did not believe that he could receive a fair trial in Jefferson Davis county because the victim was a police officer and the son of the Prentiss chief of police. C.P. 90. Maye attached affidavits from two Jefferson Davis county residents, Melissa Longino and Reverend Jessie Bridges, who stated their belief that the defendant would not receive a fair trial in Jefferson Davis county because the public had prejudged the facts of the case and had ill will toward Maye. C.P. 93-94. The State did not object to Maye's motion for change of venue. C.P. 106. The trial court found that "there has been a substantial discussion of the alleged facts of the case in Jefferson Davis County and it would be difficult to empanel an impartial jury in Jefferson Davis County," and moved the trial to Lamar county.[5] C.P. 108.

On July 28, 2003, Maye filed a Motion to Reconsider Order Granting Change of Venue, claiming that he could not receive a fair trial in Lamar County, and asking the court to return the case to Jefferson Davis County. C.P. 215. Specifically, Maye alleged that defense counsel had received a telephone call from an unnamed attorney who stated that another unnamed attorney opined that "it was doubtful that an impartial jury could be impaneled in Lamar County to hear this capital/death penalty case." C.P. 215. Further, Maye implicitly argued that he was dissatisfied with the racial composition of Lamar County. C.P. 216 (¶7). The State opposed the second motion for change of venue, arguing that the defendant had failed to meet the statutory requirements for change of venue. C.P. 218. Nevertheless, the trial court granted Maye's motion for change of venue, but moved the

[5]Maye recommended that the trial be held in either Lawrence or Lamar County. C.P. 522. However, it was determined that the victim had significant ties to Lawrence County. C.P. 504.

trial to Marion County, rather than back to Jefferson Davis County. C.P. 221.

In his motion to reconsider the order granting change of venue, Maye never framed the issue as one of a withdrawal of a waiver of his constitutional right to be tried in Jefferson Davis county. He simply argued dissatisfaction with the racial composition of Lamar County. Where support for an argument on appeal differs from the argument made before the trial court, the appellant is procedurally barred from offering new support for his argument on appeal. *Holland v. State*, 587 So.2d 848, 868 n.18 (Miss. 1991). In any event, Maye's attempt to elevate the change of venue issue to an alleged error of constitutional proportions simply does not change the standard of review for this issue, which is an abuse of discretion standard of review.

In *Simon v. State*, Simon faced four separate capital murder indictments in Quitman County. 688 So. 2d 791, 794 (Miss. 1997). He secure a change of venue to Jones County, and was tried and convicted on the first capital murder indictment. *Id.* Prior to his second trial, Simon moved for a change of venue from Jones County. *Id.* at 801. The trial court granted Simon's motion and moved the trial to DeSoto County. *Id.* Simon again moved for a change of venue, arguing that DeSoto County was not racially comparable to Quitman County, and that there was a disproportionate amount of media coverage in DeSoto County. *Id.* The trial court denied Simon's motion to return the trial to Quitman County. On appeal, Simon characterized his second change of venue motion as "a 'conditional' motion to change venue, conditioned on the right to be tried in the county where the offense occurred in the event the trial court moved the cause to a county less favorable than Quitman County." *Id.* at 803. Holding that a criminal defendant is not entitled to a second change of venue to a county with a racial composition similar to the county in which the offense occurred, the Court found that the trial court did not abuse its discretion in denying Simon's motion to change venue back to Quitman County, where the crimes occurred. *Id.* at 803-04. Maye claims that *Simon*

is distinguishable because "there is no evidence that Mr. Maye gamed the system by changing venue and then waiting until the eve of trial to file a second 'conditional' motion that created ambiguity concerning his actual position." Appellant's Brief at 43. However, the supreme court's analysis in *Simon* did not turn on the timing of Simon's motion. The analysis centered on the fact that a criminal defendant who moves for a change of venue is not entitled to a second change of venue back to the county where the crime occurred simply because he is unhappy with the racial composition of the transferee county. Try as he may to frame his issue differently on appeal, in the case *sub judice*, this was exactly the argument defense counsel made before the trial court to move the trial back to Jefferson Davis County, as evidenced by following portion of Maye's motion to reconsider the order changing venue to Lamar County. Paragraphs 7 of Maye's motion stated:

> [A]lthough the Mississippi Supreme Court held in *Simon v. State* that a defendant has no right to a change of venue to a jurisdiction with certain demographics, it said nothing to the effect that a trial court may not attempt maintain a similar racial composition in a change of venue.

C.P. 216. The racial composition of Lamar County was the only reason given for wanting to move the trial back to Jefferson Davis County.[6] As *Simon* makes clear, the trial court did not abuse its discretion in denying Maye's motion to return the case to Jefferson Davis County.

