IN THE SUPREME COURT OF MISSISSIPPI

ROGER GILLETT, *Appellant*

versus **NO. 2008-DP-00181-SCT**

STATE OF MISSISSIPPI, *Appellee*

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF MISSISSIPPI

ROGER GILLETT, *Appellant*

versus **NO. 2008-DP-00181-SCT**

STATE OF MISSISSIPPI, *Appellee*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This case arises from two homicides that occurred on March 20, 2004. On that date, Linda Heintzelman ("Heintzelman") and Vernon Hulett ("Hulett") were murdered at their home in Forrest County, Mississippi. On September 30, 2004, Roger Lee Gillett ("Appellant") was indicted, along with his co-defendant Lisa Jo Chamberlin ("Chamberlin") for the capital murders of Heintzelman and Hulett pursuant to Miss. Code Ann. 97-3-19(2)(e). R. 21-22. They were charged with murdering the victims while engaged in the commission of robbery. *Id.*

Prior to trial numerous motions were filed and heard by the trial court on January 22, 2007, March 2, 2007, May 17, 2007, August 3, 2007, September 20, 2007, and October 19, 2007. Jury selection began in Forrest County on October 29, 2007, and concluded the next day. The trial commenced on October 31, 2007, and continued until its conclusion on

November 2, 2007. Gillett was found guilty of two counts of capital murder. A sentencing hearing was then conducted, after which, on November 3, 2007, the jury returned the following:

COUNT I

We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of Capital Murder in Count I:

(1) That the Defendant actually killed Linda Heintzelman;

(2) That the Defendant attempted to kill Linda Heintzelman;

(3) That the Defendant intended the killing of Linda Heintzelman to take place; or

(4) That the Defendant contemplated that lethal force would be used.

Next we, the jury, unanimously find that the aggravating circumstances of:

(1) The capital offense was committed while the Defendant was engaged, or was an accomplice in the commission of, or an attempt, or flight after committing or attempt to commit a robbery.

(2) The capital offense was especially heinous, atrocious or cruel.

(3) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

(4) The Defendant was previously convicted of a felony involving the use of or threat of violence to the person.

is/are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find that the Defendant should suffer death in Count I.

John A. Shows
Foreman of the Jury

and

COUNT II

We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of Capital Murder in Count II:

(1) That the Defendant actually killed Vernon Hulett;

(2) That the Defendant attempted to kill Vernon Hulett;

(3) That the Defendant intended the killing of Vernon Hulett take place; or

(4) That the Defendant contemplated that lethal force would be used.

Next we, the jury, unanimously find the aggravating circumstances of:

(1) The capital offense was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt, or flight after committing or attempt to commit a robbery.

(2) The capital offense was especially heinous, atrocious or cruel.

(3) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

(4) The Defendant was previously convicted of a felony involving the use of or threat of violence to the person.

is/are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find that the Defendant should suffer death in Count II.

John A. Shows
Foreman of the Jury

R. 992-95.

On November 16, 2007, Appellant filed a post-trial "Motion for A New Trial; And If Motion For New Trial is Denied, Then A Motion For A New Sentencing Hearing." R. 1242-45. On January 25, 2008, the court denied the Appellant's motion. R. 19. The Appellant, Roger Lee Gillett appeals, *in forma pauperis*, represented by his trial attorneys, and raises the following assignments of error for consideration by this Court:

CLAIM 1. THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS THE WARRANTLESS ARREST OF MR. GILLETT AND SEIZURES INCIDENT THERETO

CLAIM 2. BECAUSE MR. GILLETT NEVER WAIVED HIS MIRANDA RIGHTS, THE TRIAL COURT ERRED IN DENYING SUPPRESSION OF MR. GILLETT'S CUSTODIAL STATEMENT AND ERRED IN DENYING SUPPRESSION OF THAT PORTION OF THE CUSTODIAL STATEMENT EXTRACTED AFTER MR. GILLETT COINCIDENTALLY INVOKED HIS RIGHT TO COUNSEL

CLAIM 3. THE TRIAL COURT ERRED IN DENYING MR. GILLETT'S MOTION TO SUPPRESS DIRECT AND DERIVATIVE SEIZURES FROM A WARRANTED SEARCH AT 606 NORTH ASH STREET, CITY OF RUSSELL

CLAIM 4. THE TRIAL COURT ERRED IN DENYING MR. GILLETT'S MOTION TO SUPPRESS DIRECT AND DERIVATIVE SEIZURES FROM A WARRANTED SEARCH AT 5482 190TH STREET, COUNTY OF RUSSELL

CLAIM 5. COUNT TWO OF THE INDICTMENT, CHARGING THE CAPITAL MURDER OF VERNON HULETT, SHOULD NOT HAVE PROCEEDED TO THE JURY.

CLAIM 5(A) THEREFORE, IT IS REVERSIBLE ERROR TO OVERRULE MR. GILLETT'S MOTION FOR A DIRECTED VERDICT ON COUNT TWO AND JURY INSTRUCTION D-72, THE PEREMPTORY INSTRUCTION ON COUNT TWO, AND MR. GILLETT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

CLAIM 5(B) BECAUSE COUNT TWO SHOULD NOT HAVE GONE TO MR. GILLETT'S JURY, THE VERDICT OF GUILTY AS CHARGED ON COUNT TWO IS LEGALLY INSUFFICIENT AND CANNOT STAND

CLAIM 6 ENTIRELY BECAUSE COUNT TWO WAS LEGALLY INSUFFICIENT FOR REASONS STATED IN CLAIM 5, THE DEATH SENTENCE FOR THE CONVICTION UNDER COUNT ONE MUST ALSO BE VACATED AS IT IS PREMISED ON INADMISSIBLE EVIDENCE OF BAD CHARACTER

CLAIM 7 MR. GILLETT'S OBJECTIONS TO JURY INSTRUCTIONS S-5 AND S-6 SHOULD HAVE BEEN SUSTAINED. IT WAS REVERSIBLE ERROR TO

INCLUDE JURY INSTRUCTIONS S-5 AND S-6 IN THE JURY CHARGE

CLAIM 8 PERMITTING EXPERT OPINION CONCERNING DNA RESULTS OVER MR. GILLETT'S *DAUBERT* OBJECTION WAS REVERSIBLE ERROR

CLAIM 9 THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REFUSING JURY INSTRUCTIONS D-42, D-44 AND D-45, INDIVIDUALLY AND COLLECTIVELY, IN DOING SO, THE TRIAL COURT EXCLUDED MR. GILLETT'S THEORY OF DEFENSE FROM THE JURY CHARGE

CLAIM 10 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTIONS D-53 AND D-60, MR. GILLETT'S LESSER-INCLUDED INSTRUCTIONS, IN THE JURY CHARGE

CLAIM 11 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-19 IN THE JURY CHARGE

CLAIM 12 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-25 IN THE JURY CHARGE

CLAIM 13 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-41 IN THE JURY CHARGE

CLAIM 14 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION D-20 IN THE JURY CHARGE

CLAIM 15 THE CONVICTIONS MUST BE REVERSED AS THE STATE NEVER SATISFACTORILY ESTABLISHED VENUE

CLAIM 16 THE TRIAL COURT ERRED IN OVERRULING MR. GILLETT'S OBJECTION TO INADMISSIBLE SOURCE HEARSAY

CLAIM 17 MR. GILLETT'S CONVICTIONS ARE UNSUPPORTED BY THE EVIDENCE ADDUCED AT TRIAL AND ARE AGAINST THE OVERWHELMING WEIGHT OF EVIDENCE

CLAIM 18 THE TRIAL COURT ERRED IN OVERRULING MR. GILLETT'S OBJECTION TO THE MISS. CODE ANN. 99-19-101(5)(E) AGGRAVATOR, THEREFORE, IT WAS ERROR TO INCLUDE THE "AVOIDING ARREST" AGGRAVATOR IN JURY INSTRUCTION S-5-S AND JURY INSTRUCTION S-6-S

CLAIM 19 THE TRIAL COURT ERRED IN OVERRULING MR. GILLETT'S OBJECTION TO THE MISS. CODE ANN. 99-19-101(5)(B) AGGRAVATOR, THEREFORE, IT WAS ERROR TO INCLUDE THE "PREVIOUS VIOLENT FELONY" AGGRAVATOR IN JURY INSTRUCTION S-5-S AND JURY INSTRUCTION S-6-S

CLAIM 20 THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTION S-4-S AS THE INSTRUCTION INSUFFICIENTLY LIMITED THE MISS. CODE ANN. 99-19-101(5)(H) AGGRAVATOR.

CLAIM 21 THE "FELONY MURDER" AGGRAVATOR AT MISS. CODE ANN. 99-19-101(5)(D) IN THIS CASE IS UNCONSTITUTIONALLY DUPLICATIVE AND THE TRIAL COURT ERRED IN SUBMITTING IT TO THE JURY. IN LIGHT OF THIS, AS WELL AS CLAIM 18, 19 AND 20, NO LAWFUL AGGRAVATION EXISTS AND THE DEATH SENTENCE MUST BE VACATED

CLAIM 22 THE TRIAL COURT "CHARGED OUT" MR. GILLETT AT THE PENALTY PHASE WHEN THE TRIAL COURT DENIED THE TOTALITY OF MR. GILLETT'S THEORY OF DEFENSE INSTRUCTIONS; NAMELY JURY

INSTRUCTIONS DA-30, DA-31, DA-49, DA-50, DA-51, DA-52, DA-53, DA-54, DA-55, DA-56, AND DA-59

CLAIM 23 THE TRIAL COURT ERRED IN GIVING JURY INSTRUCTION S-1-S AND ERRED IN REFUSING TO GIVE JURY INSTRUCTION DA-61

CLAIM 24 THE TRIAL COURT ERRED IN GIVING CONTRADICTORY INSTRUCTIONS ON THE INDEPENDENT DUTY OF EACH JUROR TO CONSIDER MITIGATION AND, POTENTIALLY AT LEAST, VOTE LIFE. THE TRIAL COURT THEN COMPOUNDED THIS ERROR IN REFUSING TO GIVE INSTRUCTIONS SUBMITTED BY MR. GILLETT THAT MAY HAVE REMEDIED THIS UNLAWFUL INCONGRUITY

CLAIM 25 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE JURY INSTRUCTION DA-13, MR. GILLETT'S INSTRUCTION THAT THE DEATH PENALTY IS NEVER REQUIRED IN THE STATE OF MISSISSIPPI, IN THE JURY CHARGE

CLAIM 26 THE TRIAL COURT ERRED IN REFUSING ANY AND ALL OF MR. GILLETT'S "PRESUMPTION OF LIFE" INSTRUCTIONS

CLAIM 27 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE INSTRUCTIONS DA-66 AND DA-67, MR. GILLETT'S INSTRUCTIONS ADVISING HIS JURY OF THE CONSEQUENCES OF THE JURY'S FAILURE TO UNANIMOUSLY AGREE ON A SENTENCE, IN THE JURY CHARGE

CLAIM 28 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE INSTRUCTION DA-5 AND DA-63 IN ITS CHARGE TO THE JURY

CLAIM 29 THE TRIAL COURT ERRED IN REFUSING TO INCLUDE INSTRUCTION DA-38, MR. GILLETT'S MARSH INSTRUCTION, IN THE JURY CHARGE

CLAIM 30 FORENSIC MISCONDUCT OCCURRING DURING FIRST-PHASE SUMMATION AND SECOND-PHASE SUMMATION REQUIRES THE CONVICTIONS TO BE REVERSED AND THE SENTENCE VACATED

CLAIM 31 AUTOPSY PHOTOS INTRODUCED AT TRIAL AND AT THE PENALTY PHASE WERE UNDULY PREJUDICIAL AND REQUIRE APPELLATE RELIEF

CLAIM 32 IN LIGHT OF ALL PREVIOUS CLAIMS, MR. GILLETT'S DEATH SENTENCE IS THE PRODUCT OF AN INVALID PENALTY PHASE. AS THE STATE HAS FAILED TO DEMONSTRATE THAT DEATH IS THE APPROPRIATE SENTENCE, THE EXECUTION OF MR. GILLETT SHALL VIOLATE HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND HIS ARTICLE THREE, SECTION TWENTY-EIGHT RIGHTS

CLAIM 33 PURSUANT TO MISS. CODE ANN. 99-19-105(3)(a) AND THE CONSTITUTIONAL PROHIBITION AGAINST ARBRITRARY INFLICTION OF THE DEATH SENTENCE, MR. GILLETT'S SENTENCE MUST BE VACATED

CLAIM 34 PURSUANT TO MISS. CODE ANN. 99-19-105(3)(c), MR. GILLETT'S DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE

CLAIM 35 THE AGGREGATE ERROR [SIC] THIS CASE REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH SENTENCES AS A MATTER OF FEDERAL CONSTITUTIONAL LAW

CLAIM 36 THE AGGREGATE ERROR IN THIS CASE REQUIRES REVERSAL OF THE CONVICTION AND DEATH SENTENCE AS A MATTER OF STATE LAW

CLAIM 37 MISS. CODE ANN. 99-19-101 IS FACIALLY UNCONSTITUTIONAL

As the following analysis demonstrates, each of the issues raised on appeal is either barred from consideration or without legal merit. Accordingly, Appellant's conviction and sentence should be affirmed.

