IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JON KURRIE PETERSON — APPELLANT

NO. 2008-CP-1438-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

JON KURRIE PETERSON, #65059
DELTA CORRECTIONAL FACILITY
3800 COUNTY ROAD 540
GREENWOOD, MS 38930

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

MISSISSIPPI RULES OF APPELLATE PROCEDURE

MISSISSIPPI RULES OF EVIDENCE

MISSISSIPPI CODE ANNOTATED

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JON KURRIE PETERSON — APPELLANT

VS — NO.2008-CP-1438-COA

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

PROCEDURAL HISTORY:

On the 22nd Day of April,2008,Jon Kurrie Peterson,(hereinafter known as Peterson,)filed his **Motion To Vacate Judgement And Sentence Or In The Alternative Motion For New Trial,cause NO.A2401-2008-129.(C.P.6-62).**In this motion Peterson had raised the claim of newly discovered evidence,prosecutorial misconduct,and ineffective assistance of counsel.On the 11th day of June 2008,the Circuit Court of Harrison County,Mississippi,entered an ORDER requiring the State to file its answer or other pleadings in response to the petition for post-conviction relief within thirty(30)days of this order.**(C.P.67)**

On July 18th 2008,Peterson filed his **Motion For Summary Judgement** after the State had failed to respond within the thirty(30)day period,and had failed to file a timely motion for extension of time.**(C.P.68).**In response,the State did file a belated Exparte Motion For Extension of Time**(C.P.73).**Peterson did file a **Rule 60(b) Motion** in opposition to the Exparte Motion For Extension Of Time and the Court's granting the exparte motion.**(C.P.75)**

On the 23rd day of July 2008,the post-conviction court did rescind it's prior orders and dismissed the post-conviction motion on jurisdictional grounds.This Appeal stems from that dismissal.

STATEMENT OF FACTS

On or about the 27th day of September,1995,the Grand Jury of Harrison County, Mississippi,returned a multi-count Indictment that did charge Jon Kurrie Peterson in Count One:Murder,pursuant to section **97-3-19(1)(a)**;Count Two:Arson-Third Degree pursuant to Section **99-17-7** of the Mississippi Code Ann.(1972),being cause No.2401-95-00755.

A trial by jury was held April 16-19,1996,the jury returned a verdict of guilty on both counts charged in the indictment and subsequently sentenced Peterson to Life for murder and a consecutive three year sentence for Arson.

SUMMARY OF THE ARGUMENT

Peterson did file his current post-conviction motion under the newly discovered evidence clause of **Mississippi Code Ann.Section 99-39-5(2)(Rev.2000)**,which states in pertinent part:

"...that he has evidence ,not reasonably discovered at the time of trial, which is of such nature that it would be pratically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence."

Peterson had filed his motion under the newly discovered evidence clause into the trial court,as he had previously sought leave in a prior application to the Mississippi Supreme Court on different issues than the issues that are now before this Court.So that,pursuant to **Mississippi Code Ann.Section 99-39-5(2) and 99-39-23(6)(Rev.2000)**,the newly discovered evidence met the exceptions that are numerated to overcome the procedural bars for filing a time-barred or successive post-conviction Motion.

Peterson asserts that he did not have to seek leave from the Mississippi Supreme Court to file a successsive post-conviction motion.Neither **Mississippi Code Ann. section99-39-5(2),or Section 99-39-23(6)**,give a requirement that,on newly discovered evidence on a time-barred or successive petition,that one must first seek leave from the Mississippi Supreme Court to file such motion. Under these statutes,if Peterson had met the exceptions,he could file into the lower court which now has jurisdiction.

Peterson asserts that the Appellee is presenting to this Courtthe wrong standard of review,as,Peterson's post-conviction motion was filed pursuant to **Mississippi Code Ann. Section 99-39-5(1)(a),(e)and(i)** which states in pertinent part:

> "**[A]**ny prisoner in custody under sentence of a court of record of the State of Mississippi who claims...**[T]**hat there exist evidence of material facts,not previously presented and heard,that requires vacation of the conviction or sentence in the interest of justice... may file a motion to vacate,set aside or correct the judgement or setence..."

Since Peterson had previously been denied leave by the Mississippi Supreme Court on a prior application for leave,**Mississippi Code Ann. Section 99-39-27(9)** precluded a successive application to that court.Peterson had only one anvenue to raise his claims of newly discovered evidence,and that was in the trial court.

It is clear from the record,that,the Circuit Court of Harrison Coutny, Mississippi had takes jurisdiction in this case,as was reflected in its Order of June 11th 2008,requiring the State to file an answer or other responsive pleadings.And that Court did not change its course of action until the State was in default and Peterson filed for summary judgement.The Appellee in its brief is incorrect,as jurisdiction for Peterson's motion was the Circuit Court Pursuant to **Mississippi Code Ann. Section 99-39-5(1)(a),(e)and(i)(Rev.2000).**

The Appellee has failed to address any of the claims raised in Peterson's Brief,so that,this Court should rule on the merits of the prosecutorial misconduct of withholding exculpatory evidence pursuant to **BRADY V. MARYLAND,373 U.S. 83(1963).**

Also,on the assertion of Appellee that Peterson's claim of ineffective assistance of counsel was res judicata is not supported by the record in **PETERSON V. STATE,740 So.2nd 940(Miss.1999)(No.96-KA-00941-COA).**Peterson,s Appellate Attorney raised the following issues on Appeal:

1.Improper Voir Dire by State;
2.The State systematically Eliminated all Black Jurors;
3.The Court Erred In Not Granting Appellant's Motion For Continuance Based ON Prejudicial Impact Of Radio Newspaper and Other News Of The Plea Of Marin On Day Before The Trial;
4.Complete Disparity in Sentences Of Co-Defendants;and
5.Duty Of Trial Court To Insert Manslaughter and Self-Defense Jury Insructions.