Maye also relies on *State v. Caldwell*, 492 So. 2d 575 (Miss. 1986) to support his contention that he was entitled to withdraw his waiver of venue and reassert his constitutional right to be tried in Jefferson Davis County. *Caldwell* has no applicability to the present case, because Caldwell was allowed to have the sentencing phase of his trial returned to the county in which the offense occurred

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[6]As previously stated, defense counsel did allege that she received a phone call from an unnamed attorney who stated that another unnamed attorney opined that an impartial jury could not be empaneled in Lamar County. But as for the reason why this may be so, only race was cited in the motion.

only after United States Supreme Court vacated the death sentence. The Mississippi Supreme Court's finding that the trial court erred in denying Caldwell's motion to return the sentencing phase of trial back to the county in which the offense occurred was based on the rationale that when a defendant waives a constitutional right before or during trial and the conviction is subsequently reversed, "on retrial their slate of constitutional rights is wiped clean, thus allowing invocation of the rights." *Id.* at 577. The *Caldwell* court went on to clarify that its holding was not applicable to a sentencing phase conducted after conviction and before appellate review. *Id.* A logical extension of the *Caldwell* court's analysis is that a defendant who waives his right to be tried in the county in which the offense occurs is not entitled to withdraw that waiver absent a reversal of his conviction and remand for a new trial.

Although not cited by the appellant in his brief before this Court, Maye cited *United States v. Marcello*, 423 F.2d 993 (5th Cir.) in his second amended motion for JNOV or new trial. Interestingly, *Marcello* supports the State's position that the trial court did not abuse its discretion in denying Maye's second motion for change of venue back to Jefferson Davis County. Marcello, a reputed Mafia boss, was indicted for assault in the Eastern District of Louisiana. *Id.* at 997. Marcello moved for a change of venue due to pretrial publicity. *Id.* at 1001. At the hearing on the motion for continuance and change of venue, defense counsel indicated that he only wanted to pursue the motion for continuance and was "not pressing my request for a change of venue,"and stated his belief that with the widespread media coverage of his client's case, Marcello would be unable to receive a fair trial anywhere until the publicity died down. *Id.* at 1002. However, further exchange between defense counsel and the trial court made clear that change of venue motion was not abandoned, and the trial court granted Marcello's motion for change of venue. *Id.* at 1003. Immediately after the hearing, defense counsel filed a motion to reconsider the order granting change

of venue. *Id.* Acknowledging that New Orleans was saturated with negative pretrial publicity, Marcello nevertheless insisted that it was his constitutional right to be tried in the district in which the crime was committed. *Id.* at 1004. Specifically, Marcello argued that he either withdrew his motion for change of venue at the hearing, or that he was entitled to withdraw the waiver of his constitutional right to be tried in New Orleans. *Id.* As to the first contention, the Fifth Circuit Court of Appeals found that Marcello had not withdrawn his motion at the hearing. *Id.* As to Marcello's alternative contention that he should be allowed to withdraw the waiver, the Court found that Marcello had proven that he could not receive a fair trial in New Orleans and that "no Judge worthy of the name" would thereafter allow him be tried in New Orleans. The Court further stated,

> The Judge could also see that if he did not grant a change of venue [from New Orleans] the case would begin with built-in grounds for reversal. . . .
>
> The Judge was entitled, indeed required, to take Marcello's claim as presented and proved. His duty was to act and having acted it was not for the Defendant to reweigh the strategic or tactical disadvantages of the victory. . . .
>
> To persist in this in the face of the exchanges between Judge and counsel was to seek the advantage of a ruling that would be the very contradiction of a Sixth Amendment right to be tried in a district poisoned by prejudice.

Id. at 1004-05. The Court further held that it was completely within the trial court's discretion to rescind the order granting a change of venue. *Id.* Regarding a defendant's right to withdraw the waiver of a constitutional right, the Court stated the following.

> Recognizing that *Stevens v. Marks*, 1966, 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724 stands generally for the proposition that a Defendant ought to be allowed to withdraw a prior waiver of a Constitutional right when there is no justification otherwise, there was strong justification here. It would have been impossible for Marcello to receive a fair trial in New Orleans because of the continued and continuing unfavorable publicity. . . . Nor was the Judge required after such a determination to regard it all as just so much a matter of tactics by clever resourceful advocates in what might well be a heads-I-win-tails-you-lose technique. FN18
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> FN18. This had the marks of a preplanned attack. It was clear to the

> Judge, as it is to us, that if Defendant's motion for change of venue were denied and he had been convicted, then his conviction could easily be reversed on appeal and if the motion were granted, then he could use the procedure he is presently using.
>
> A federal judge- in no sense a mere moderator- does not perform his awesome role by allowing 'rights' to be moved like chessmen.