STATEMENT OF FACTS

On March 29, 2004, members of the Russell County, Kansas Sheriff's Department received information from Debbie Milan, Gillett's aunt, that Gillett was involved in manufacturing illegal narcotics and was in possession of a stolen pick-up truck. Tr.911-12. Agent Matthew Lyon, a narcotics investigator with the Kansas Bureau of Investigation (KBI) was contacted for assistance. Tr.1172. Based on the information received from Milan, and other corroborating facts, Agent Lyon sought out and obtained two search warrants. Tr.1175-76.

Gillett, along with co-defendant Chamberlin, was located and arrested on felony narcotics charges as a result of the first search warrant. Tr. 918. Gillett was transported to the Russell County Jail and was interviewed there by Agent Lyon where, after having been of his Miranda Rights, Gillett initially made a request to have a lawyer and then withdrew that request after having been informed of the charges against him and the possibility of additional charges. State's Exhibit 61. After a brief statement where he acknowledged that

he had been in Mississippi recently and had not been to the farm, which was the location of the second search warrant, Gillett again stated his desire for a lawyer and the interview was terminated. State's Exhibit 61.

During the execution of the second search warrant the officers entered a shed located on the property and discovered a freezer. Tr. 921. When the freezer was opened, the officers discovered the remains of two human bodies. Tr. 922-23.

Gillett was not interviewed further regarding the bodies found in the freezer however, Chamberlin did give the authorities a statement and led them to a local landfill where she and Gillett had disposed of garbage bags containing property associated with the victims. Tr. 1213.

Based on the information received, the Kansas authorities contacted police in Hattiesburg to check the residence of Heintzelman and Hulett. Tr. 1434-35. The house was subsequently searched and evidence consistent with blood stains was located throughout the house. Tr. 1494-1505. Also located was a the impression of a footprint on the floor which was cut out an removed for further analysis. Tr. 1512. A shoe recovered from the garbage bags at the landfill was found to have been the source of the footprint. Tr. 1507-23. The shoe was also found to contain evidence of Linda Heintzelman's blood. Tr. 1540.

At trial, testimony revealed that Chamberlin and Gillett's had driven to Hattiesburg from Kansas and were staying with Heintzelman and Hulett. Chamberlin and Gillett's vehicle had been damaged in a wreck while on a trip to the Mississippi Gulf Coast. Tr.1027-

33. The last time anyone had seen the victims was March 19, 2004. Tr. 1044. Gillett told relatives that the couple had gone to the coast with a friend. Tr. 1044-45.

Shortly thereafter, Gillett and Chamberlin arrived in Kansas driving the victim's truck. The truck had a tarp over a rectangular object in the bed of the truck. Gillett informed two friends that he had stolen the truck from the owners, had killed the owners and they were in the back of the truck. Tr. 1069-70, 1094. One of those individuals Gillett confessed to, later went to what was called the Gillett farmstead and observed a freezer in one of the sheds on the property. Tr.1079-80. The freezer was identified by Mr. Hulett's mother as having belonged to the murdered couple and was last seen at their residence in Hattiesburg. Tr. 1016.

The pathologist that conducted the autopsies found Ms. Heintzelman to have suffered at least 69 separate injuries prior to her death, involving injuries caused by blunt force trauma, cutting, stabbing and suffocation. Tr. 1360-81. Ms. Heintzelman's death was caused by multiple injuries to her torso, head and neck; also asphyxiation or lack of oxygen in her airway. Tr. 1380. The pathologist found Mr. Hulett to have sufferred numerous injuries as well. Tr. 1382-90. Mr. Hulett's death was caused by blunt force trauma to the head. Tr. 1390-91.

SUMMARY OF THE ARGUMENT

The trial court had sufficient information upon which to conclude that Gillett's arrest was lawful. Therefore, there was no error in the court's denial of his motion to suppress the

evidence of his arrest. The statement made by Gillett after his arrest was not then subject to suppression. Gillett's claim that evidence of his fingerprints were not suppressed is a new claim on appeal and procedurally barred from consideration.

The trial court had sufficient information upon which to conclude that Gillett's statement to law enforcement following his arrest was knowingly and voluntarily given. Therefore, there was no error in the denial of his motion to suppress the statement .

The trial court had sufficient information upon which to conclude that search warrants issued for North Ash and the Gillett farm were based upon probable cause. Therefore, there was no error in the denial of the motion to suppress any evidence obtained as a result of the warrants.

Gillett was properly charged with the capital murder of Vernon Hulett during the commission of a robbery and there was no error in refusing Gillett's for directed verdict, peremptory instruction or motion for new trial.

All jury instructions were either properly allowed for consideration by the jury or were properly denied and the jury was properly instructed at both the penalty and sentencing phases of the trial.

Testimony regarding DNA testing was properly allowed at trial after the court conducted a *Daubert* hearing.

Venue was properly found by the jury to have been proven beyond a reasonable doubt. There was no hearsay error associated with the testimony of a police officer explaining his

reason for checking a residence in Hattiesburg. The convictions are supported by the evidence produced at trial. There was no cumulation of errors that require the convictions or sentences be overturned nor is Mississippi's capital sentencing scheme unconstitutional.

LEGAL ANALYSIS

CLAIM 1. THE TRIAL COURT DID NOT ERR IN THE DENIAL OF GILLETT'S MOTION TO SUPPRESS DETAILS OF HIS ARREST

Prior to trial Gillett filed his Motion to Suppress Evidence Derivative Of An Illegal Arrest, R. 69-72, also identified as Gillett's motion 005. In that motion, Gillett contended he was unlawfully taken into custody for narcotics violations on March 29, 2004, at the Fossil Creek Park in Russell, Kansas, and specifically argued that certain evidence; the clothing he wore, along with his wallet and personal effects seized from him after being taken into custody, as well as the results of his custodial interrogation at the Russell County Sheriff's Office on that date, should be inadmissable at his trial. The State answered Gillett's motion with its Replication to Motion to Suppress Evidence Derivative Of An Illegal Arrest. R. 144-56.

On January 22, 2007, a pre-trial hearing was conducted on this claim, and others[1], in the Forest County Circuit Court. At the conclusion of the hearing Gillett announced to the

[1]The pre-trial hearing involved argument regarding the suppression motions filed by Gillett and were identified as motions, 005, 006, 007 and 008, all of which are argued here on appeal in Gillett's first four claims. By agreement the motions were all heard together as opposed to separate arguments. Tr. 2-3.

court that he would be filing a Memorandum of Law regarding the motion. Tr. 242. On March 30, 2007, Gillett did in fact file a Memorandum of Law In Support of Motion 005 with the court. R. 706-730. The memorandum recounts the previous claims made by Gillett as well as repeating the testimony given at the hearing. Gillett again asked that the arrest be declared unlawful and that his clothing, wallet, personal effects and evidence of his interrogation be suppressed. R. 710. The trial court denied the motion. Tr. 464.

Now, on direct appeal, Gillett maintains that the trial court erred in not holding that his arrest was improper and that evidence of his statement to Agent Matthew Lyon of the KBI, was improperly allowed into evidence. Gillett omits any reference to his earlier demands that his clothing, wallet and personal effects should have been excluded. Instead, Gillett now maintains that evidence of his fingerprints, State's Exhibit 105, and testimony by a fingerprint analyst, Holly Wasinger, were improperly allowed into evidence. Tr. 1403-31.

Gillett's claim that the fingerprint evidence and testimony by Wasinger, are barred from consideration as it is raised for the first time in this appeal. The evidence of his fingerprints, State's Exhibit105, were entered into evidence without objection.[2] Tr. 1251-52. The testimony regarding those fingerprints by Ms. Wasinger were not objected to by Gillett at anytime during the trial or in his motion for new trial. This issue was fully capable of having been objected to at trial or in the motion for new trial and is therefore barred from

[2]Gillett did specifically object to the fingerprints of co-defendant Lisa Jo Chamberlin and related testimony. State's Exhibit 104; Tr. 1253.

consideration on appeal. "We have held that error not raised at trial or in post-trial motions may not be reviewed on appeal." *Davis v. State*, 660 So.2d 1228, 1246 (Miss.1995); citing *Foster v. State*, 639 So.2d 1263,1289 (Miss.1994); *Watts v. State*, 492 So.2d 1281, 1291 (Miss.1986).

Alternatively, without waiving the procedural bar discussed above, Gillett's arrest was not unlawful, therefore all evidence seized as a result of that arrest, the complained of fingerprint evidence and testimony as well as the videotaped interview conducted on March 29, 2004, were lawfully obtained and were properly admitted as evidence at trial.

When Gillett was taken into custody by Sergeant Kelly Schneider of the Russell County Sheriff's Department, Sergeant Schneider informed Gillett he was being charged with narcotics violations. Tr. 19. Gillett contends that since he was not informed of the nature of the narcotic violation he was being arrested for and that he did not possess narcotics in Sergeant Schneider's presence that he was arrested without probable cause. Appellant's Brief at 35. Gillett goes on to state that because of these claims the videotape of his statement to KBI Agent Matthew Lyon, and now on appeal - evidence of his fingerprints, should have been suppressed.

In *Dies v. State*, 926 So.2d 910 (Miss.2006), this Court discussed the standard of review on denial of a motion to suppress evidence of a warrantless arrest:

> ¶ 20. In reviewing this issue, this Court adopts a mixed standard of review. Determinations of reasonable suspicion and probable cause should be reviewed de novo. *Ornelas v. United States*, 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Floyd v. City of Crystal Springs*, 749 So.2d

> 110, 113 (Miss.1999). However, this Court is restricted to a de novo review of the trial judge's decision based on historical facts reviewed under the substantial evidence and clearly erroneous standards. *Floyd*, 749 So.2d at 113.

926 So.2d 910, 917.

The issue boils down to a question of whether or not Sergeant Schneider had probable cause to place Gillett under arrest at the Fossil Creek Park, and then whether or not the trial court had sufficient evidence to support the denial of the motion to suppress. This was not a difficult or complex question for the trial court to answer.

Facts to support the probable cause to arrest were presented at the January 22, pre-trial hearing. Sergeant Schneider received information from Kathy Thacker and Gillett's aunt, Debbie Milam, *inter alia*, that Gillett had threatened her with a gun and was in possession of materials used for manufacturing methamphetamine. Tr. 10, 11. In due course, Sergeant Schneider contacted KBI Agent Matthew Lyon who ultimately applied for and obtained a search warrant for 606 North Ash, Russell, Kansas based on that information and information he personally received from Debbie Milam .[3] State's Exhibit 58. The warrant listed five felony crimes associated with methamphetamine that Agent Lyon had reason to believe had been or were being committed. State's Exhibit 58. All law enforcement officers involved in the search warrant met and discussed the warrant prior to its execution.