Appellant counsel did not raise an ineffective assistance of counsel claim on direct appeal,as the Brief of Appellant affirms.But,for some reason unbeknowing to Peterson the Appellee Brief entered Proposition VI,which reads as follows;

PROPOSITION VI

THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Though the Court of Appeals of the State of Mississippi attributed Proposition VI of the Appellee's Brief to Peterson on direct appeal,and in its opinion found it to be meritless.Does not change the fact that the Appellee raised the claim in its brief and not Peterson.So the ineffective assistance of counsel was never raised by Peterson on direct appeal,but rather by the State,and cannot be used by the Appellee in an effort to res judicata this claim.

It also has held that direct appeal is not the proper forum to raise a claim of ineffective assistance of counsel,and the post-conviction proceeding is the usual avenue for pursuing ineffctive assistance of counsel claim even where trial and Appellate Counsel were different.As it has long been held by the Courts of Mississppi,that the failure to raise the question of the effectiveness of trial counsel on direct appeal,was not a procedural bar in raising it in a subsequent post-conviction collateral proceeding.

In the case sub judice,the gravaman of Peterson's case is the fact that the State withheld exculpatory evidence from the defense in violation of due process.This exculpatory evidence was newly discovered,and could not have been discovered prior to trial with due diligence,as, the State had failed to disclose this evidence to the defense.This fact has been attested to by Peterson's trial counsel in a sworn affidavit.**(C.P.37).**

The Appellee would have this Court to ignore the probative value of this exculpatory evidence as not being conclusive to induce a different result or induce a different verdict.For this Court to accept the reasoning of the Appellee, would overlook the fact that Peterson's due process rights were violated because the State suppressed exculpatory evidence that,if disclosed,could reasonably have altered result of the proceeding.

Assuming aruendo that this Court finds that any of the evidentiary issues would fall under the procedural bar of **Mississippi Code Ann. Section 99-39-21(1) (Rev.2000)**as set forth by the Appellee,Peterson then would claim that he has met the cause and prejudice standard as designated in **Section 99-39-21(4)(5)**,and his issues on appeal should be ruled upon by this Court on the merits.

Also,this Court could notice plain error under the authority granted this Court by **Mississippi Rules of Evidence Rule 103(d),and Mississippi Rules of Appellate Procedure,Rule 28(a)(3)**,as the errors presented by Peterson on this appeal has affected both his substantive and fundamental rights.

The Appellee does state that there was testimony of Mr.Rudy Marin and Ms.Vanessa

McClendon who were supposedly eyewitnesses to the alleged offenes.But,these two witnesses' testimony was suspect,as it was the false physical evidence that was presented by the State that added any credibility to their testimony. So that,should have the State not suppressed the exculpatory evidence,then Peterson would have had the ability to defend himself against the false testimony of these witnesses and the State's false evidence.

ARGUMENT

1.PETERSON'S MOTION WAS PROPERLY FILED IN THE TRIAL COURT UNDER NEWLY DISCOVERED EVIDENCE

Peterson's only recourse in the filing of post-conviction motion on newly discovered evidence was the trial court,as **Mississippi Code Ann. Section 99-39-27(9)**precluded a successive application for leave to that Court.The only avenue open to Peterson in the presentation of his Newly Discovered Evidence was in the Trial Court.

In **TURNER V. STATE,673 So.2nd 382(Miss.1996)**, Turner had filed several applications for leave to the Mississippi Supreme Court,but was denied each time. Turner finially filed his motion on newly discovered evidence into the trial court where it was denied.Turner appealed and the Mississippi Supreme Court held that the appropriate standard of review of Turner's post-conviction motion was whether he had proved by a preponderance of the evidence that material facts existed which had not been previously heard and which require the vacation of his conviction or sentence.Nowhere did that court rule that Turner,who had a jury trial and had his conviction affirmed on direct appeal,had to seek leave pursuant to **Mississippi Code Ann. Section 99-39-27(Rev.2000)**,before filing pursuant to **Section 99-39-5(1)(e)and(i).**

Also the trial Court had taken jurisdiction of said motion and ordered the State to respond to the allegations of the due process violations pursuant to the United States Supreme Court's holding in **BRADY V. MARYLAND,373 U.S. 83 (1963).see LAWSON V. STATE,748 So.2nd 96(Miss.1999).**So that the trial court did assume that the allegations in Peterson's motion were of such constitutional magnitude denying him his fundamental due process rights,that it did overcome any procedural bars that would preclude relief.**see LUCKETT V. STATE,582 So.2nd 428(Miss.1991);also GRAY V. STATE,819 So.2nd 542(Miss.Ct.App.2001).**

Peterson asserts that according to the Mississippi Supreme Court's holding in **TURNER AND LAWSON**,**supra**,that pursuant to **Mississippi Code Ann. Section**

99-39-5(2) and 99-39-23-(6),that the motion that Peterson filed into the Circuit Court of Harrison County,Mississippi was properly filed and that that court had jurisdiction to rule upon the motion without leave from that Mississippi Supreme Court .