Id. at 1005-06. The same criticisms made by the *Marcello* court of Marcello's tactics apply with equal force in the case *sub judice*. Maye made the requisite showing that he would be unable to obtain a fair trial in Jefferson Davis county, where the victim was a highly regarded police officer and the son of the chief of police. At the hearing on Maye's motion for a new trial, the State showed that even five years after the murder, there was still media coverage of the incident in Jefferson Davis County, and a monument in memory of Officer Ron Jones had been erected at Prentiss City Hall. T. 1042. There can be no question that had the trial court agreed to return the trial to Jefferson Davis County that this honorable Court would find that the trial court abused its discretion in allowing Maye to be tried in a county where it was highly unlikely that an impartial jury could be empaneled. Additionally, had the request been granted, Maye's ineffective assistance of counsel claim would certainly have more merit than his current claim of ineffective assistance.

Maye finally alleges that the trial court abused its discretion because its ruling was made based on a misapprehension of law. Maye quotes an off-the-cuff statement made by the trial court at the hearing on the motion for new trial, three years after the trial court had ruled on the second change of venue motion. At the hearing on the motion for new trial, defense counsel argued that although the court "granted" Maye's motion to reconsider the order changing venue to Lamar County, the trial court moved the trial to Marion County rather than back to Jefferson Davis County. T. 970. The trial court responded, "I thought I couldn't do it." T. 970. On appeal Maye claims that the trial court's incorrect belief amounted to reversible error since his ruling was based on a

misapprehension of law. However, Maye's argument is based on the erroneous belief that the trial court could have transferred the trial back to a county where Maye had already proven he could not receive a fair trial. To quote the Marcello court, "no judge worthy of the name" could have allowed Maye to be tried in Jefferson Davis County after Maye had already proven that he could not receive a fair trial there. The trial court did not abuse its discretion in refusing to allow Maye to manipulate the system and obtain "the advantage of a ruling that would be the very contradiction of a Sixth Amendment right" to be tried by an impartial jury.

V. THE TRIAL COURT DID NOT ERR IN REFUSING INSTRUCTIONS D-3, D-8, D-9, AND D-15.

Jury instructions must be read as a whole. *McKlemurry v. State*, 947 So.2d 987, 990 (¶3) (Miss. Ct. App. 2006). If the instructions, when read together as a whole, properly state the law and effectuate no injustice, no reversible error exists. *Id.*

The trial court granted the following self-defense instructions offered by the defense. Instruction D-4 reads as follows:

> The Court instructs the jury that to make a killing justifiable on the grounds of self defense, the danger to the defendant must be either actual, present and urgent, or the defendant must have reasonable grounds to believe that the victim intended to kill the defendant or to do him some great bodily harm, and in addition to this, he must have reasonable grounds to believe that the4re is imminent danger of such act being accomplished. It is for the jury to determine the reasonableness of the ground upon which the defendant acts. If you, the jury, unanimously find that the defendant acted in self-defense, then it is your sworn duty to return a verdict in favor of the defendant.

C.P. 382. Instruction D-5 read as follows:

> The Court instructs the jury that if you find from the evidence in this case that on December 26, 2001 Cory J. Maye did shoot and kill Ron Jones; but that such shooting was in necessary self defense, as defined by other instructions, then your duty under the law is to find Cory J. Maye not guilty of the murder of Ron Jones.

C.P. 381. Four other self-defense instructions offered by Maye, D-3, D-8, D-9, and D-15, were all refused as being fairly covered elsewhere. T. 549-51. "When one jury instruction adequately covers the defendant's theory of self-defense, the trial court may properly refuse to grant a second instruction that is redundant or cumulative." *Johnson v. State*, 749 So. 2d 369, 374 (¶18) (Miss. Ct. App. 1999). The granted self-defense instructions in this case, D-4 and D-5, fully covered Maye's theory of self-defense. Instruction D-4 is a modified *Robinson* self-defense instruction.[7] *Robinson*

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[7]The State refers to instruction D-4 as a modified *Robinson* instruction because instruction D-4 gives the same definition of self-defense as the approved *Robinson* instruction, except that instruction D-4 is not "couched in prosecutorial terms." See *Reddix v. State*, 731 So.2d 591, 595

v. State, 434 So.2d 206, 207 (Miss. 1983). Our court's have repeatedly held that a *Robinson* instruction fully and properly defines self-defense. *Johnson*, 749 So. 2d at 374 (¶15); *Williams v. State*, 803 So.2d 1159, 1161-62, 1163 (¶8, 13) (Miss. 2001); *Harris v. State*, 861 So.2d 1003, 1013-14 (¶21) (Miss. 2003); *Woods v. State*, 996 So.2d 100, 103 (¶16) (Miss. Ct. App. 2008). In addition to defining self-defense, instructions D-4 and D-5 explicitly informed the jury that it must acquit if it found that Maye acted in self-defense in shooting and killing Officer Ron Jones. There is simply no aspect of Maye's defense, as presented at trial, which was not covered by D-4 or D-5. Accordingly, no other self-defense instructions were required. However, the State will discuss Maye's specific claims regarding each refused self-defense instruction.