Sergeant Schneider was a participant in the execution of the warrant assigned to duty on the perimeter. Tr. 15. After entry of officer's into the residence Sergeant Schneider was

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[3]Gillett argues separately the validity of the search warrant in Claim 3.

informed that narcotics had been located and that Gillett should be taken into custody. Tr. 15. Sergeant Schneider, along with other officers, located and arrested Gillett at the Fossil Creek Park. Tr. 19. Gillett was transported to the Russell County Jail where he was given a copy of the search warrant and informed of the charges against him, manufacture of methamphetamine, conspiracy to manufacture methamphetamine, possession of psudoephedrine with intent to manufacture, possession of drug manufacturing paraphernalia. Tr. 88. A warrant was subsequently obtained and listed the above charges with the addition of a charge of possession of anhydrous ammonia with intent to manufacture. State's Exhibit 57.

"Probable cause" has been defined as "less than the evidence which would justify condemnation, but more than bare suspicion." *Hester v. State*, 463 So.2d 1087, 1090 (Miss.1985)(quoting *Carroll v. United States*, 267 U.S. 132 (1925); *Locke v. United States*, 11 U.S.) 339 (1813). Whether or not officers have probable cause to arrest depends on if at the time of arrest "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that a person had already committed a crime. *Williams v. Lee County Sheriff's Department*, 774 So.2d 286, 294 (Miss.2001)(quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). This Court has also held:

> ¶ 65. The test for probable cause in Mississippi is the totality of the circumstances. *Haddox v. State*, 636 So.2d 1229, 1235 (Miss.1994). In other words, probable cause is:

> a practical, nontechnical concept, based upon the conventional considerations of every day life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably 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.
>
> *Conway v. State*, 397 So.2d 1095, 1098 (Miss.1980) (quoting *Strode v. State*, 231 So.2d 779 (Miss.1970)). The "duty of a reviewing court is simply to ensure that ... a 'substantial basis for concluding' that probable cause existed" was evidenced. *Rooks v. State*, 529 So.2d 546, 554 (Miss.1988) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548 (1983)).

Byrom v. State, 863 So.2d 836, 859-60 (Miss.2003).

A review of the facts clearly show probable cause on Sergeant Schneider's part to take Gillett into custody. The officer had information that a felony had occurred and that Gillett had committed it.

At the conclusion of the hearing the trial court had heard testimony from the officer's involved in search of the residence as well as the associated search and arrest warrants. Tr. 2-242; State's Exhibits 57, 58. In addition to that evidence there was the benefit of Gillett's memorandum associated with this issue that informed the court of the applicable Kansas statute dealing with arrests absent warrant. R. 713-14.

With all of this evidence before it, the trial court denied Gillett's motion to suppress. As the officers had probable cause to arrest Gillett at the Fossil Creek Park, the trial court's ruling was clearly not erroneous or contrary to the substantial evidence before it. *Dies*, 926

So.2d 910, 917. This issue is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 2. THE TRIAL COURT DID NOT ERR IN THE DENIAL OF GILLETT'S MOTION TO SUPPRESS HIS STATEMENT

In addition to Gillett's pre-trial claim that his custodial statement should have been suppressed as a result of his alleged unlawful arrest, discussed *supra*, he also filed a separate Motion To Suppress An Alleged, Custodial Statement, R. 73-81, also identified as Gillett's motion 006. In that motion Gillett contended that: he was not adequately advised of his state and federal rights to counsel and to the right to remain silent; the interviewer did not observe his assertion of his rights; the statement was not made voluntarily; that since the State was seeking the death penalty against Gillett additional rights had attached and had been neglected. The State answered the motion with its Response to Motion to Suppress Custodial Statement. R. 157-81.

On March 30, 2007, Gillett also filed a Memorandum of Law In Support of Motion 006 with the court. R. 648-89. Gillett also attached a transcription of the interview to the motion. R. 690-705. The memorandum recounts the previous claims made by Gillett as well as summarizing the testimony given at the hearing and numerous references to the conversation between Gillett and Agent Lyon. R. 648-89.

A pre-trial hearing was held, as noted above, this issue was heard simultaneously with the other Motions 001,003,004, on January 22, 2007.

The standard of review regarding the denial of a motion to suppress a statement is detailed in *Taylor v. State*, 789 So.2d 787(Miss.2001):

> ¶ 21. This Court in *Baldwin v. State*, 757 So.2d 227 (Miss.2000), discussed the heavy burden that must be met for a trial court's decision regarding a motion to suppress to be overturned. This Court stated:
>
> > A trial court is also given deference in the admissibility of an incriminating statement by a criminal defendant. In *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996), this Court held that the defendant seeking to reverse an unfavorable ruling on a motion to suppress bears a heavy burden. The determination of whether a statement should be suppressed is made by the trial judge as the finder of fact. *Id.* "Determining whether a confession is admissible is a finding of fact which is not disturbed unless the trial judge applied an incorrect legal standard, committed manifest error, or the decision was contrary to the overwhelming weight of the evidence." *Balfour v. State*, 598 So.2d 731, 742 (Miss.1992); *Alexander v. State*, 736 So.2d 1058, 1062 (Miss.Ct.App.1999).
>
> *Baldwin v. State*, 757 So.2d at 231. "Where, on conflicting evidence, the lower court admits a statement into evidence this Court generally must affirm." *Dancer v. State*, 721 So.2d 583, 587 (Miss.1998) (citing *Morgan v. State*, 681 So.2d 82, 87 (Miss.1996)).

Taylor, 789 So.2d 787.

After his arrest at the Fossil Creek Park, Gillett was transported to the Russell County Jail where he was interviewed by KBI Agent Lyon. Tr.70. The interview was videotaped. State's Exhibit 61. At the beginning of the interview Agent Lyon provided Gillett with a copy of the search warrant that had been executed at 606 North Ash, told Gillett the interview was being videotaped and informed Gillett of his Miranda rights. Tr. 690-91; State's Exhibit 61.

Gillette contends his statement should have been suppressed as he did not voluntarily, knowingly and intelligently waive his right to remain silent. Appellant's Brief at 52. The interview began with the officer properly informing Gillett of his rights under Miranda. When asked if he was willing to answer questions Gillett gave an ambiguous response, "Maybe". Tr. 691; State's Exhibit 61. Based on that response Agent Lyon asked a clarifying question, if Gillett would then at least "talk to me for a little bit" , to which Gillett replied "What's this about?". R. 691-92; State's Exhibit 61. At no time did Gillett indicate in any manner, at any time, before or during the interview that he desired to remain silent as he was required to do to properly invoke his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

As Gillett never invoked his right to remain silent the interview properly proceeded until Gillett invoked his right to counsel, "I need to speak to an attorney". R. 696; State's Exhibit 61. Agent Lyon Immediately ceased questioning and informed Gillett of the charges against him and additionally informed him of the possibility that there could be more charges. R. 696; State's Exhibit 61. Gillett responded, "Like?", and Agent Lyon informed him that since he had asked for an attorney the interview had ceased. R. 696; State's Exhibit 61. Gillett then shortly thereafter specifically withdrew his request for an attorney and the interview proceeded again. R. 697; State's Exhibit 61. The interview concluded as, after failing to barter for his freedom, Gillett again asked for an attorney. R. 705; State's Exhibit 61.

State's Exhibit 61 clearly shows Gillett invoking his right to counsel and shows Agent Lyons informing him of his charges and preparing to have Gillett returned to his jail cell. It is well established law that if the right to have an attorney present is invoked, the interrogation must cease until one is present. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The right to have an attorney present must be "specifically invoked." *Id.* at 482. The interrogation may only start up or resume in the absence of an attorney if the defendant: (1) initiates further discussions with the police (2) knowingly, intelligently and voluntarily waived the right previously invoked. *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

The record in this matter shows the trial court's decision to deny the motion to suppress was not contrary to the overwhelming weight of the evidence nor was it manifest error to hold as it did. *Taylor*, 789 So.2d 787. This issue is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 3. THE TRIAL COURT DID NOT ERR IN THE DENIAL OF GILLETT'S MOTION TO SUPPRESS EVIDENCE OF THE SEARCH OF 606 NORTH ASH STREET

Prior to trial Gillett filed a Motion to Suppress Evidence Seized Subsequent to Warranted Search at 606 North Ash Street, Russell, Kansas. R. 98-104. The motion asked for suppression of evidence seized as the result of a consent search of 606 North Ash Street, Russell, Kansas on March 30, 2004. R. 98-99. Gillett asked the court to conduct an evidentiary hearing on the motion. R. 102. Gillett acknowledged that he had the responsibility to establish standing to contest the warrant. R. 102. The State responded to

Gillett's motion and a pre-trial on hearing this issue and others was held on January 22, 2007. R. 197-202; Tr. 2-242. At the conclusion of the hearing Gillett announced his intention to file a memorandum of law with the court and in fact did file a Memorandum of Law in Support of Motion 007, on March 30, 2007. In that memorandum, for the first time, Gillett brought forth the issue that the first search of the residence of 606 North Ash Street on March 29, 2009 was the product of an illegal search and that therefore he was entitled to the suppression of all details pertaining to the arrest.[4] The trial court denied the motion to suppress. Tr. 464.

The State would submit that Gillett has still never shown a legitimate expectation of privacy as complained of by the State in answer to his motion for hearing. In support thereof the State would respectfully incorporate into this Claim the argument contained in the State's Response located at R. 197-202.

The State would further submit the issue of the propriety of the March 29, 2004 search warrant of the 606 North Ash Street residence is barred from consideration as it is not the issue brought before the trial court for consideration and is raised for the first time here on appeal. The issue was fully capable of having been raised at the trial level and is therefore barred from consideration on appeal. *Le v. State*, 913 So.2d 913, 928 (Miss.2005).

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[4]Discussed in Claim 1, *supra*.

Alternatively, without waiving the procedural bar, the State addresses the merits of Gillet's claim. Gillett's argument boils down to a question of whether or not there was probable cause to issue the search warrant. As to the issue this Court has held:

> ¶ 10. In determining whether the issuance of a search warrant is proper, an appellate court will review the trial judge's decision to determine whether there was a substantial basis for concluding that probable cause existed. *Petti v. State*, 666 So.2d 754, 757 (Miss.1995) (citing *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). The reviewing court will overturn the trial court if there is an absence of substantial credible evidence to support the issuance of the search warrant. *Magee v. State*, 542 So.2d 228, 231 (Miss.1989).

Culp v. State, 933 So.2d 264 (Miss.2005).

Further, this Court held:

> ¶ 12. As to the proper standard of review, this Court has stated:
>
> > In reviewing a magistrate's finding of probable cause, this Court does not make a de novo determination of probable cause, but only determines if there was a substantial basis for the magistrate's determination of probable cause. *Smith v. State*, 504 So.2d 1194, 1196 (Miss.1987).
> >
> > *Petti v. State*, 666 So.2d 754, 757-58 (Miss.1995).

Roach v. State, 7 So.3d. 911, 917 (Miss.2009).

A "totality of the circumstances" test must be conducted in making probable cause determinations for the issuance of search warrants. *Petti* at 758. A review of the facts that were before the court prior to issuing the search warrant were sufficient and substantial to provide a substantial showing that probable cause existed.

Agent Matthew Lyon received information from Debbie Milam, Gillett's aunt, that Gillett was engaged in the manufacture and possession of illegal narcotics and a stolen vehicle. State's Exhibit 58. Along with the benefit of Agent Lyon's more than 20 years of narcotics investigation experience as detailed in the attached affidavit, the court was informed that:

> At approx. 11:15 a.m. on 03-29-2004, SSA LYON and SA Sherri Moore interviewed Debbie Lynn MILAM at the Russell County Sheriff's Office (SO). MILAM advised of the following:
>
> MILAM was not under the influence of alcohol or any other drug. She last used methamphetamine approx. six years ago. She is the aunt of Roger Lee GILLETT.
>
> GILLETT drove to Russell, Ks on 03-25-2004 or 03-26-2004.
>
> On 03-28-2004, during the evening hours, GILLETT and his girlfriend, Lisa Jay CHAMBERLIN, had MILAM drive them, in MILAM's vehicle, to MILAM's uncle's abandoned farm, located at the northeast corner of section 33, Township 11 South, Range 13 West, Russell County, Ks, commonly know as 5482-190th St. MILAM observed GILLETT get in a white pickup truck, which he placed in a shed. MILAM then slept in her vehicle. When she awoke, she could smell a strong odor. GILLETT had a trash bag with him. He showed her a firearm, and advised that if she told anyone what he was doing, he would kill her.
>
> GILLETT and CHAMBERLIN entered MILAM's vehicle with the trash bag. He had MILAM drive back roads to Bunker Hill, Ks, to dispose of the trash. He then changed his mind, and had MILAM drive to Russell. MILAM asked him if he wanted to throw the trash bag in her trash, and he advised he did not want to put it in her trash. He directed her to drive to the Russell City swimming pool, where he threw the trash bag in the dumpster at the pool. MILAM then drove GILLETT and CHAMBERLIN to 606 Ash, Russell, where he stays when he is in Russell.
>
> GILLETT advised MILAM of the following:

GILLETT needed to obtain a storage unit to hide the pickup truck that was at the above farm house. It was stolen from Mississippi. He had left "D" in MILAM's vehicle. He had "stuff" on him now. The FBI was looking for him as he had committed computer crimes in Oregon. He had obtained computers and false identification for drug dealers there.