2.PETERSON'S INEFFECTIVE ASSISTANCE CLAIM IS NOT RES JUDICATA AND THE OTHER CLAIMS ARE EXCEPTED FROM PROCEDURAL BARS

Peterson's present claim of the ineffective assistance of trial counsel has never been presented by him before this time in any court State or Federal. Neither has there been any claim of ineffective assistance filed by Peterson on his direct appeal,as is clearly seen by the Appellant Brief in Cause No.96-KA-00941-COA,Rather,the Appellee had raised the effective assistance claim in their Brief,and the Court Appeals made s ruling on that issue.**(see attched Appellant Brief,and Appellee Brief)**.So that this claim is not res judicata.

Also as the Mississippi Supreme Court has held:"the application of the procedural bar of **Mississippi Code Ann.Section 99-39-21(1)**would be inappropriate to a defedant who had no earlier meaningful opportunity to present issues of denial of effective assistance of counsel.**PERKINS V. STATE,487,So.2nd 791(Miss. 1986)**.Peterson has not been given an opportunity before this time to present the ineffective assistance of counsel claim,so that,it should be excepted from any procedural bars that would prohibit review of this claim.

The ineffective assistance claim could not have been presented on direct appeal,as it could not have been raised at that time,nor was direct appeal the proper forum to present thai claim as setforth by the United States Supreme Court,and was a proper issue for collateral review.**see KIMMELMAN V. MORRISON, 466 U.S. 648,655(1984)**.And,as the Mississippi Supreme Court held in **READ V. STATE,430 So.2nd 832,837(Miss.1983)**,this Court "note that the failure to assign the lack of effective assistance of counsel at trail was not a procedural bar to the subsequent raising of the question of ineffective counsel either on appeal or in subsequent post-conviction relief proceedings."**also DUNN V. STATE, 693 So.2nd 1333,1339-40(MIss.1997).**

Peterson's claims of the prosecutorial misconduct could not have been raised on direct appeal or in any prior collateral proceeding, as this claim was hindered by the State's suppression of the exclupatory evidence in violation of due process,**see BRADY V. MARYLAND,373 U.S. 83(1963)**.and this issue is of such nature

that it should put in question the reliablity and fairness of the trial.**KYLES V.WHITLEY,115 S.CT.1555,1556(1995).**this was newly discovered evidence that bears on the constitutionality of Appellant's conviction and would probably result in a different outcome at trial if presented.**MCCLENDON V. STATE,539 So.2nd 1375,1377(Miss.1989).**

Peterson's claims are excepted from procedural bars governing paot-conviction motions,as they deal with trial errors affecting fundamental constitutional rights.**see SINGLETON V. STATE,840 So.2nd 815(Miss.Ct.App.2003).**So that,it should be an error on the part of the State that caused these issues from being presented before this time.Peterson's claims have met the cause and prejudice standard of **Mississippi Code Ann. Section 99-39-21(4)(5),**and should be heard by this Court.

This Court should also notice plain error under the authority granted this Court by **Mississippi Rules of Evidence,Rule 103(d),and Mississippi Rules of Appellate Procedure,Rule 28(a)(3),**as these errors affected Peterson's substantive and fundamental rights to a fair trail.**WILLIAMS V. STATE,794 So.2nd 181,187 (Miss.2001);LIVINGSTON V. STATE,525 So.2nd 1300(Miss.1988).**

Because the State had suppressed the forensic tests and the ballistic results, Peterson was denied his confrontation right to cross-examine the State's witnesses concerning the physical evidence presented during trial.Especially the State witnesses' testimony that there was damage done to the barrel of the alleged murder weapon.**(R.E.48).**Peterson's confrontation rights have been violated and he has been denied his right to a fair trial.

CONCLUSION

WHEREFORE PREMISES CONSIDERED,the trial court's denial of relief should be vacated and Peterson be granted a New Trial,or in the Alternative returned to Harrison County,Mississippi,for a Evidentiary Hearing on the suppressed evidence.

RESPECTFULLY SUBMITTED THIS THE 12 DAY OF MARCH,2009.

Jon Kurrie Peterson

JON KURRIE PETERSON,#65059
DELTA CORRECTIONAL FACILITY
GREENWOOD, MS 38930

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY, that I, Jon Kurrie Peterson, Appellant, have this caused to be delivered this day, via United States Postal Service, postage prepaid, a true and correct copy of the foregoing Reply Brief of Appellant to the below listed person:

W. GLENN WATTS
SPECIAL ASSISTANT ATTORNEY GENERAL
P.O. BOX 220
JACKSON, MS 39205-0220

This the 12 day of March, 2009.

Jon Kurrie Peterson

JON KURRIE PETERSON, #65059
DELTA CORRECTIONAL FACILITY
3800 COUNTY ROAD 540
GREENWOOD, MS 38930

BEFORE THE MISSISSIPPI STATE SUPREME COURT

TS NO. 96-TS-0941

JON KURRIE PETERSON — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF HARRISON COUNTY

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies pursuant to Mississippi Supreme Court Rule 28(a)(1) that the following persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Defendant/Appellant:	Jon Kurrie Peterson
Defense Attorney:	Bobby Joe Randall
District Attorney:	Cono Caranna
Assistant District Attorneys:	Steve Simpson
Circuit Court Judge:	Hon. Bob Walker

/s/ Randall

Bobby Joe Randall

April 1, 1997

BEFORE THE MISSISSIPPI STATE SUPREME COURT

TS NO. 96-TS-0941

JON KURRIE PETERSON — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other:

STATEMENT OF ISSUES

BEFORE THE MISSISSIPPI STATE SUPREME COURT

TS NO. 96-TS-0941

JON KURRIE PETERSON — APPELLANT

VS.