Maye first claims that the trial court erred in failing to instruct the jury that the State bore the burden of proof on the issue of self-defense. However, instruction D-2 explained that the State must prove each element of the crime charged beyond a reasonable doubt, while instructions D-4 and D-5 were proper self-defense instructions. This honorable Court held that so long as the jury is adequately instructed on self-defense and the State's burden to prove the elements of the crime charged, the defendant is not entitled to a separate instruction which states that the State must disprove self-defense beyond a reasonable doubt. *Satcher v. State*, 852 So.2d 595, 599-600 (¶17) (Miss. Ct. App. 2002) (citing *Williams v. State*, 803 So.2d 1159, 1162 (¶ 11) (Miss. 2001)). In addition to Maye not being entitled to a separate instruction explaining that the State must disprove self-defense, Maye did not request such an instruction. "A trial court does not have a duty to instruct

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(Miss. 1999). Instead, instruction D-4 uses the neutral language that "It is for the jury to determine the reasonableness of the grounds upon which the defendant acts." Additionally, instruction D-4 includes a final sentence which expressly informs the jury of its duty to acquit if it found that Maye did in fact act in self-defense, curing the shortcoming of a purely definitional *Robinson* instruction. *Id.*

the jury *sua sponte*, 'nor is a court required to suggest instructions in addition to those which the parties tender.'" *Booze v. State*, 942 So.2d 272, 275 (¶15) (Miss. Ct. App. 2006) (quoting *Wansley v. State*, 734 So.2d 193 (¶ 20) (Miss. Ct. App.1999)).

Instruction D-3

Refused instruction D-3 stated the following:

> The Court instructs the jury that you are bound, in deliberating upon this case, to give the defendant the benefit of reasonable doubt of the defendant's guilt that arises out of the evidence or want of evidence in this case. There is always a reasonable doubt of the defendant's guilt when the evidence simply makes it probable that the defendant is guilty.
>
> Mere probability of guilt will never warrant you to convict the defendant. It is only when, after examining the evidence on the whole, you are able to say on your oaths, beyond a reasonable doubt, that the defendant is guilty that the law will permit you to find him guilty. You might be able to say that you believe him to be guilty, and yet, if you are not able to say on your oaths, beyond a reasonable doubt, that he is guilty, it is your sworn duty to find the defendant not guilty.

C.P. 369. Instruction D-3 was refused because the trial court found that reasonable doubt was fairly covered by instruction D-2. T. 551; C.P. 378. A trial court may properly refused a proposed jury instruction which is fairly covered elsewhere. *Denham v. State*, 966 So.2d 894, 900 (¶25) (Miss. Ct. App. 2007). Additionally, instruction D-3 is identical to the instruction in *Vaden v. State* that this Court characterized as an impermissible attempt to define reasonable doubt. 965 So.2d 1072, 1074 (¶¶3-4) (Miss. Ct. App. 2007). See also *Shirley v. State*, 942 So.2d 322, 332 (¶ 43) (Miss. Ct. App. 2006); *Berry v. State*, 859 So.2d 399, 404 (¶¶16-17) (Miss. Ct. App. 2003). The law of this state regarding jury instructions which attempt to define reasonable doubt is well-settled. Such instructions are improper because "reasonable doubt defines itself." *Martin v. State*, 854 So. 2d 1004, 1009 (¶12) (Miss. 2003) (quoting *Barnes v. State*, 532 So.2d 1231, 1235 (Miss.1988)). Accordingly, instruction D-3 was properly refused.

Instruction D-8

Instructions D-8 and D-9 were refused as being fairly covered by instructions D-4 and D-5. T. 549; C.P. 381, 382. Refused instruction D-8 stated the following:

> The Court instructs the Jury that you are not to judge the actions of Cory J. Maye in the cool, calm light of after-developed facts, but instead you are to judge his actions in the light of the circumstances confronting Cory J. Maye at the time, as you believe from the evidence that those circumstances reasonably appeared to him on that occasion; and if you believe that under those circumstances it reasonably appeared to Cory J. Maye, at the instant that he took up a weapon, that Cory J. Maye then and there had reasonable ground to apprehend a design on the part of Ron Jones to kill Cory J. Maye or his daughter or ro do to Cory J. Maye and his daughter some great personal injury, and there reasonably appeared to Cory J. Maye to be imminent danger of such designs being accomplished; then Cory J. Maye was justified in anticipating an attack and using reasonable means to defend such attack; then you must find Cory J. Maye not guilty of the murder of Ron Jones.