SSA Lyon determined there was an active felony warrant for GILLETT in Pendleton, Umatilla County, Oregon, for the following:

7 Counts of forgery in the first degree.
5 Counts of theft in the first degree.
26 Counts of identity theft.
41 Counts of Computer crime.

Russell County SO Deputy Kelly SCHNEIDER advised that MILAM showed him items she had observed at the farm house. These items were consistent with that of a clandestine methamphetamine laboratory. Deputy SCHNEIDER further advised of the following:

On 02-17-2004, Russell County Deputy Fred WHITMAN conducted a traffic stop on CHAMBERLIN's vehicle. He found her in possession of an 18 ounce bottle of Red Devil Lye, a 32 ounce bottle of Sunnyside Muriatic Acid, a small quantity of green vegetation and other drug paraphernalia.

MILAM showed SA MOORE the bag in the above dumpster. SA MOORE retrieved it. KBI SA Brian CARROLL advised there was a methamphetamine laboratory in the trash bag. MILAM signed a consent to search her vehicle. Deputy SCHNEIDER advised he found a propane tank in her vehicle as well as ammonium sulfate and sodium hydroxide in the trash. SSA LYON knows that these chemicals are consistent with the manufacture of anhydrous ammonia.

Russell County Sheriff John FLETCHER advised that Russell County Undersheriff Max BARRETT had spoken to a neighbor near the above farm house. The neighbor had observed at above white pickup truck at the farm house on 03-25-2004 or 03-26-2004.

SSA Lyon had interviewed GILLETT in 1993, after GILLETT had been arrested by the Osborne County SO for possession of marijuana. He advised

> SSA LYON that he had been fronted the marijuana that he had been caught with, and owed money for it.
>
> Therefore, the undersigned requests that a search warrant be issued for the items described herein, as provided by law.

State's Exhibit 58.

Especially of note in the affidavit is Milam's information regarding Gillett's use of a firearm, that he had "stuff" on him now and that she had taken him and co-defendant Chamberlin to the residence on North Ash Street. As previously stated in Claim 1:

> probable cause is:
>
> > a practical, nontechnical concept, based upon the conventional considerations of every day life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably 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.

Byrom, 863 So.2d at 859-60.

The totality of these facts are substantial and a man of average caution could believe crimes have been and are being committed by the named individuals.

The affidavit does not state that Milam had been the source of any reliable information in the past. This Court has found that probable cause does not exist for the issuance of a search warrant when no indicia of reliability or veracity can be attached to the informant. *State v. Woods*, 866 So.2d 422, 427-28 (Miss.2003). "Because the affidavit sub judice does not contain *any* corroborating evidence to show that the CI was truthful and reliable, the

affidavit, standing alone, does not support a finding that probable cause existed for the issuance of the search warrant." *Id.* (Emphasis the Court's). Such is not the case before the Court now. The affidavit in support of the search warrant shows Agent Lyon taking steps to corroborate the information supplied by Milam. Contained in Agent Lyon's affidavit were references to Milan's statement that Gillett was wanted for computer crimes in Oregon-the Agent found active warrants regarding computer crimes in Oregon; Milan reported Gillett's claim of a stolen white truck-it was confirmed that neighbors had seen a white truck at the farmstead; Milam led Agents to the abandoned trash bag in the dumpster which did in fact contain a methamphetamine lab; Milam consented to the search of her vehicle which produced the propane tank she had said Gillett left there. *See* State's Exhibit 58. Based on the totality of the circumstances there was probable cause to support the issuance of the search warrant. The evidence presented to the trial court was likewise substantial to support the denial of the motion to suppress. *Roach*, 7 So.3d. 911, 917. This claim is procedurally barred and alternatively without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 4. THE TRIAL COURT DID NOT ERR IN THE DENIAL OF GILLETT'S MOTION TO SUPPRESS EVIDENCE OF THE SEARCH OF 5482 190th STREET IN RUSSELL, KANSAS

Prior to trial Gillett filed a Motion to Suppress Evidence Seized Pursuant to Warranted Searches Conducted on And Between March 29, 2004, And April 1, 2004, at 5482 190th Street, County of Russell, State of Kansas. R. 105-22. Gillett asked the court to conduct an

evidentiary hearing on the motion. R. 114. Gillett acknowledged that he had the responsibility to establish standing to contest the warrant. R. 114. The State responded to Gillett's motion and a pre-trial on hearing this issue and others was held on January 22, 2007. R. 204-09; Tr. 2-242. At the conclusion of the hearing Gillett announced his intention to file a memorandum of law with the court and in fact did file a Memorandum of Law in Support of Motion 008, on March 30, 2007. The trial court denied the motion to suppress. Tr. 464.

The State would submit that Gillett has still never shown a legitimate expectation of privacy as complained of by the State in answer to his motion for hearing. In support thereof the State would respectfully incorporate into this Claim the argument contained in the State's Response located at R. 204-09.

The State would further show that Gillett makes the same accusation as to lack of probable cause to issue the search warrant and ultimately for the trial court to have denied the motion to suppress. As the issues in this regard are similar to those discussed *supra* in Claim 3, the State would respectfully incorporate the entirety of argument found in Claim 3 into this Claim. As argued in the previous Claim, the totality of the circumstances presented for review established probable cause to believe crimes had been and were being committed by Gillett and co-defendant Chamberlin at that location. *Byrom*, 863 So.2d at 859-60.

Gillett adds the element that the warrant was defective as it did not adequately describe the place to be searched in this Claim, contending the only place that could have been properly searched within the scope of the warrant was "a shed" Debbie Milam had related to Agent Lyon found in the affidavit. Agent Lyon asked for and received the search warrant to search:

> A farm house located in the northeast corner of section 33, Township 11 South, Range 13 West, Russell County, Ks, commonly know as 5482-190th St., to include any out buildings normally associated with this residence.
>
> The search is to include persons of anyone on the property at the time of the search and any vehicles or conveyances located on the property at the time of the search.

See State's Exhibit 2 for Purpose of Suppression Hearing.

The farm was described at trial as a cluster of buildings, situated fairly close together, consisting of an abandoned farm house, a metal shed, a wooden shed and an outhouse (or old chicken house). Tr. 1073-79; State's Exhibits 49-54. All of the buildings on the farm that were searched fell inside the scope of the warrant. Gillett relies in large part on the case of *Maryland v. Garrisson*, 480 U.S. 79 (1987), in which the Supreme Court Stated that "probable cause to believe that a stolen lawnmower may be located in a garage will not support a warrant to search an upstairs bedroom.", for the contention that the place to be search was not particularized sufficiently. *Id.* at 84. Such is not the case here, as the cluster of buildings was sufficiently described and authorized in the search warrant and all fell within the curtilage of the property. *United States v. Dunn*, 480 U.S. 294, 296 (1987). The

property located at 5482 190th Street was properly searched pursuant to a search warrant based on probable cause and the trial court did not abuse its discretion in denying the suppression of the search warrant. This being so, there is no fruit of the poisonous tree to exclude any evidence taken from the location and used at trial. *Brown v. Illinois*, 422 U.S. 590, 599 (1975). This issue is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 5. THE TRIAL COURT DID NOT ERR IN DENYING A MOTION FOR DIRECTED VERDICT AS TO COUNT II OF THE INDICTMENT

Gillett next argues that the trial court erred in not granting a directed verdict as to Count II of the indictment that involved the capital murder of Vernon Hulett. Gillett's argument is based on the premise that since an object of the robbery, the stolen truck, was not registered to Mr. Hulett that he had no interest in the truck and therefore could not be robbed of it. He argues this scenario negates the State's ability to prove the robbery element of the indictment.

This issue is not entirely new to Mississippi, as the question of whether or not the deceased victim in a robbery was required to have any possessory interest in the stolen goods in order for the jury to return a verdict of guilty in a capital murder charge was answered by the Mississippi Court of Appeals. In the recent case of *Grant v. State*, 8 So.3d 213 (Miss.App.2008)(cert. denied May 7, 2009-No. 2007-CT-00108-SCT), the issue of the killing of a co-conspirator during a robbery was discussed:

¶ 5. Grant claims that the capital murder statute in Mississippi should not apply when the deceased is a co-conspirator in the underlying felony and not an intended victim. Mississippi Code Annotated section 97-3-19(2)(e) (Rev.2006) defines capital murder, and reads, in part:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies[.]

Grant argues that the Mississippi Legislature did not intend for the felony-murder portion of the capital murder statute to apply in cases where the co-conspirator dies during the commission of one of the enumerated felonies. Grant contends that the capital murder statute, and specifically the felony-murder portion, was designed to protect the citizenry or the innocent victims of dangerous felonies. It was not, he argues, designed to protect co-conspirators from each other. Further, he argues that a finding that the capital murder statute applies when the victim was also a co-conspirator is at odds with the United States Supreme Court's findings in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Those decisions address the appropriateness of imposing the death penalty on a co-conspirator whose involvement in the felony was relatively minor. Grant, however, was not given the death penalty. He was sentenced to life imprisonment without eligibility for parole.

¶ 6. The statute does not address whether the victim in a felony-murder case must be innocent. The statute simply states that capital murder is the "killing of a human being without authority of law by any means or in any manner" when committed, regardless of intent, by a person engaged in one of several enumerated felonies. Robbery is one of the enumerated felonies. The jury found that Grant killed Joshua during the commission of a robbery. This assignment of error is without merit.

8 So.3d 213, 216.

As a co-conspirator the victim of the killing obviously did not have a valid interest in the property he was stealing. As a participant in a robbery is covered by our statute, so must be an innocent victim as well. As correctly argued by the prosecutor, the killing of Mr. Hulett occurred during the commission of a robbery and that is what must be and was proven to the jury. Tr. 1544-45. The trial court did not err in the denial of Gillett's motion for directed verdict on Count II of the indictment and all claims made by Gillett under this heading are without merit. Gillett is entitled to no relief under this assignment of error.

CLAIM 6. AS GILLETT'S ARGUMENT RESTS SOLELY ON THE MERITLESS ARGUMENT IN CLAIM 5 THIS CLAIM IS ALSO WITHOUT MERIT

Based on the argument in Claim 5, *supra*, Gillett contends that since the trial court did not grant his directed verdict motion on Count II, that the jury was presented with improper bad character evidence; i.e. the evidence of Mr. Hulett's murder, during the penalty phase. Gillett argues this evidence therefore rendered the death sentence as to Count I, impermissible. As this argument is based solely upon Gillett's argument in Claim 5, the issue is without merit as is the issue in Claim 5. Gillett is entitled to no relief in this assignment of error.

CLAIM 7. THE TRIAL COURT DID NOT ERR IN ALLOWING THE JURY TO CONSIDER INSTRUCTIONS S-5 AND S-6 AT THE GUILT PHASE OF THE TRIAL

Gillett next contends the trial court erred in submitting instructions S-5 and S-6 to the jury during the penalty phase of the trial. Gillett argues that the State failed to prove the intent to rob Ms. Heintzleman and Mr. Hulett was formed before they died at the hands of Gillett. Gillett also argues that instruction S-6 does not apply because Mr. Hulett was not the listed owner of the pickup truck that he stole, therefore there was no robbery of Mr. Hulett as argued in Claim 5, *supra*. The State correctly responded that Mississippi follows the one continuance transaction rule found in *Pickle v. State*, 345 So.2d 623 (Miss.1977). Tr. 1550-51.