STATE OF MISSISSIPPI — APPELLEE

STATEMENT OF CASE

This is a criminal appeal taken from the Circuit Court, Harrison County, First Judicial District, Mississippi, wherein Jon Kurrie Peterson was convicted from a two count indictment. Count I Murder; Count II Arson, Third Degree; and sentenced to serve life imprisonment in Count I Murder and three (3) years in Count II Arson Third Degree, to run consecutively with each other in the custody of the Department of Corrections, on April 19, 1996.

STATEMENT OF THE FACTS

On the night of April 4, 1995, Darius Saucier, the victim, and the boyfriend of Wendy Thomas, agreed to accompany his girlfriend's sister, Robin Barnett, to New Orleans, Louisiana for the purpose of taking her father to catch a plane. It was a stormy, bad weather day. The pair returned to Gulfport mid-afternoon the same day, and had lunch at Kentucky Fried Chicken on Highway 49, Gulfport, Mississippi, where Wendy Thomas worked. At approximately 4:00 p.m. that same day, Saucier and Barnett went to the residence of Jon Kurrie Peterson (appellant), to get $1,200.00 which appellant Peterson allegedly owed Saucier from a prior loan. Peterson and Saucier were blood kin, and closer than brothers.

After a brief stay at Peterson's home, Saucier returned to his truck where Robin Barnett was waiting, and showed some degree of aggravation. Wendy Thomas got off work and had dinner with

Darius Saucier, who called Peterson's brother, Josh Peterson, to fix a VCR, and later that same evening took the VCR to the Peterson's home for repair, and to pick up money from Jon Kurrie Peterson owed him from the loan. Wendy did not accompany Saucier on that visit to the Peterson's home; rather, she stayed home, and later that night, fell asleep. Darius Saucier did not return home that night, and the next day Wendy put out a missing person description with the Harrison County Sheriff's Department.

On August 5, 1995, a Patrick Peterson, not related to appellant Jon Kurrie Peterson, nor is his presence related to the crime, except, he was a member of the Oil Well Hunting Club, while looking over the hunting property, found a truck which had been burned and was still smoldering. After identifying the truck as the same which had been reported missing, and belonging to Wendy Thomas, the Harrison County Sheriff's Department began an investigation to determine the whereabouts of Darius Saucier, who had been reported as a missing person. Rudy Marin, a friend of both Saucier and Peterson, was questioned and revealed that he assisted Peterson in burning the truck, but denied any part in assisting in the murder. Marin was the informant who took the Harrison County Sheriff's Department to the shallow grave where Darius Saucier's body was discovered buried. During the investigation, Rudy Marin gave the investigators several conflicting statements. Marin was allowed to enter a plea of guilty to accessory after the fact of murder; and, arson Third degree. Marin received a suspended sentence and was placed on probation for three (3) years. Main's plea, which occurred the day before the trial of Jon Kurrie Peterson convened, was highly publicized on radio, newspaper, television and other forms of media coverage. During voir dire, a great number of members of the jury venire admitted to reading Marin's story in the newspaper the morning of the first day of Peterson's trial, or, alternatively, had knowledge of the news releases.

SUMMARY OF THE ARGUMENT

Jon Kurrie Peterson assigns five (5) errors.

1. **Improper Voir Dire by State**

After the trial judge went into extensive questions, instructions and comments, he turned the jury over to the State's attorney whereupon he went into eleven pages of what can only be called, at best, a speech. MRCP Rule 5.02 Voir Dire, "the Attorney shall direct to the entire venire, questions only on matters not inquired into by the Court. Individual jurors may be examined only when proper to inquire as to answers given or for other good cause allowed by Court. .... "

In effect, the State was afforded two (2) unauthorized opening statements to the jury, in violation of the Rule. This, we contend, is reversible error. (Ab. 1, R. 49-60)

However, when defense counsel began in a like manner, and State objected, the Court sustained the objection with instructions to defense counsel "repetitive, move on." Appellant contends this comment sent the wrong message to the jury that the State had some rights and liberties which the defendant did not have. Appellant contends reversible error. (Ab. 1, R. 91 [28])

2. **The State Systematically Eliminated All Black Jurors**

The venire was made up of both black and white jurors and during the challenge portion of the trial, the defense noted "I'm losing all my black jurors." The Appellant contends that the final jury should and must be race-neutral. Further, the State was systematically eliminating all blacks from the jury venire because the defendant was a white, middle class, male. In analyzing the challenges, the State was striking those who had no knowledge of the news release in preference to those who did know about the said news releases. Also, when defense counsel raised the issue before the Court, and the record reflects that regarding Juror Evans it was noted that the Court asked the State if it had a

Batson challenge, to which the State responded adequately. The Court had a duty, at that juncture, to go back throughout the venire of all black jurors and require the State, on the record, to give the reasons why they struck those said black jurors. This was not done and thus constitutes reversible error.