C.P. 372. Maye claims that he was entitled to an instruction which instructed the jury to assess his actions and the surrounding circumstances from his viewpoint at the time of the shooting. However, this Court has held, "When the trial court gives a *Robinson* instruction, the trial court does not err when it does not instruct the jury to examine the circumstances at the time of the incident from the defendant's viewpoint." *Johnson*, 749 So. 2d at 373 (¶13) (citing *Gossett v. State*, 660 So. 2d 1285, 1295 (Miss. 1995)). Because the trial court granted instruction D-4, a modified *Robinson* instruction, it was not bound to instruct the jury to examine the circumstances from Maye's viewpoint at the time of the shooting. C.P. 382. Additionally, the *Johnson* court even characterized the refused instruction in question as "yet another but unnecessary perspective on the defense." *Id.* at 374 (¶18). In accordance with *Johnson*, the trial court did not err in refusing instruction D-8 as fairly covered elsewhere.

Instruction D-9

Instruction D-9 stated the following:

> The Court instructs the jury that Cory J. Maye was not under an obligation to wait for serious bodily harm upon him and his daughter from Ron Jones before Cory J. Maye took actions to defend himself and his daughter from an attack. If you find from the evidence that Cory J. Maye took action to defend himself and his daughter without knowing for certain that Ron Jones was about to cause him and his daughter serious bodily harm, and further that it was reasonably apparent to a reasonable person fo average prudence that Cory J. Maye and his daughter were in danger of serious bodily harm, then you must find Cory J. Maye not guilty of the murder of Ron Jones. It is for the jury to determine the reasonableness of the ground upon which Cory J. Maye acted.

C.P. 373. Maye argues that the trial court erred in refusing this instruction because it was the only instruction which informed the jury that Maye had no duty to retreat, it was the only instruction which embodied the concept of defense of others, it impermissibly shrunk the scope of self-defense, and it was discussed with approval in *Johnson v. State*, 749 So. 2d 369 (Miss. 1999).

It is true that an instruction similar to D-9 was granted in *Johnson. Id.* at 374 (¶16). However, *Johnson* involved a "*Reddix* problem," that is, the *Robinson* self-defense instruction only defined self-defense, but did not inform the jury that it must acquit if it found that the defendant acted in self-defense. *Id.* at 373 (¶15). Therefore, the Court examined other instructions to see if the jury was informed of its duty to acquit. The only significance in *Johnson* of the instruction similar to refused instruction D-9 in the case *sub judice* was the fact that it included the phrase, "then you must find [the defendant] not guilty of the murders of [the victims,]" thereby curing a potential *Reddix* problem. *Id.* at 373-74 (¶¶16-18). *Johnson* certainly does not stand for the proposition that an instruction similar to D-9 is required when a defendant claims self-defense.

Maye also claims that instruction D-9 was erroneously refused because it was the only instruction which informed the jury that Maye had no duty to retreat before acting in self-defense. The State would first note that refused instruction D-9 is not exactly a "no duty to retreat" or "stand your ground" instruction. However, to the extent that this Court may interpret the first sentence of

D-9 as a "no duty to retreat" instruction, the State submits that Maye was not entitled to such an instruction. A defendant claiming self-defense is entitled to a no duty to retreat instruction only when "from the facts of the case it appears that the defendant could have avoided the fatal difficulty only by precipitous retreat, but did not leave, [and] if the other requisite factors are present as stated in *Long* [*v. State*, 52 Miss.23, 34 (1876)]." *McDonald v. State*, 717 So. 2d 715, 717 (Miss. 1998). The principle annunciated in *Long* regarding no duty to retreat is as follows.

> Flight is a mode of escaping danger to which a party is not bound to resort, so long as he is in a place where he has a right to be, and is neither engaged in an unlawful, nor the provoker of, nor the aggressor in, the combat. In such case he may stand his ground and resist force by force, taking care that his resistance be not disproportioned to the attack.