The complained of instructions state in S-5;

> The Court instructs the Jury that in a case of Capital Murder the fact that the victim was dead at the time of taking the personal property of Linda Heintzelman does not mitigate against the conclusion of robbery. If the intervening time between the murder, if any, and the time of the taking of the property, if any, formed a continuous chain of events, the fact that the victim was dead when the property was taken cannot absolve the Defendant from the crime.
>
> If you should find from the evidence in this case beyond a reasonable doubt that Roger Lee Gillett, alone or in conjunction with another, killed and murdered Linda Heintzelman and then, after the said Linda Heintzelman was dead, took the personal property of Linda Heintzelman; and if you should further find beyond a reasonable doubt that the intervening time between the time of the murder, if any, and the time of the taking of the property, if any, formed a continuous chain of events, the fact that Linda Heintzelman was dead when the property was taken does not absolve the Defendant from the crime of capital murder in Count II.

R. 884.

and in S-6;

> The Court instructs the Jury that in a case of Capital Murder the fact that the victim was dead at the time of taking the personal property of Linda Heintzelman does not mitigate against the conclusion of robbery. If the intervening time between the murder, if any, and the time of the taking of the property, if any, formed a continuous chain of events, the fact that the victim was dead when the property was taken cannot absolve the Defendant from the crime.
>
> If you should find from the evidence in this case beyond a reasonable doubt that Roger Lee Gillett, alone or in conjunction with another, killed and murdered Vernon Hulett and then, after the said Vernon Hulett was dead, took the personal property of Linda Heintzelman; and if you should further find beyond a reasonable doubt that the intervening time between the time of the murder, if any, and the time of the taking of the property, if any, formed a continuous chain of events, the fact that Vernon Hulett was dead when the property was taken does not absolve the Defendant from the crime of capital murder in Count II.

R. 885.

Again, as pointed out by the State, Mississippi follows the "one continuous transaction" rational in capital cases. That is "the underlying crime begins where an indictable attempt is reached." *Pickle*, 345 So.2d 623. An indictment charging a killing occurring "while engaged in the commission of" one of the enumerated felonies includes the actions of the defendant leading up to the felony, and "flight from the scene of the felony." *Turner v. State*, 732 So.2d 937, 949-50, ¶¶ 47-48 (Miss.1999); *Pickle, supra*; *Neal v. State*, 451 So.2d 743, 757-58 (Miss.1984); *Pruett v. State*, 431 So.2d 1101, 1105-05 (Miss.1983). *See Duplantis v. State*, 708 So.2d 1327, 1341-42, ¶¶ 63-67 (Miss.1998); *Walker v. State*, 671 So.2d 581, 594-96 (Miss.1995); *West v. State*, 553 So.2d 8 (Miss.1989); *Wheat v. State*, 420 So.2d 229, 238-39 (Miss.1982). This Court has further held that even though a victim is

killed prior to property being taken from them, proof of a robbery can be sustained. *Manning v. State,* 726 So.2d 1152, 1196, ¶¶ 189-91 (Miss.1998); *Mackbee v. State*, 575 So.2d 16, 35-37 (Miss.1990); *West v. State*, 463 So.2d 1048, 1055-56 (Miss.1985). It is of no consequence when the robbery occurred so long as it occurred while the defendant was "engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery." *See* MISS. CODE ANN.§ 99-19-101 (5)(d).

Gillett claims the State failed to produce any evidence that supports the instruction however, in contradiction to the most of his argument under this claim, Gillett acknowledges that the State is properly able to have instruction S-6, under *Knox v. State*, based on Gillett being discovered in the possession of the Linda Heintzelman's personal property. *See* Appellant's Brief at 127-28.

The facts in this case are similar to those in the case of *Knox v. State*, 805 So.2d 527 (Miss.2002). In *Walker v. State,* 913 So.2d 198 (Miss.2005) this Court looked to *Knox* in its analysis as being another similar case and held:

> ¶ 81. This Court has stated that the intent to rob, which is required to prove the underlying felony of robbery, can be shown from the facts surrounding the crime. *Lynch v. State*, 877 So.2d 1254, 1266 (Miss.2004) (collecting authorities).
>
> ¶ 82. In *Knox v. State*, 805 So.2d 527 (Miss.2002), Knox contended that the State presented insufficient evidence to prove that he intended to rob the victim when he killed her. Because of the alleged insufficiency of evidence, Knox argued that the State failed to prove the underlying felony of robbery, and, therefore, the charge of capital murder. *Id.* at 531. This Court disagreed with Knox's claims holding: " 'Intent to do an act or commit a crime is also a question of fact to be gleaned by the jury from the facts shown in each case.'

> " *Id.* (quoting *Shanklin v. State*, 290 So.2d 625, 627 (Miss.1974)). This Court found it most significant that Knox was in possession of the victim's personal belongings at the time he was arrested. *Id.* at 532. This Court held: "[W]hen the defendant is discovered with the personal property of the deceased on his person it is entirely within reason for the jury to find that this fact in itself constitutes robbery." *Id.*

Walker v. State, 913 So.2d at 224.

Gillett was discovered in possession of the stolen truck at the Gillett farmstead. More than proving mere possession, the record reflects that Gillett confessed to two people that he had stolen the truck and killed the owners. Tr. 1070, 1094. As the record sufficiently supported the fact that Gillett had committed the murders and that he was discovered to be in the possession of the personal property of Linda Heintzelman, the instructions were correct statements of law and properly given for the jury's consideration by the trial court.

Gillett's contention that instruction S-6 was improperly given based on Mr. Hulett not being the registered owner of the vehicle was fully argued in Claim 5, *supra*. This issue is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 8. THE TRIAL COURT DID NOT ERR IN ALLOWING EXPERT TESTIMONY OVER GILLETT'S *DAUBERT* OBJECTION

A pre-trial Daubert hearing was conducted on September 20, 2007, regarding the State's intention to introduce DNA evidence that showed a shoe recovered from a landfill in Russell, Kansas contained the blood of Linda Heintzleman. Tr. 316-455. At the conclusion of the hearing the trial court ruled that the evidence would be admissible at trial and any weight to be attached to the evidence would be for the providence of the jury. Tr.

455. Gillett now contends the trial court erred in allowing the State to introduce the evidence at trial through the testimony of William H. Jones, DNA Section Chief at the Mississippi Crime Laboratory.

As to the admissibility of evidence, this Court has held:

> ¶ 9. Our well-established standard of review for reviewing the trial court's admissibility of evidence, including expert testimony, is abuse of discretion. *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss.2003); *McGowen v. State*, 859 So.2d 320, 328 (Miss.2003); *Haggerty v. Foster,* 838 So.2d 948, 958 (Miss.2002). Unless we can safely say that the trial court abused its judicial discretion in allowing or disallowing evidence so as to prejudice a party in a civil case, or the accused in a criminal case, we will affirm the trial court's ruling. *McGowen*, 859 So.2d at 328.
>
> * * *
>
> ¶ 16. Effective May 29, 2003, this Court amended Miss. R. Evid. 702 to clarify the gate-keeping responsibilities of our trial courts in evaluating the admissibility of expert testimony. Our current Rule 702, which is now identical to Fed.R.Evid. 702, states:
>
> > If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> The comment to this amended rule clearly reveals this Court's effort to address the United States Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). FN8 Thus, after years of applying the *Frye* standard FN9 on the issue of the admissibility of expert testimony, we now apply the *Daubert* standard. *See, e.g., Hughes v. State*, 892 So.2d 203, 210 (Miss.2004) (fn 1); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 60 (Miss.2004); *Janssen*

Pharmaceutica, Inc. v. Armond, 866 So.2d 1092, 1103 (Miss.2004) (Graves, J., specially concurring); *Mississippi Transp. Com'n v. McLemore*, 863 So.2d 31, 35-40 (Miss.2003); McGowen v. State, 859 So.2d 320, 340-41 (Miss.2003).

> FN8. The comment states in pertinent part:
> By the 2003 amendment of Rule 702, the Supreme Court clearly recognizes the gate keeping responsibility of the trial court to determine whether the expert testimony is relevant and reliable. This follows the 2000 adoption of a like amendment to Fed.R.Evid. 702 adopted in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). It is important to note that Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge, and that the factors mentioned in *Daubert* do not constitute an exclusive list of those to be considered in making the determination: *Daubert's* "list of factors was meant to be helpful, not definitive." *Kuhmo [Tire Co., Ltd. v. Carmichael*], 526 U.S. [137] at 151, [119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)]. *See also Pipitone v. Biomatrix, Inc.*, 288 F.3d 239 (5th Cir.2002).

* * *

¶ 18. In adopting the *Daubert* test concerning expert testimony, we stated in *McLemore* that our state trial courts perform a critical gatekeeping role in addressing the admissibility of expert testimony, but that this role does not replace the adversary system. 863 So.2d at 39. There is a two-pronged inquiry which the trial court must perform in making a determination as to whether expert testimony is admissible, in that the trial court must first determine if the proffered testimony is relevant, and if relevant, then is the proffered testimony reliable. *Id.* at 38. We acknowledged that *Daubert* provides a "non-exhaustive, illustrative list of reliability factors" to aid the trial courts in exercising their discretion to determine whether expert testimony is admissible. *Id.* at 36. *See Daubert*, 509 U.S. at 592-94, 113 S.Ct. 2786. Finally, in *McLemore*, we stated:

> The gatekeeping function of the trial court is consistent with the underlying goals of relevancy and reliability in the Rules. *Daubert* ensures that the relevancy requirements of the rules are

> properly considered in an admissibility decision. Rule 702 gives the judge "discretionary authority, reviewable for abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho Tire*, 526 U.S. at 158, 119 S.Ct. 1167, 143 L.Ed.2d 238.
>
> We are confident that our learned trial judges can and will properly assume the role as gatekeeper on questions of admissibility of expert testimony. The modified *Daubert* test does not require trial judges to become scientists or experts. Every expert discipline has a body of knowledge and research to aid the court in establishing criteria which indicate reliability. The trial court can identify the specific indicia of reliability of evidence in a particular technical or scientific field. Every substantive decision requires immersion in the subject matter of the case. The modified *Daubert* test will not change the role of the trial judge nor will it alter the ever existing demand that the judge understand the subjects of the case, both in terms of claims and defenses. We are certain that the trial judges possess the capacity to undertake this review.

863 So.2d at 39-40.

Jones v. State, 918 So.2d 1220, 1226-28 (Miss.2005).

As stated by Gillett, the question presented now is did the trial court abuse its discretion in holding the results of the DNA testing, concluding that the blood contained on the shoes recovered from the Russell, Kansas landfill belonged to Ms. Heintzelman, were admissible at trial. *See* Appellant's Brief at 139. The only point of contention brought forth by Gillett at the *Daubert* hearing was that the blood sample taken from the deceased body of Linda Heintzelman had been stored in a "red top" tube as opposed to a "purple top" tube.

It was established at the *Daubert* hearing that for purposes of DNA testing a purple top tube is preferred if available. Tr. 353-54. A purple top tube contains EDTA which

prevents the blood from clotting or otherwise deteriorating. Tr. 347. There is no preservative contained in a red top tube. Tr. 376. Mr. Jones testified that the crime lab's practice was to test the red top tubes for DNA if no purple top tube was available. 345-46. Mr. Jones also testified that Vernon Hulett was positively excluded as a source of any of the blood on the shoes based on the testing of the red topped tube of blood containing his sample. Tr. 350-51. Mr. Jones additionally gave his opinion that " I am absolutely convinced that if you get a DNA profile from the red-top tube, that it would be the same as the purple-top tube of that individual. Tr. 354.

Gillett tendered Dr. Peter D'Eustachio as his expert on DNA. Tr. 410. Dr. D'Eustachio testified that to his knowledge no validation studies had been conducted regarding red topped tubes. Tr. 446. Dr. D'Eustachio also conceded that to his knowledge there were no studies that addressed red topped tubes in any manner. Tr. 447.