3. **The Court erred in not granting appellant's motion for continuance based on prejudicial impact of radio, newspaper and other news of the plea of Marin one day before this trial**

Appellant complains that when he discovered the news releases and the number of jurors who acknowledged they read or had knowledge of the articles or broadcasts, he felt compelled to make an ore tenus motion for continuance, which the trial court denied. This case carried with it a possible life sentence and additional years, which could run consecutive, if convicted. The defendant's counsel was placed in the awkward position of bringing out all the testimony of a co-defendant before the jury was properly instructed on the law by the trial judge. Or, in the alternative, to say nothing, and take the chance they would not be unduly influenced by the complete statement of the news releases by co-defendant Marin, which gave an explicit description of what, who, when, and all else. Defense attorney requested a new venire. The majority of this jury had been already influenced by the news, and even though they indicated they could judge the evidence, human virtues was deeply implanted. Therefore, in a case of this magnitude, with the prevailing circumstances and possible sentence, appellant complains that this jury was tainted from the beginning, and therefore, should have been struck. It should also be noted here that during the trial, the element of discovery violation occurred. The State requested and was given a short continuance by the Court concerning the "shoes". The defense, on the other hand, was not afforded any consideration by the Court to the erroneous problem of obvious prejudice of the entire jury venire. There is no clear guidelines as to what specifically is

prejudicial and appellant complains that prejudice should not be a legal fiction. This is plain error and appellant deserves and demands a new trial. (Ab. 5; R. 644-658)

4. **Complete Disparity in Sentences of Co-Defendants**

Appellant complains of the complete disparity in sentences of all co-defendants. In U.S. v. Wheeler, 802 F.2d 778 (5th Cir. 1986) and McGelfrey 1 & 2, (Forrest County), the Court indicated in meeting out sentences a factor analysis must be used.

Appellant assigns as plain error that these Wheeler and McGelfrey 1 & 2 factors were never considered. The entire record is based to that fact. The co-defendant Marin, as accessory after the fact of murder; and Third Degree arson, was given a suspended sentence and placed on probation. Venessa McClendon was given complete immunity and nol pros. This Appellant asserts that he was not afforded a fair trial, not allowed a continuance, timely requested; not permitted to have an unprejudiced jury; and in the sentencing phase was not allowed a factor analysis by the trial judge covering the disparity of sentences of co-defendants.

Appellant's Motion for New Trial should have been granted. (Ab. Exh 1 R 25-27) (Final Judgment Third Day at Exh 1; R 55)

5. **Duty of trial court to insert manslaughter and self-defense jury instructions**

Appellant complains that the trial court has a duty to insert a jury instruction on both manslaughter and self-defense, even when it is not requested by the defense. The failure to have provided said instructions to the jury shifts the burden of proof, improperly, upon the defendant to prove that the alleged crime was something other or less than murder. This is reversible error, and appellant demands a new trial (Exb 1; R 28-54)

U.S. Chief Justice Oliver Wendall Holmes once said while addressing an adversary, "most men

are products of defective virtues, and you sir, are a man of many virtues."

CONCLUSION

This case points clearly to the many defective virtues of the human element. In order for our system, which is the best ever designed in the minds of man, will succeed, it must be allowed to work with the utmost alert supervision, ever mindful of the right of the accused to have access to complete justice, in its highest and best sense. Appellant complains he has not been afforded that inalienable privilege. This case must be retried, with the due care and diligence it demands. Not perfect care or diligence; to do otherwise, will, we contend, further diminsh our system of justice. "It is better that some criminals escape, that one man be wrongfully convicted" (author unknown).

Appellant pleads and demands and deserves a new trial.

Respectfully submitted,

JON KURRIE PETERSON, Appellant

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JON KURRIE PETERSON	APPELLANT
versus	No. 96-KA-0941
STATE OF MISSISSIPPI	APPELLEE

BRIEF FOR APPELLEE

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JON KURRIE PETERSON — APPELLANT

versus — No. 96-KA-0941

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History: In September of 1995, the Grand Jury of the First Judicial District of Harrison County, in Cause No. B-2401-95-00755, returned an indictment charging (in Count I) Jon Kurrie Peterson with the murder of Joseph Darius Saucier; (in Count II) Jon Kurrie Peterson and Francis Rudolph Marin with the third-degree arson of Wendy Thomas's pick-up truck; and (in Count III) Francis Rudolph Marin as an accessory after the fact to the crime of murder (CP. 6-7).

On September 19, 1995, Peterson moved for severance of defendants (CP. 22-23). The Appellee does not find a written order of severance, but it appears that the motion was granted or that it was agreed that Peterson and Marin would be tried separately.

On April 15, 1996, Marin pleaded guilty to the indictment and was sentenced to suspended and concurrent terms of three years in

Count II (arson) and five years in Count III (accessory after the fact, murder), and placement on three years' probation (CP. 4; R.IV/ 305-306).

On April 16, 1995, Peterson went to a jury trial and was found guilty on both counts on April 19, 1996 (CP. 54; R.VI/ 741). On the same day, the Circuit Court, Honorable Robert Harry Walker, Circuit Judge, presiding, having pronounced judgment on the verdicts, sentenced Peterson to consecutive terms of life imprisonment for murder and three years' imprisonment for third-degree arson (CP. 55-56; R.VI/ 742-743).

Substantive Facts: Wendy Thomas and Darius Saucier were fiances and were living together in Gulfport. Saucier was Peterson's second cousin, and the two spent a lot of time with each other. In July of 1995, Saucier loaned $1200.00 to Peterson, and Saucier made several unsuccessful attempts to get Peterson to pay him back (R. II/ 140-142).