Id. at (¶11) (quoting *Long*, 52 Miss. at 34). First, Maye was confronted with no "fatal difficulty." The record firmly establishes that Officer Ron Jones' gun was not even drawn when he lawfully entered Maye's apartment. This is simply not a situation where Maye was "resist[ing] force by force," and even if Officer Ron Jones' actions could conceivably be considered an attack, Maye's action of firing a gun in response to someone forcing open a door is certainly disproportionate. The facts of this case simply do not support a "no duty to retreat" instruction. Cases in which our reviewing courts have found error in failing to grant such an instruction involved defendants who were actually engaged in a physical altercation with a victim who was an initial aggressor. *Id*; *Reynolds v.* State, 776 So. 2d 698 (Miss. Ct. App. 2000); *Haynes v. State*, 451 So. 2d 227, 228 (Miss. 1984). Such is not the case at bar, and a "no duty to retreat" instruction was not warranted.

Maye also claims that instruction D-9 was warranted because it was the only self-defense instruction which embraced the concept of defense of others. While defense of others is a valid legal defense, the evidence did not warrant such an instruction. The only contested issue at trial was whether or not Maye knew Officer Ron Jones was a police officer. If the jury believed Maye's

version of events that the officers did not announce themselves as police officers and that he did not see the victim before shooting, then instructions D-4 and D-5 required the jury to acquit. It matters not that the granted self-defense instructions did not include defense of others, because if the jury believed Maye's version of events, his daughter was not confronted an actual, present and urgent danger separate and apart from the perceived danger Maye allegedly thought he faced. In *Guster v. State*, 758 So. 2d 1086 (Miss. Ct. App. 2000), this honorable Court reversed a manslaughter conviction based on the trial court's refusal to grant a defense of others instruction. In *Guster*, Guster's boyfriend came to her home and threatened her began choking her. *Id.* at 1088 (¶10). Guster yelled for her two-year-old son to leave the room, but rather than comply, the toddler bit the attacker's leg. *Id.* The attacker then kicked the boy in the chest, knocking him across the room. *Id.* Guster then picked up a knife and stabbed the attacker in the back. *Id.* This honorable Court found that the trial court should have conformed the granted self-instruction to include defense of others, since it was included in Guster's theory of the case. *Id.* at 1089-90 (¶21). In the present case, Ta'Corriana was under no separate and distinct threat, and a defense of others instruction was not warranted. See also, *Shepperd v. State*, 777 So. 2d 659, 662-63 (¶¶14-16) (Miss. 2000) (defense of others instruction required because one victim physically attacked defendant's cousin while another victim ran toward defendant with a gun); *Calhoun v. State*, 526 So. 2d 531 (Miss. Ct. App. 1988) (defense of other instruction warranted where victim threatened defendant's girlfriend prior to the fatal shooting and numerous times previously).

Finally, Maye claims that the refusal of instruction D-9 precluded the jury from understanding that a homeowner may use force in response to a forcible entry by what appears to be an unlawful intruder who may commit a felony against property or person, even if the anticipated felony is not one that would result in great bodily harm. However, Maye fails to explain how

instruction D-9 would have relayed that concept to the jury.

Instruction D-9 was properly refused, as the granted self-defense instructions fully informed the jury of Maye's theory of defense.

Instruction D-15

Refused instruction D-15 stated, "The Court instructs the jury that you can not find Cory J. Maye guilty of any crime greater than manslaughter where the evidence is uncontradicted that at the time of the shooting, Cory Maye did not know that Ron Jones was a police officer." A trial court may not grant any instruction which "singles out and gives undue prominence to certain portions of the evidence." *Hancock v. State*, 964 So.2d 1167, 1172-73 (¶12) (Miss. Ct. App. 2007). Instruction D-15 was an improper attempt to comment on the evidence, and was therefore properly refused. Any discussion of refused instruction D-15's bearing on the inclusion of a depraved heart murder instruction is irrelevant where Maye was not convicted of depraved heart murder.

VI. THE SEARCH WARRANT WAS NOT PROCURED THROUGH FRAUD.

The underlying facts and circumstances attached to the search warrant affidavit for Maye's home stated the following:

> I, Ronald W. Jones, P5, do hereby state under oath that I have received information from various sources that controlled substances are being stored in and sold from two apartments located on Mary St.
>
> A C.I. personally known to me to have given true and reliable information in the past which has led to at least one arrest went to said residence within past twenty-four hours and saw a large quantity of Marijuana being stored in both apartments located on Mary St.
>
> I, Ronald W. Jones, also state under oath that I personally surveillanced [sic] said apartments and witnessed a large amount of traffic at unusual hours traveling to and from said apartments. Said apartments is [sic] being occupied by Jamie Smith[,] a known drug dealer[,] and persons unknown.
>
> . . .

Exhibit 46.