After hearing testimony from both experts and argument from counsel the trial court ruled:

> THE COURT: While the red-top tubes may not be the preferred way for substances to be submitted for DNA evaluation, for the purposes of this hearing and the matters before this Court today, I think that the Daubert gatekeeping role of this Court is to play, I think the State's witness certainly satisfies those criteria, and your motion will be denied and this evidence will be allowed. Of course, the remainder of that question is left to the providence of the jury.

Tr. 455.

The record is clear that the trial court made a reasoned determination based on the particular facts of the case presented that the *Daubert* requirements had been met by the State for presentation of the evidence. There is no showing of prejudice by the defense as to the admission of the testimony at trial. Mr. Jones testimony was given at trial without objection and without cross-examination. Tr. 1539, 1542.

At trial, prior to the testimony of Mr. Jones, Dr. Donald Pojman, the pathologist that performed the autopsies and collected the blood samples from the victims provided an insightful explanation as to his reason for using red topped tubes to collect the samples:

> Q. My question is: Was there any particular reason that you didn't use a purple-top tube or some other tube with respect to the blood that you sent to Hattiesburg that was drawn from Mr. Hulett and Ms. Heintzelman?
>
> A. Okay. It would have been -- the blood we have available -- let me explain how it works in, sort of, real life. In the hospital setting when you're dealing with living patients, you have tubes like a gray-top tube that has something called sodium fluoride. It's a preservative. And it also helps prevent blood from clotting. Sometimes they want to use blood that has clotted. Other times they want to use blood that has not been clotted. So there are different clotting or anti-clotting factor basically -- or anti-clumping factors that they will add. The gray tops have sodium fluoride, and then the red tops have no anti-clotting factors, and then the purple tops have something called EDTA, which prevents the blood from clotting, and then green-top tubes have something called Heparin, which also helps prevent clotting. Generally, when we're doing DNA testing or other type of blood banking work, they want the tubes in a purple-top tube which has the preservative EDTA in it. Well, after death that changes because all the blood is going to be clotted anyway. So our red tops, our purple tops, and our green tops are the exact same tubes. They're empty and we just put on a different top. If they say, We want a green top, we'll put on a green top for them because their protocol is we have to use a green top. The only ones that actually have preservative are the ones that are sodium fluoride and those are not used to prevent clotting because, as I said, the blood is all clotted. It doesn't matter. What it does is it prevents bacterial overgrowth

> because the bacteria will sometimes destroy some of the drugs that we're testing for, so that's the purpose of it. So it doesn't matter if they're going to do the DNA testing on a dead person whether they're using a red-top tube, a green-top tube, or a purple-top, it's going to be the same specimen.

Tr. 1393-94.

There was no abuse of discretion by the trial court in allowing the DNA testimony at trial. The trial court properly performed its gatekeeping duties and found the evidence to be admissible under the applicable standards. *Jones*, 918 So.2d at 1226-28. This claim is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 9. THE TRIAL COURT DID NOT ERR IN DENYING GILLETT'S INSTRUCTIONS ACCUSING THE POLICE OF A BAD FAITH, DISTORTIONS AND NEGLIGENCE IN THE INVESTIGATION OF THIS CASE

Gillett next contends the trial court erred in denying three jury instructions he claims were presented as his theory of the defense. First, the standard of review this Court employs in the denial of jury instructions is found in the case of *Walker v. State*, 913 So.2d 198 (Miss.2005):

> The Court does not single out any instruction or take instructions out of context; rather, the instructions are to be read together as a whole. *Thomas v. State*, 818 So.2d 335, 349 (Miss.2002). A defendant is entitled to have jury instructions which present his theory of the case. *Id.* This entitlement is limited, however, in that the court is allowed to refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence. *Id.*

913 So.2d 198, 234.

The proposed instructions are not supported by the evidence in this case and were correctly denied by the trial court. Gillett first offered instruction D-42:

> It is a defense theory that *the prosecution's investigation evidence in this case was negligent, incomplete, purposefully distorted and/or not done in good faith.* You are to access the credibility of the investigative evidence together with all of the other evidence.
>
> Investigation which is thorough and conducted in good faith may be credible while an investigation which is incomplete, negligent or in bad faith may be found to have lesser value or no value at all.
>
> In deciding the credibility of the witnesses and the weight, if any, to give the prosecution evidence, consider whether the investigation was negligent and/or conducted in bad faith.

R. 1321. (Emphasis added).

D-44:

> If you find that the State inadequately investigated one matter, you may infer that the prosecution also inadequately investigated other matters. Based on this inference alone you may disbelieve the prosecution witnesses and evidence. This, by itself, may be sufficient for you to have a reasonable doubt as to the defendant's guilt.

R. 1323.

D-45:

> As the State has lost evidence, there is a rebuttable presumption that the information contained in that evidence would have been favorable to the defendant.

R. 1324.

There were certainly a few inquiries by the defense during the trial questioning the police on their investigation however, at no time did the defense make a showing that law

enforcement was negligent in its investigation, had distorted any evidence or had acted in bad faith in any way whatsoever. As no evidence to support the instructions was produced at trial they were rightfully denied by the trial court. *Walker*, 913 So.2d at 234.

Additionally as to D-44 and D-45, there is no persuasive authority presented to the court for consideration of inclusion, nor do the cases cited actually support the proposition raised by the instructions. Failure to cite to relevant authority eliminates the obligation to review the issue. *Id.* at 246. This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 10. THE TRIAL COURT DID NOT ERR IN DENYING GILLETT'S MANSLAUGHTER INSTRUCTIONS

Gillett next contends the trial court erred in not allowing the jury to consider instructions D-53 and D-60, his proposed manslaughter instructions. D-53 states[5]:

> If you acquit Roger Gillett of the capital murder of Linda Heintzelman and the murder of Linda Heintzelman you may then consider whether Roger Gillett is guilty of the manslaughter of Linda Heintzelman.
>
> If you find from the evidence unanimously and beyond a reasonable doubt, that Roger Gillett, on or about March 20, 2004, in Forrest County, purposely or knowingly caused serious bodily injury to Linda Heintzelman through the use of a deadly weapon or other means likely to produce death or serious bodily harm but without the deliberate design to effect the death of Linda Heintzelman and, further, that Roger Gillett was not acting in self-defense, was not acting in defense of another, did not act with lawful authority, had the mental capacity to know right from wrong at the time, and the assault upon Linda Heintzelman was not accidental, and that, as a result of the assault, Linda Heintzelman died, then you shall find Roger Gillett guilty of manslaughter.

---

[5]D-60 is the same instruction regarding Mr. Hulett. R. 1342-43.

> If the prosecution has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find Roger Gillett not guilty of manslaughter.

R. 1333-34.

Gillett's instruction argues that the Ms. Heintzelman and Mr. Hulett were merely the victims of an aggravated assault and just happened to die of the injuries received in the assault. As correctly pointed out by the State there is no evidence to support this instruction. Tr. 1563-64.

This Court has held that a manslaughter instruction should not be automatically or indiscriminately given, but only when warranted by the evidence. *Underwood v. State*, 708 So.2d 18, 36-37, ¶ 53-57 (Miss. 1998); *Ballenger v. State*, 667 So.2d 1242, 1255-56 (Miss. 1995); *Thorson v. State*, 653 So.2d 876, 893 (Miss. 1994). Gillett never offered an alternative evidentiary scenario to show how the killings merited his version of manslaughter found in his instructions.

As this Court has held there must be some evidentiary support to grant an instruction for manslaughter. Here Gillett offers none. In *Burns v. State*, 729 So.2d 203 (Miss. 1998), the Court held:

> ¶ 103. This Court has addressed a very similar issue in *Griffin v. State*, 557 So.2d 542, 549 (Miss.1990) (holding that defendant convicted of capital murder while in the commission of a robbery was not entitled to a manslaughter instruction). The Court said in *Griffin* that "[t]his homicide having occurred during the course of a robbery, it was capital murder, regardless of the intent of Griffin." *Id.* In the case sub judice, Burns was engaged in the commission of robbery when McBride was killed. Thus, no manslaughter instruction was required to be given.

> ¶ 104. The record reveals that Burns never offered any mitigating evidence that would justify manslaughter rather than murder. There was nothing to indicate that this murder was done in the heat of passion. Because the burden to overcome the presumption of murder lies with the defendant, *Nicolaou v. State*, 534 So.2d 168, 171-72 (Miss.1988), and because Burns failed to meet this burden, this issue is without merit.

729 So.2d at 225.

While Gillett's proposed instruction omits heat of passion in the present case the principle is the same in that he has offered no evidence of how the deaths of Linda Heinztleman or Vernon Hulett were the result of manslaughter as detailed in his instructions. The clear evidence was that Gillett murdered the victims while engaged in the crime of robbery. Since there was clearly no proof of manslaughter, the trial court was not in error in denying instructions D-53 and D-60. This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 11. THE TRIAL COURT DID NOT ERR IN DENYING INSTRUCTION D-19 REGARDING REASONABLE DOUBT

Gillett next contends the trial court erred in not allowing the jury to consider his instruction regarding reasonable doubt. The instruction reads as follows:

> I shall not define 'reasonable doubt' for you. Each of you is free to determine what you believe to be a 'reasonable doubt.' Therefore, it is not necessary that a reasonable doubt be a collected doubt shared by all or a majority of the jurors. If a reasonable doubt is present in the mind of only a single juror, then the juror must vote to acquit.

R.1294.

The State would submit the prosecution was correct in the objection that the instruction is flawed as not a correct statement of the law and therefore not required to be given. *Walker* at 234. The State would further submit that the jury was properly instructed as to reasonable doubt in the jury's deliberations in instruction C-2 which was given by the court without objection. Tr. 1549. C-2 reads:

> The Court instructs the jury that you are bound in deliberating upon this case, to give the defendant the benefit of any 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 her 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."

R. 876.

After taking the proposed instruction under advisement, the trial court ultimately denied it. R. 1556, 1566. The proposed instruction was rightfully rejected by the court in that the same as this Court has held that the trial court is not required to grant repetitive or cumulative instructions on the same point of law. In *Hull v. State*, 687 So.2d 708 (Miss. 1996), this Court held:

> This Court's standard in reviewing jury instructions is to read all instructions together and if the jury is fully and fairly charged by other instructions, the refusal of any similar instruction does not constitute reversible error. *Lee v. State*, 529 So.2d 181, 183 (Miss.1988). This Court does not review jury instructions in isolation. *Malone v. State*, 486 So.2d 360, 365

(Miss.1986). Refusal of a repetitive instruction is proper. *Allman v. State*, 571 So.2d 244, 252 (Miss.1990).

687 So.2d at 722.

When all of the jury instructions are read together the jury was fully and fairly charged as to its proper function in determining the sentence to be imposed. This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 12. THE TRIAL COURT DID NOT ERR IN DENYING INSTRUCTION D-25 REGARDING IMPEACHMENT

Gillett next contends the trial court erred in the denial of instruction D-25 which states:

> The testimony of a witness or witnesses may be discredited or impeached by showing that on a prior occasion they made a statement which is now inconsistent with or contradictory to their testimony in this case. In order to have this effect, the inconsistent or contradictory prior statement must involve a matter which is material to the issues in this case.
>
> You may consider any earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness. If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves, if any.

R. 1301.

Ellis v. State, 790 So.2d 813 (Miss.2001), dealt with the testimony of an accomplice to a crime. The conviction was based largely on the testimony of that accomplice and was found to have been material to the conviction. *Id.* at 814. Gillett does not identify which witness this instruction may have applied to and makes argument only that the instruction,

or at least the first paragraph, was a correct statement of the law under *Ellis v. State* and therefore should have been granted in whole or in part.

The following statements were made at trial regarding the submission of this instruction:

> THE COURT: 25?
>
> MR.LAPPAN: Submitted.
>
> MR. SAUCIER: Objection, Your Honor. The authority given was Ellis v. State. The second paragraph is not in that jury instruction in Ellis v. State. And another thing that this jury instruction doesn't do that Ellis v. State does is a prior statement must involve a material matter to the issues. This doesn't say that. The prior statement of the witness and what Ellis said was the prior statement of the witness or witnesses can be considered by you only for the purposes of determining the weight or believability that you give the testimony of the witnesses or the witnesses that made them. You may not consider the prior statement as proving the guilt or innocence of the defendant. This jury instruction doesn't contain any of that language.
>
> THE COURT: Response?
>
> MR.LAPPAN: No, sir.
>
> THE COURT: It will be refused.