On August 4, 1995, Saucier and Wendy Thomas's sister, Robin Barnett, returned to Gulfport from a trip to New Orleans, and at about 1:30 p.m. went to the Peterson house. Barnett, who stayed in the car while Saucier went inside, saw Rudy Marin, a girl, and a motorcycle at the Peterson house (R.III/ 167-171; 180). When Saucier came out of the house, he was visibly upset and would not talk to her. Barnett dropped Saucier off at his house, and the next morning she learned from her sister that Saucier was missing (R.III/ 172-173).

On the evening of August 4, 1995, Saucier went to the Peterson house in Thomas's Ford Ranger truck to get Kurrie Peterson's

brother Josh to repair a VCR and to try again to get his money back from Kurrie Peterson. Thomas expected him to return home at about 9:00 p.m., but she never saw him again. The next morning she called the Peterson house looking for Saucier, and then went out with her sister, Robin, to look for him. Later that morning she filed a missing-person report with the Gulfport police department. She spoke with Kurrie Peterson, who told her he had paid Saucier $800.00. Later, she learned that her truck had been found (R.II/ 144-150).

At about 4:00 p.m. on August 5, 1995, Patrick Peterson, a member of a hunting club, discovered Wendy Thomas's truck, which had been burned and was still smoking, and he reported this to the sheriff's office (R.III/ 189-190).

Investigator Calvanese received the missing-person report and the report of the burned truck. He went out to where the truck was and observed motorcycle tracks. He interviewed Wendy Thomas and Robin Barnett, and, on the morning of the 6th, went to the Peterson residence (R.III/ 198, 201, 202). He interviewed Kurrie Peterson, who at first told him he had given Saucier $100.00, but changed his story and said $800.00 when Calvanese told he had been told in his previous interviews (R.III/ 204). What previous interviews?

Calvanese then went to the home of Rudy Marin, observed that the tires on a motorcycle he saw there appeared to match the tracks he had seen in the area of the burned truck, and interviewed Marin (R.III/ 205-206). Marin was arrested for arson, gave a taped statement to the sheriff's department, and led the investigators to the place where Peterson had buried Saucier (R.III/ 207-209). In

the cab of the burned truck, underneath the driver's seat, Calvanese found a spent cartridge, Exhibit 8 (R.III/ 210-211), which was fired in the pistol, Exhibit 9 (R.IV/ 382).

On the afternoon of August 6th, Calvanese interviewed Vanessa McClendon. She subsequently was charged as an accessory after the fact to the crime of murder, but her case later was nol prossed (R.III/ 211-212; 213-214).

Jon Peterson, Kurrie Peterson's father, consented to a search of the Peterson house, and during that search Officer Tony Sauro found the pistol, Exhibit 9 (R.III/ 248-249). The officers also recovered numerous items from what is referred to in the testimony as the burn pile (R.III/ 235; 251; 278-280).

Dr. McGarry performed the autopsy and found five gunshot wounds (R.III/ 299, 300).

Rudy Marin testified that on August 4th he went to Kurrie Peterson's house, where Peterson told him he had come at a bad time, since he (Peterson) was fixing to kill Darius Saucier (R.IV/ 307). That night, Marin was present at the Marin house when Saucier came over with the VCR (R.IV/ 309). Later, Marin went to a roadhouse called the Frontier, and Kurrie Peterson called Marin on the telephone there and told him that he (Peterson) had killed Saucier (R.IV/ 311). The next day, Marin saw Peterson and Peterson's girlfriend, Vanessa McClendon, and Peterson again told him he had killed Saucier. Peterson took Marin and showed him the truck, and Marin saw blood all over the seat (R.IV/ 314). Peterson told Marin that he had told Saucier that the money was at the bridge and that when he and Saucier went to the bridge he pulled

out his gun and shot Saucier five times (R.IV/ 314-315). Marin helped Peterson set fire to the truck and then took Peterson home, where Peterson unloaded his pistol by firing it into the ground (R.IV/ 315-317). He identified Exhibit 9 as Kurrie Peterson's pistol (R.IV/ 318-319). After cleaning the pistol, Peterson changed clothes and burned the clothes he had been wearing when he killed Saucier (R.IV/ 319). Peterson indicated to Marin where he had buried Saucier (R.IV/ 320).

Vanessa McClendon testified that Kurrie Peterson told her he was going to kill Saucier (R.IV/ 392-393). She was present when Saucier came over with the VCR (R.IV/ 393). Peterson and Saucier left together in the truck, and a few minutes later McClendon heard five or six gunshots (R.IV/ 395-398). She also identified Exhibit 9 as Peterson's pistol (R.IV/ 399). A few minutes after the shooting, Peterson returned in the truck and asked Vanessa if he had any blood on him; she didn't see any, but he washed off, just in case. Peterson spoke on the phone with Rudy Marin, waited about fifteen minutes, and then went and got a shovel (R.IV/ 399-403).

Vanessa went with Peterson in the truck, riding in the bed, and when they stopped she saw Saucier in the cab. Peterson pulled Saucier's body from the truck, dragged him through the woods, and buried him (R.IV/ 404-407). She was present the next day when Peterson told Marin he had killed Saucier (R.IV/ 412) and when Peterson emptied the pistol (R.IV/ 415) and when Peterson burned the clothes he was wearing when he killed Saucier (R.IV/ 415-416).

SUMMARY OF THE ARGUMENT

1. The Appellant's contentions regarding the conduct of the voir dire are procedurally barred and are shown by the record to be meritless.