At the hearing on Maye's motion for a new trial, Maye presented the testimony of Randy Gentry, who claimed to be the confidential informant that Officer Ron Jones used on the evening of the murder to purchase narcotics from the Mary Street duplex. Gentry claimed that after meeting with Officer Ron Jones to set up the controlled buy, that his brother, Carroll Gentry drove him to the Mary Street duplex. T. 647. Gentry claimed that Carroll, who does not use drugs, stayed in the truck while Gentry went to Smith's apartment. T. 651. Gentry was unable to make the purchase because Maye was not home. T. 651. Gentry testified that he had purchased narcotics from Smith before, and described Smith as a middleman who would obtain the drugs from Maye. T. 653. The Gentry brothers returned later, and Gentry went to Smith's apartment while Carroll again stayed in the truck. T. 654. Gentry gave Smith $40, and Smith walked next door to Maye's apartment. T. 654. Gentry testified that he waited outside while Smith went inside Maye's apartment and returned with crack

cocaine. T. 654. Carroll testified at the hearing that he did drive Gentry to the Mary Street duplex on the night in question. T. 692. When asked if he saw his brother go anywhere other than inside Smith's apartment, Carroll stated that he did not notice Gentry leave Smith's apartment and go anywhere else, but then again, he was not "eyeballing him." T. 695.

On appeal, Maye asks this Court to find that Officer Jones procured the search warrant through fraud because "under either brother's version of events, the applications falsely averred that Randy entered Mr. Maye's home." Appellant's Brief at 53. He then claims that when the allegedly false statement is removed from the search warrant affidavit, the remaining information failed to establish the requisite probable cause for the issuance of the search warrant. In *Franks v. Delaware*, the United States Supreme Court held as follows:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

438 U.S. 154, 155-56 (1978). Gentry's testimony that he did not go into Maye's apartment five years previously certainly does not establish that Officer Ron Jones knowingly, intentionally, or with a reckless disregard for the truth included a false statement in the search warrant affidavit. The truth of the matter died with Officer Ron Jones, the only person who could testify with certainty if Gentry was the confidential informant who told Jones that he had seen marijuana in both apartments. Officer Jones stated in the affidavit that he had received information from various sources that drugs were being sold out of both apartments. If Gentry's version of events is true, he could very well be

one of the various sources, rather than the confidential informant singled out in the second paragraph of the affidavit. Additionally, Maye attempted to discredit Gentry throughout his testimony. Yet at the same time, he asks this Court to believe that the information this known drug user remembers five years after the fact was in fact what Gentry told Officer Ron Jones and what Officer Ron Jones included in the search warrant affidavit. Maye's theory is nothing but speculation and conjecture, and certainly not sufficient to show that Officer Ron Jones lied in procuring the search warrant.

Maye additionally claims that he was denied due process because the State failed to turn over the name of the confidential informant. However, the record clearly reflects that the State was unaware, and is still uncertain to this day, of the identity of the confidential informant singled out in Officer Jones' search warrant affidavit. Furthermore, even if the State had know of the confidential informant's identity, it would not have been required to reveal it since the informant was not a witness to the murder. *Peters v. State*, 971 So.2d 1289, 1292 (¶8) (Miss. Ct. App. 2008).

VII. THE TRIAL COURT PROPERLY DENIED MAYE'S MOTION TO SUPPRESS.

The standard of review for the admission or exclusion of evidence is abuse of discretion. *Harrison v. McMillan*, 828 So.2d 756, 765 (Miss. 2002). In reviewing the denial of a motion to suppress evidence, the reviewing court must determine whether the trial court's findings, considering the totality of the circumstances, are supported by substantial credible evidence. *Evans v. State,* 823 So.2d 617, 621 (Miss. Ct. App. 2002). Where supported by substantial credible evidence, this Court will not disturb those findings. *Id.* Further, reversible error will not be based on the erroneous admission or exclusion of evidence where no substantial right belonging to a party has been effected. *Passman v. State,* 937 So.2d 17, 20-22 (Miss. Ct. App. 2006).

Maye claims that the motion to suppress the marijuana found in his home should have been granted because no probable cause existed for the issuance of the search warrant. "Probable cause for issuance of a search warrant is present when facts and circumstance within the officer's knowledge, or of which he had reasonable trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it." *Holbrook v. State*, 877 So.2d 525, 528 (Miss. Ct. App. 2004) (quoting *Hall v. State*, 455 So.2d 1303, 1304 (Miss. 1984)). There can be no question that Officer Jones had probable cause to believe that drugs were being sold from both apartments in the Mary Street duplex. The information within Officer Jones' knowledge, as evidenced by the search warrant affidavit, would lead a man of average caution to believe that criminal activity was occurring in Maye's home. Additionally, for the sake of argument only, even if the trial court had erroneously admitted evidence of the marijuana found in Maye's apartment, no substantial right belonging to Maye was violated by the ruling. Maye was not tried for possession or sale of marijuana, but for capital murder. The evidence of the marijuana had no bearing on the jury's finding that Maye knew he was shooting a

police officer. The trial court properly denied Maye's motion to suppress.