Tr. 1557-58.

When asked by the trial court to respond to the State's objection Gillett declined the opportunity to inform the court of the relevance or propriety of the instruction as a whole. The trial judge is not required to draft or give every instruction allowable in a capital case as it is the duty of the defendant to submit the instructions he desires to be given. *Jordan v. State*, 786 So.2d 987, 1025 (Miss.2001). Nor is there an obligation of the trial judge to give

jury instructions *sua sponte*. *Gray v. State*, 728 So.2d 36, 60 (Miss.1998). The trial judge did not err in denying this proposed instruction therefore this issue is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 13. THE TRIAL COURT DID NOT ERR IN DENYING INSTRUCTION D-41

Gillett next contends he was entitled to instruction D-41 based on alleged discrepancies between the testimony of Agent Lyon and of Agent Moore at trial. What is presented here on appeal is different from that presented at trial. In consideration of the instruction the following was stated:

> THE COURT: 41?
>
> MR.LAPPAN: Submitted.
>
> MR. SAUCIER: Object because it goes toward the weight and credibility of witnesses and he shouldn't give those.
>
> THE COURT: Do you have authority for that statement?
>
> MR. SAUCIER: No, sir, I don't have any authority. I haven't even seen that instruction before.
>
> THE COURT: I haven't either.
>
> MR.LAPPAN: Judge, the reason why I submitted D-41, if it please the Court, is Agent Lyon, if you recall, when he was testifying under examination from myself volunteered information that Roger had a gun at a high school and then I objected to a narrative answer, and I believe that he was volunteering information that was prejudicial to Roger, and that's why I submitted D-41.
>
> THE COURT: I'm going to refuse it.

Tr. 1560-61.

""[A]n objection on one or more specific grounds constitutes a waiver of all other grounds." *Doss v. State*, 709 So.2d 369, 378 (Miss.1996) (citing *Conner v. State*, 632 So.2d 1239, 1255 (Miss.1993)). *See also Randall v. State*, 806 So.2d 185, 212-13 (Miss.2001)." *Thorson v. State*, 895 So.2d 85, 130 (Miss.2004). As Gillett makes a different objection here on appeal that the one lodged at trial he has waived consideration of the issue.

Alternatively, without waiving the procedural bar, the issue is without merit. Gillett cites only to the case of *United States v. Andrea*, 538 F.2d 1255, 1256-57 (6th Cir.1976) for support of the argument. *Andrea* was reviewed by the circuit court which found multiple witnesses engaged in a pattern of improper testimony and especially took issue with one witness answering a question in a way that may have led the jury to believe the defendant was previously incarcerated. *Id.* That court found the complained of statements to have been purposely given rather than inadvertently. *Id.* With that in mind the court still found the matter to be harmless error. *Id.*

No such factual scenario exists in this case. The witness was responding to a question posed by Gillett and was responding. Tr. 1560. This single mention of gun possession by Gillett was inadvertent at worst and there was no other objection from Gillett besides the "narrative response". Tr. 1560. There was no reversible error in the testimony complained of. This issue is procedurally barred as well as without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 14. THE TRIAL COURT DID NOT ERR IN DENYING GILLETT'S GUILT BY ASSOCIATION INSTRUCTION

Gillett next contends the trial court erred in denying instruction D-20 which states, "Guilt by association is neither a recognized nor tolerable concept in our criminal law". R. 1556. Gillett complains here on appeal that the denial of the instruction was reversible error however, the trial court did not err as the instruction was fairly covered elsewhere in instructions S-7, D-8 and D-21.

S-7 reads in relevant part:

> Before any Defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about a crime.
>
> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a Defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

R. 886.

D-8 states:

> You are here to decide whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act, conduct, or offense not alleged in the indictment. Neither are you to be concerned with the guilt of any other person not on trial as a defendant in this case.

R. 894.

D-21 reads:

> Roger Gillett cannot be convicted upon mere suspicion. No amount of suspicion or innuendo, however strong, will warrant his conviction.

R. 897.

Reading the instructions as a whole, the jury was fairly instructed that they could only return a guilty verdict based on Gillett's action and not those of any other person, therefore the jury was fairly instructed on this issue and the court did not err in denying the repetitive instruction. In *Tripplett v. State*, 672 So.2d 1184 (Miss. 1996), this Court held:

> The trial court "is not required to grant several instructions on the same question in different verbiage." *Johnson v. State*, 475 So.2d 1136, 1148 (Miss.1985). *Accord, Davis v. State*, 568 So.2d 277, 280 (Miss.1990) (holding that judges are not required to grant repetitious instructions); *Smith v. State*, 527 So.2d 660, 665 (Miss.1988).

672 So.2d at 1186-87.

The State would assert that the requested instruction was repetitive of others given by the trial court. This claim is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 15. FORREST COUNTY WAS THE PROPER VENUE

Gillett next contends, now for the first time on appeal, that the State failed to establish venue in this case. As to the requirements to prove venue, this Court has held:

> ¶ 10. Proof of venue is an essential part of criminal prosecution, and the State bears the burden of proving venue beyond a reasonable doubt. *Crum v. State*, 216 Miss. 780, 787, 63 So.2d 242, 244 (1953); *Hester v. State*, 753 So.2d 463, 467 (Miss.Ct.App.1999). Venue may be proved by either direct or circumstantial evidence. *Jones v. State*, 606 So.2d 1051, 1055 (Miss.1992). Miss.Code Ann. § 99-11-19 (2000) provides that:
>
> > When an offense is committed partly in one county and partly in another, or where the acts, effects, means, or agency occur in whole or in part in different counties, the jurisdiction shall be in

> either county in which said offense was commenced, prosecuted, or consummated, where prosecution shall be first begun.

¶ 11. Miss.Code Ann. § 99-11-3(1) (2000) provides that:

> The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

While the ultimate burden of proving venue that rests upon the State is beyond a reasonable doubt, this is a standard of proof before the jury, not the trial judge. *State v. Fabian*, 263 So.2d 773, 775 (Miss.1972).

¶ 12. We hold that, based on the aforementioned authorities, the evidence at trial was sufficient to establish venue in Forrest County. *As long as the evidence is sufficient to lead a reasonable trier of fact to conclude that the crime in the present case occurred at least partly in Forrest County, then the evidence of venue is sufficient. ...*

Hill v. State, 797 So.2d 914, 916 (Miss.2001)(Emphasis added).

There was ample evidence presented in this case for the jury to have concluded beyond a reasonable doubt that the crimes took place in Forrest County. Gillett and co-defendant Chamberlin were staying at the home of the victims. Tr. 1043. The home was located at 908 South Gulfport Street, Hattiesburg, Forrest County, Mississippi. Tr.??. The victims were last seen on March 19, 2004. Tr. 1044. On March 20, 2004, Gillett stated to Michael Hester that the victims had gone to the coast with a friend. Tr.1044-45. Gillett and co-defendant Chamberlin were next seen in Kansas where Gillett confessed to friends that he had stolen the truck he was riding in, had killed the owners and their bodies were in the

back of the truck. Tr. 1069-70, 1094. The victim's bodies were found in a freezer at the Gillett farmstead in Russell, Kansas. Tr. 922. The freezer was the property of the victims and was last seen in Hattiesburg at the victim's residence. Tr. 1016. The bodies displayed signs of trauma that included cuts and stabs. Tr. 1360-91. Mr. Hulett's body was dismembered. Tr. 1382. The victims' possessions were discovered in trash bags at a Russell, Kansas landfill that Gillett had been seen at as well. Tr. 1213-14. In one of the trashbags was a bloody shoe. State's Exhibit 67. The shoeprint of the bloody shoe in State's Exhibit 67, matched a footprint found at the victims' residence in Hattiesburg. Tr.1522; State's Exhibit 113, 132-140. The residence in Hattiesburg contained a rolled up carpet with blood-like stains. Tr. 1499. The residence in Hattiesburg showed numerous signs of suspected blood-like stains throughout the house and the largest stains in the kitchen and living room areas. Tr. 1499.

There was sufficient evidence for the jury to reasonably conclude that the crime had occurred at 908 South Gulfport Street, Hattiesburg, Forrest County, Mississippi, making venue to have been properly proven to try the case in Forrest County. *Hill* at 916. This issue is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 16. THERE WAS NO TRIAL COURT ERROR REGARDING GILLETT'S HEARSAY OBJECTION

Gillett next contends the trial court erred in allowing hearsay testimony by Sergeant Terrel Carson of the Hattiesburg Police Department. Gillett argues that his objection should have been sustained when Sergeant Carson, in response to the question of, had he received a communication from Kansas authorities regarding a Hattiesburg address, answered, "I got

a call from Special Agent Mellor. He asked me to go over to 908 South Gulfport Street for a welfare concern". Tr. 1435.

The complained of testimony was not hearsay. The Mississippi Court of Appeals, by discussing this Court's previous holdings regarding just such instances of testimony offers a clear explanation of the correctness of the trial court's ruling to allow the officer to testify in this case. In *Butler v. State*, 758 So.2d 1063 (Miss.App.2000), that appellate court held:

> ¶ 8. Butler complains that the following statement made by one of the investigating officers, Officer Jackson, amounts to hearsay:
>
> > Q. And did you [Officer Jackson] determine as to what happened there that night?
> >
> > A. Yes, Sir. Mr. Boyte had explained that as he came out to his truck, someone had jumped him, grabbed the money bag, and they got in a tussle. And he went down to the ground, was still hanging on to the money bag. And at some point he was hit. He said he looked around to try to get his head in a different location and he was struck again. At that point he turned the money bag loose and two subjects ran away.
>
> ¶ 9. Over the objection of Butler, Officer Jackson's statement was allowed into evidence. The officer's statement, however, does not amount to hearsay. "To constitute hearsay, extra-judicial words must by some means present a statement, declaration, or assertion introduced for the purpose of proving the truth of the matter contained in or asserted by the item or thing." *Swindle v. State*, 502 So.2d 652, 658 (Miss.1987). Further the Mississippi Supreme Court has stated that if the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay. *Parker v. State*, 724 So.2d 482, 484 (Miss.App.1998). In the case sub judice, the out-of-court statement made by Boyte was not admitted for the purpose of proving the truth of the assertion made, but to explain the steps taken by Officer Jackson to investigate the incident. The truth of the statement by Boyte to Jackson was not in issue.

> ¶ 10. The Mississippi Supreme Court has held that admitting out-of-court statements made to the police during the course of their investigations is permissible. In so holding, the Court stated that "[i]t is elemental that a police officer may show that he has received a complaint, and what he did about the complaint without going into details of it." *Swindle*, 502 So.2d at 658. In *Swindle*, a police officer testified about a tip received from an informant. The Court held that a police officer's testimony about a tip received from an informant is admissible to the extent required to show why an officer acted as he did and was at a particular place at a particular time. *Id.* at 658.
>
> ¶ 11. The State produced testimony from Boyte to explain the actual events of the robbery. Officer Jackson's testimony was merely adduced to lay a predicate in order to discuss the officer's investigative actions. Through the officer's investigation, he determined that Boyte had been hit. From this determination, the officer was able to find the weapon used in the robbery. It was completely allowable for the court to admit this testimony. Moreover, the statement made by Officer Jackson did not implicate Butler because the statement given Officer Jackson by Boyte indicated that Boyte did not know who hit him. The trial court, therefore, did not err in allowing the statement.

Butler at 1063.