2. The Appellant has shown no "Batson" error.

3. The trial court's denial of the motion for continuance or for quashal of the venire on the claim of undue pre-trial publicity should be reviewed by the same standard as a denial for change of venue. There is no showing that the jury was unduly prejudiced, and there is no showing of abuse of discretion.

4. The Appellant cannot make an objection as to sentencing initially on appeal.

5. The court was not asked to give manslaughter or self-defense instructions, and there was no evidentiary basis for either.

6. The Appellant has made no effort at all to meet his burden of overcoming the presumptions in favor of the trial court's judgment and in favor of counsel's competence.

ARGUMENT

PROPOSITION I

THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO THE VOIR DIRE.

The defense made no objection at trial to the court's conduct of the voir dire. The defense made no objection to the State's voir dire, nor did the defense aver at trial that the court in any way favored the State over the defense in their respective voir dires. The Appellant's first assignment of error is procedurally barred. An objection cannot be raised initially on appeal. ***Williams v State***, 684 So2d 1179, 1203 (Miss., 1996).

The Appellee, without conceding the procedural bar, notes that the averments in the Appellant's brief are without support in the record. The State's voir dire, which takes up twenty-one pages in the transcript (R.II/ 40-60), was not a speech or an opening statement; it was an ordinary voir dire in which the prosecutor asked the venire proper questions. The defense's voir dire, which takes up thirty-two pages in the transcript (R.II/ 60-92), also was a typical, ordinary voir dire. Near the end of the defense's voir dire, the State interposed one objection, which was sustained by the trial court (R.II/ 91). There is nothing to the Appellant's first assignment of error.

The Appellee respectfully submits that the Appellant's first assignment of error is procedurally barred and is without merit.

PROPOSITION II

THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO THE STATE'S EXERCISE OF ITS PEREMPTORY CHALLENGES.

The trial court noted for the record that there were five black veniremen, to-wit, Watts, Spann, Durr, White and Evans (R.II/ 96). Spann was seated on the jury (R.II/ 98, 100, 104). The State struck Watts, Durr and White (R.II/ 97, 98, 101), and it struck Evans as an alternate (R.II/ 101).

The only "Batson[1]" objection interposed by the defense was specifically as to Evans (R.II/ 101), and the State gave a race-neutral explanation for this strike (R.II/ 102). The defense stated on the record that it had no other objections to the manner of the selection of the jury (R.II/ 103).

The Appellant contends that the trial court, after asking if the defense had an objection to the State's strike of Venireman Evans, and after receiving a satisfactorily race-neutral explanation from the State for that strike, then had a "duty, at that juncture, to go back through the venire of all black jurors and require the State, on the record, to give the reasons why they [*sic*] struck the black jurors". The Appellant cites no authority in support of this contention and makes no attempt to argue why the Batson doctrine should be interpreted to support this contention. The Appellee respectfully submits that the Appellant accordingly has not met his burden of persuasion on appeal. ***Brown v State***, 690

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[1]***Batson v Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Presumably, since the Defendant was white, the Appellant meant to cite the case of ***Powers v Ohio***, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). *See*, ***Davis v State***, 660 So2d 1228, 1240 (Miss., 1995).

So2d 276, 297 (Miss., 1996); ***Holloman v State***, 656 So2d 1134, 1141 (Miss., 1995).

Furthermore, the defense affirmed that it had no other objections (R.II/ 103), and it would seem that this was a waiver at trial that must bar presentation of the matter on appeal. *See*, ***Conner v State***, 632 So2d 1239, 1264 (Miss., 1993), cert. den., --- U.S. ---, 115 S.Ct. 314, 130 L.Ed.2d 276 (1994) (failure to object to State's peremptory challenges waives any and all claims to composition of jury), and ***Brown v State***, 682 So2d 340, 350 (Miss., 1996) ("objection at trial cannot be enlarged in a reviewing court to embrace an omission not complained of at trial").

The Appellant also contends that defense counsel had a duty to cause the record to reflect the race and gender of the veniremen peremptorily removed by the State. The trial judge took care of this, and the Appellant's contention seems pointless.

The Appellee respectfully submits that the Appellant's second assignment of error is without merit.

PROPOSITION III

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR CONTINUANCE OR TO QUASH THE VENIRE ON THE GROUNDS OF PRE-TRIAL PUBLICITY.

The trial judge, at the commencement of the voir dire, asked if any of the veniremen had any knowledge of this case or had heard about this case from any source whatsoever (R.II/ 20). Those answering in the affirmative were Veniremen Morrison, Cuevas, Russell, Fayard, MacIver, Thomas, Canter (R.II/ 21), Hoke (R.II/ 22), Fabacher and Hanby (R.II/ 23). The judge very carefully determined that these veniremen had merely heard or read factual news accounts regarding the case and that nothing they had heard or read would prevent them from deciding the case on the evidence and reaching a fair verdict (R.II/ 23-26).

After voir dire, the defense brought to the court's attention an article on the front page of the Coast & State section of The Daily Herald relating that the co-indictee, Rudy Marin, had pleaded guilty the previous day and would be testifying as a witness for the State at Peterson's trial, and on this basis the defense moved that the case be "reset to a time when we can get a jury that has not seen such an article as this on the very morning of the trial beginning" (R.II/ 108-111).

The trial court reviewed the news article, found that it contained nothing "offensive or prejudicial that would require the court to strike the venire", and noted the specific inquiries made by the court at voir dire and the veniremen's responses (R.II/ 115-116).