VIII. THE RECORD DOES NOT SUPPORT MAYE'S CLAIM OF PROSECUTORIAL MISCONDUCT.

Maye's prosecutorial misconduct claim is procedurally barred because Maye failed to object to the so-called misconduct at trial. *Jackson v. State*, 832 So.2d 579, 581 (¶3) (Miss. Ct. App. 2002). Maye's claim is also without merit. He claims that the prosecutor committed reversible error by repeatedly calling to attention Jones' special status as a police officer. This claim is absurd because the victim's status as a police officer was the basis for the capital murder charge. His status as a police officer was therefore inevitably alluded to throughout the trial. Maye's claim that the State mischaracterized evidence during closing is directly contrary to the record. Maye claims that the record does not support the prosecutor's statements that someone turned the light on inside Maye's home as the officers attempted to gain entry and that Officer Jones' clothing made him easily recognizable as a police officer. The following pages in the transcript prove that the prosecutor was fairly summarizing the evidence presented - T. 35, 50, 58, 250, 262-63, 267, 408, 414, 423; 248. Maye's claim of prosecutorial misconduct is both procedurally barred and without merit.

IX. DEFENSE COUNSEL'S PERFORMANCE WAS NOT CONSTITUTIONALLY DEFICIENT.

As is common practice among appellants raising claims of ineffective assistance of counsel, Maye simply puts forth a laundry list of alleged deficiencies without showing that but for the alleged deficiencies there would likely have been a different result in Maye's trial. Further, the bulk of Maye's criticism of defense counsel's performance involves defense counsel's trial strategy and general attacks on defense counsel's skills. An attorney's decisions regarding whether or not to file certain motions, call certain witnesses, ask certain questions, or make certain objections fall within the ambit of trial strategy. *Scott v. State*, 742 So.2d 1190, 1196 (¶14) (Miss. Ct. App. 1999). Mere criticism of trial strategy does not give rise to an ineffective assistance of counsel claim. *Howard v. State*, 945 So.2d 326, 357 (¶63) (Miss. 2006).

Among Maye's many criticisms of defense counsel's performance is her failure to obtain experts to rebut Dr. Hayne's testimony. However, current counsel for Maye obtained experts to purportedly rebut Dr. Hayne's trial testimony, and as previously discussed, both experts reached the same conclusion that Dr. Hayne reached at trial, that is, it was not possible to determine the shooter's or victim's position at the time of the shooting. In launching a general attack on defense counsel's skills, Maye also claims that defense counsel failed to make *Batson* challenges "despite the State's highly suspicious use of strikes that disproportionately challenged racial minorities and women." Appellant's Brief at 72. However, the record does not support the conclusory allegation that the State engaged in such conduct. If Maye's baseless claim had any merit, then surely he would have included a separate assignment of error claiming a *Batson* violation.

Maye has failed to show either deficient performance or prejudice to succeed on an ineffective assistance claim.

X. THE TRIAL COURT LACKED AUTHORITY TO IMPOSE ANY SENTENCE LESS THAN LIFE WITHOUT THE POSSIBILITY OF PAROLE.

Maye's proportionality argument is procedurally barred as he failed to raise the issue in the trial court. *Edwards v. State*, 800 So.2d 454, 468 (Miss. 2001). Additionally, his claim is also without merit. As a general rule, sentences which do not exceed the statutory maximum will not be disturbed on appeal. *Johnson v. State*, 950 So.2d 178, 183 (¶22) (Miss. 2007). "[P]roviding punishment for crime is a function of the legislature, and, unless the punishment specified by statute constitutes cruel and unusual treatment, it will not be disturbed by the judiciary." *Id.* (citing *Presley v. State*, 474 So.2d 612, 620 (Miss. 1985)). The trial court gave Maye the minimum sentence for which he was eligible. A review of the *Solem v. Helm* factors is not required because Maye failed to raise an inference of gross disproportionality. *Johnson* at 183 (¶22).

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Maye's conviction of capital murder and sentence of life without the possibility of parole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna C. Holland, 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:

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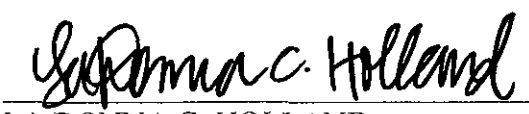
This the 6th day of February, 2009.



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