The court noted that of the ten veniremen who had indicated that they had any knowledge of the case, nine -- all except Miss Canter -- had been removed peremptorily by either the State or the defense. Miss Canter was accepted by both sides, and the defense was left with three peremptory challenges and so could have removed her had it chosen to do so (R.II/ 116-117).

The Appellant assigns error to the court's denial of the motion for continuance or to quash the venire, but since the Appellant cites no authority in support of his assignment of error, the Court need not consider it. ***Thibodeaux v State***, 652 So2d 153, 155 (Miss., 1995).

Whether the defense's motion is taken as a motion for continuance or as a motion to quash the venire, the standard for review of the trial court's ruling is the abuse-of-discretion standard. ***Walker v State***, 671 So2d 581, 592 (Miss., 1995) (ruling on motion for continuance is committed to trial court's discretion); ***Taylor v State***, 672 So2d 1246, 1264 (Miss., 1996) (trial court's determination as to whether veniremen can be fair and impartial jurors will not be reversed unless clearly wrong).

Where pre-trial publicity is the ground asserted for a motion to quash the venire, this Court has held that the defendant's proper remedy is to move for a change of venue. ***Hoops v State***, 681 So2d 521, 526 (Miss., 1996). Assuming for the sake of argument that a properly-documented motion for change of venue had been made in this case on these facts, the trial court would not have been in error for denying it, since the voir dire clearly revealed that the venire was not unduly prejudiced by the publicity. ***Simon v State***,

633 So2d 407, 411 (Miss., 1993), vac. on other grounds, --- U.S. ---, 115 S.Ct. 413, 130 L.Ed.2d 329 (1994). *See also,* ***Burrell v State,*** 613 So2d 1186, 1189-1190 (Miss., 1993) (Supreme Court defers to trial court's ruling on issue of media coverage); ***Box v State,*** 610 So2d 1148, 1153 (Miss., 1992) (no abuse of discretion in denial of change of venue, even though high number of veniremen had heard about case); ***Mitchell v State,*** 609 So2d 416, 420 (Miss., 1992) (ruling on motion for change of venue on claim of pre-trial publicity is committed to trial court's discretion).

The only trial juror who had been exposed to the news reports was Canter. The trial court observed that the defense accepted her as a juror and that it had unused peremptory strikes remaining. In this situation, the Appellant cannot complain about the seating of Miss Canter on the jury. ***Davis v State,*** 660 So2d 1228, 1243 (Miss., 1995) (denial of challenge for cause not assignable as error where defense has not exhausted peremptories).

The Appellee respectfully submits that the Appellant's third assignment of error is without merit.

PROPOSITION IV

THE TRIAL COURT COMMITTED NO SENTENCING ERROR.

The defense made no objection to his sentence in the trial court, and objections as to sentence cannot be made initially on appeal. ***Hewlett v State***, 607 So2d 1097, 1107 (Miss., 1992). The Appellee does not waive the procedural bar.

Jon Kurrie Peterson was indicted for and was convicted of the crimes of murder and third-degree arson. His co-indictee, Marin, was not charged with murder; he was charged with and pleaded guilty to accessory after the fact to the crime of murder, and third-degree arson. The Appellant has not cited any authority or offered any cogent argument in support of his contention that criminals convicted of different crimes must be sentenced equally. As to Vanessa McClendon, the decision to cut a deal with one indictee to testify against another is a matter of prosecutorial discretion. ***Clemons v State***, 535 So2d 1354, 1357-1358 (Miss., 1988), vac. on other grounds, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), citing ***Culberson v State***, 379 So2d 499 (Miss., 1979).

The Appellee respectfully submits that the Appellant's fourth assignment of error is without merit.

PROPOSITION V

THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO JURY INSTRUCTIONS.

Since there was no evidence to support the giving of either a manslaughter instruction or a self-defense instruction, trial counsel of course requested neither. The trial court is not required to give unrequested instructions, ***Ballenger v State***, 667 So2d 1242, 1252 (Miss., 1995), and it cannot give an instruction for which there is no evidentiary basis. ***Catchings v State***, 684 So2d 591, 596 (Miss., 1996).

The Appellee respectfully submits that the Appellant's fifth assignment of error is frivolous.

PROPOSITION VI

THE TRIAL COURT COMMITTED NO ERROR WITH RESPECT TO THE DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Appellant has made no effort to show that the trial court had any basis at all to find that trial counsel's performance did not meet constitutional standards. The Appellee respectfully rests on the presumption in favor of the trial court's judgment, ***Gates v Gates***, 616 So2d 888, 890 (Miss., 1993), and the presumption in favor of counsel's competence and effective assistance. ***Foster v State***, 687 So2d 1124, 1130 (Miss., 1996).

The Appellee respectfully submits that the Appellant's sixth assignment of error is without merit.

CONCLUSION

The Appellee respectfully submits that there was no reversible error, if error at all, in the court below, and that the judgment of the circuit court herein ought to be affirmed.

Respectfully submitted, this the 10th day of July, 1997.

MIKE MOORE
ATTORNEY GENERAL

DeWitt T. Allred III
Special Assistant Attorney General

CERTIFICATE OF SERVICE

I, the undersigned DeWitt T. Allred III, Special Assistant Attorney General, do hereby certify that I have caused correct copies of the foregoing **BRIEF FOR APPELLEE** to be mailed, postage prepaid, to the following persons:

Honorable Robert Harry Walker
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This the 10th day of July, 1997.

DeWitt T. Allred III
Special Assistant Attorney General