Rather than "textbook hearsay" as described by Gillett, the testimony merely allowed the officer to explain why he was where he was, or rather why he had reason to go to the residence in Hattiesburg to begin with and was not hearsay. *See also Thorson*, 895 So.2d 85, 126(¶ 95) (Miss.2004) (citing *Knight v. State*, 601 So.2d 403, 406 (Miss.1992))(a statement is not hearsay if "offered merely to show its effect on someone.") This issue is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 17. THE CONVICTIONS ARE NOT AGAINST OVERWHELMING WEIGHT OF THE EVIDENCE

Gillett next contends that his conviction is against the overwhelming weight of the evidence introduced at trial. He contends that the trial court erred in denying his motion for

directed verdict or granting a peremptory instructions. He further contends that the trial court also erred in denying his post-trial motions. Gillett's short argument on appeal does not point out how the evidence was insufficient to support the verdicts of guilty of capital murder returned by the jury. Gillett simply makes the unsupported claim that the State failed to meet its burden of proof as to the charges beyond a reasonable doubt. He argues that when all of the credible evidence, even taken as true, that "reasonable fair minded jurors could only have acquitted Mr. Gillett." *See* Appellants Brief at 172.

Gillett misstates the standard by which this Court is to consider a claim that the verdict is against the overwhelming weight of the evidence. He contends that only the "substantive" evidence must be considered as true by this Court. However, this Court has long adhered to the rule that when a challenge is made to the evidentiary sufficiency of a jury finding, whether in the context of a directed verdict, peremptory instruction, motion for new trial or appellate attack on sufficiency and weight of the evidence, any review by this Court must be initiated in all deference to the verdict returned by the jury. Therefore, as a primary rule, proof adduced at trial, must on appeal by the defendant, be accepted in a light most favorable to the State. The *evidence and all inferences* tending to support the verdict must be accepted as true. In *Hathorne v. State*, 759 So.2d 1127 (Miss. 1999), this Court held:

> ¶30. This Court's stringent standard of appellate review for challenges to the legal sufficiency of evidence was articulated in *Garrett v. State*, 549 So.2d 1325, 1331 (Miss.1989) (quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987)):

> When on appeal one convicted of a criminal offense challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. *We proceed by considering all of the evidence-not just that supporting the case for the prosecution-in the light most consistent with the verdict. We give the prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence.* If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fairminded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> (Citations omitted.)

759 So.2d at 1133. [Emphasis added, parenthetical the Court's.]

See generally Callahan v. State, 419 So.2d 165, 174 (Miss. 1982); *Williams v. State*, 463 So.2d 1064 (Miss. 1985); *Christian v. State*, 456 So.2d 729 (Miss. 1984); *Hyde v. State*, 413 So.2d 1042 (Miss. 1982); *Sparks v. State*, 412 So.2d 745 (Miss. 1982); *Robinson v. State*, 409 So.2d 719 (Miss. 1982); *Sadler v. State*, 407 So.2d 95 (Miss. 1981); *Carroll v. State*, 396 So.2d 1033 (Miss. 1981). Within the sphere of criminal law, an absolute standard must be met prior to reversal predicated on the evidence can be had. As stated in *Maiben v. State*, 305 So.2d 87 Miss. 1981), it follows:

> We have held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony. We have further said *that we will not set aside a guilty verdict, absent other error, unless it is clearly a result of prejudice, bias or fraud, or is manifestly against the weight of the credible evidence. Cromeans v. State*, 261 So.2d 453

(Miss. 1972); *Marr v. State*, 248 Miss. 281, 159 So.2d 167 (1963); and *Freeman v. State, supra.*

405 So.2d at 88. [Emphasis added.]

Further, in *Spikes v. State*, 302 So.2d 250 (Miss. 1974), this Court held:

> On appeal, in this situation, in passing on the sufficiency of evidence to support a verdict, this Court must accept as true the evidence which supports the verdict. *Murphee v. State*, 288 So.2d 599 (Miss. 1969).

302 So.2d at 251.

There is seldom a case where there is no conflict in the evidence. In *Hankins v. State*, 288 So.2d 866 (Miss. 1974), this Court said:

> In *Evans v. State*, 159 Miss. 561, 132 So. 563 (1931), we stated:
>
> > We invite the attention of the bar to the fact that we do not reverse criminal cases where there is a straight issue of fact, or a conflict in the facts; juries are impaneled for the very purpose of passing upon such questions of disputed fact, and we do not intend to invade the province and prerogative of the jury.
>
> (159 Miss. at 566, 132 So. at 564)
>
> We conclude there was ample evidence to support the verdict of the jury and we decline to intrude into the fact-finding office of the jury.

288 So.2d at 868.

Gillett's substantive evidence claim is therefore incorrect. Gillett's assertion that the verdict is against the overwhelming weight of the evidence is likewise flawed.

Looking to the evidence adduced by the State in this case, in its totality is overwhelming weight of Gillett's guilt to the charged crimes, most specifically by the

testimony of Ronnie Burns and LaRay Crumbless to whom Gillett confessed his robbery and murder of the victims. Tr. 1070-71, 1094. Further evidence of Gillett's involvement in the capital murders has been discussed throughout this brief. The evidence introduced by the State taken with the inferences that can be drawn from that evidence, when considered in a light most favorable to the verdict returned by the jury clearly supports that verdict. Gillett's convictions for capital murder are supported by the overwhelming weight of the evidence adduced by the State during the guilt phase of this trial. This claim is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 18. THE TRIAL COURT PROPERLY ALLOWED THE AVOIDING ARREST AGGRAVATOR TO BE INCLUDED IN JURY INSTRUCTIONS S-5-S AND S-6-S

Gillett next contends that the trial court erred in not sustaining his objection to the introduction of the avoiding arrest aggravator to the jury for consideration. This Court has held that the mere killing of the victim does not automatically give rise to this avoiding or preventing arrest aggravating circumstance. Other factors must be presented to show that the defendant was killing the victim to "cover his tracks." If there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer to 'cover their tracks' so as to avoid apprehension and eventual arrest, it is proper for the court to allow the jury to consider this aggravator. *See Mitchell v. State* 737 So.2d 192, 219-20, ¶¶103-07 (Miss.2001); *Walker v. State*, 740 So.2d 873, 888, ¶¶63-65 (Miss.1999); *Puckett v. State*, 737 So.2d 322, 361-62, ¶¶123-26 (Miss.1999). In *Grayson v.*

State, 879 So.2d 1008 (Miss.2004), this Court reiterated its previous holdings with regard to his aggravator stating:

> This Court has held:
>
> > Each case must be decided on its own peculiar facts. If there is evidence from which it may be reasonably inferred that a substantial reason for the killing was to conceal the identity of the killer or killers or to 'cover their tracks' so as to avoid apprehension and eventual arrest by authorities, then it is proper for the court to allow the jury to consider this aggravating circumstance.

Wiley v. State, 750 So.2d at 1206 (quoting *Chase v. State*, 645 So.2d 829, 858 (Miss.1994)(quoting *Hansen v. State*, 592 So.2d 114, 153 (Miss.1991)).

It was proper for the trial court to allow the jury to consider this aggravating circumstance, and this issue is without merit. The facts particular to this case show a clear attempt by Gillett to "cover his tracks" and avoid arrest. After brutally murdering Mr. Hulett and Ms. Heintzelman, Gillett went about the business of dismembering Mr. Hulett and concealing both bodies in their own freezer. Tr. 1016; State's Exhibit 18. Gillett then loaded the freezer with the bodies into the truck he stole from the murdered couple and drove it to Kansas where he informed friends of his crime and asked for help in disposing of the stolen truck. Tr. 1069-71, 1094-95. Gillett was identified as having made two drop-offs at a landfill in Russell, Kansas, where co-defendant Chamberlin led authorities to find seven trash bags of evidence associated with Mr. Hulett and Ms. Heintzleman. Tr. 1118-25, 1213-23. Gillett also made further attempts to have friends or relatives help him dispose of the stolen truck. Tr. 1136.

There is a large amount of evidence that was presented at trial to justify the inclusion of the avoiding arrest aggravator. It was entirely reasonable that the jury could reach the conclusion that the victims were murdered to conceal the identity of the killers and to avoid any investigation into the robbery. *Ross v. State*, 954 So.2d 968 (Miss.2007). This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 19. THE TRIAL COURT PROPERLY ALLOWED THE PREVIOUS VIOLENT FELONY AGGRAVATOR TO BE INCLUDED IN JURY INSTRUCTIONS S-5-S AND S-6-S

Gillett next contends the trial court erred in allowing the jury to consider the aggravating circumstance of having previously been convicted of a felony involving the use or threat of violence to the person over his objection. The conviction relied upon by the State regarded a conviction in the Kansas state courts and was discussed at trial as follows:

> MR. LAPPAN: Your Honor, if it please the Court, I spoke with Mr. Saucier before we began this morning, and he was very kind and he showed me documents that he wishes to introduce in the penalty phase regarding Roger's prior no contest plea to an aggravated attempted escape. Judge, I have several objections.
>
> THE COURT: Okay.
>
> MR. LAPPAN: Your Honor, the first is the document that the State wants to put into evidence is certified on page two, but it is not truly limited to the judgment of conviction for aggravated attempted escape. There's allegations of robbery. There's allegations of kidnapping. Judge, if that goes to the jury, it's going to be wantonly prejudicial. And if the Court is to allow a prior conviction to come in, it would only have to be for that conviction. My second objection, Your Honor, is that in the state of Mississippi escape does not satisfy the 5(b) aggravator, and I would cite Hanson versus State. Third, I would object that the documents that are before the judge do not sufficiently provide a factual basis to support the aggravating circumstance of a prior

violent felony. And, finally, Your Honor, the State has a burden to prove that this conviction in Kansas would also be a proper conviction in Mississippi for a prior violent felony, and they did not succeed in doing that. But most of all, Judge, the document that they want to put before the jury is really truly wantonly prejudicial. There's way too much information on that. It goes far beyond what the State is allowed to show, and if it goes to the jury it's going to be terribly destructive, and I would object.

THE COURT: Response?

MR. SAUCIER: Your Honor, this is one of those areas that a lot of people don't delve in, but I would submit to the Court that there are two documents that I would ask the Court to introduce. And the first document, although a lot of people don't think it's permissible, is basically our indictment. They call it a complaint, but that's their form of an indictment. And the second document is their judgment of conviction. Both of which are dually certified. Now, I submit to the Court that proof of the prior conviction may be proved by introduction of the PIN packs to show a prior conviction for a crime of violence. Now, it also goes on to say in this case -- I'm going to quote -- this can include facts about the prior crime. Williams v. State, 684 So.2d 1179. It's a 996 case. The indictment for the prior crime of violence to the person may be introduced to prove that the crime was one of violence, and that's cited in Blue versus State at 674 So.2d. 1184. It's a 1996 case. Now, I do submit to the Court that this trial court should use Mississippi law and order to determine whether a prior conviction from another state is in fact a felony involving the use of threat or violence. And that is in Holland versus State, 587 So.2d 848, a 1991 case. But I submit that if you look at the statute which I've provided the Court, we don't have an exact statute like that in our escape statute, so I provided the Kansas appropriate statute. And while this Court has to make a decision that a crime like this would be violent in Mississippi, since we don't have a statute like this there is no statutory law for the Court to go by. So I submit to the Court that I did provide a case law from the state of Kansas which went specifically to this statute. And it was extremely interesting because in the case law the case that was being decided was where a guy just walked away. He didn't cause any violence to anybody. But in that case they said it's not necessarily that you even cause violence. The act of an escape is violent because in apprehending you, you are putting people into jeopardy, both citizens and law enforcement. And they went on and on and on about how escape crime because of what can happen, not necessarily what did happen. And I would ask the Court to take time to review that case, and I'm

not submitting that we should adopt Kansas law, but because we don't have a statute like that, I think you can take that law into consideration of whether a law like that would be considered a violent crime in the state of Mississippi.

THE COURT: What about the other charges in this complaint that were dismissed, Mr. Saucier, that there was no conviction of?

MR. SAUCIER: I can only submit to the Court a certified document. I can't alter it, but this Court certainly can. I just can't submit it to you altered and not let you know what it all says. I have no problem in taking a black magic marker and delineating those other charges that were dismissed in the conviction. But I still think that the document should be now introduced because that's what we're supposed to introduce, so I wouldn't have any objection to blackening out or whiting out the others. And if we made this a part of the record, perhaps we could make a copy that simply whited out everything else where it wouldn't be noticeable. Then we would have this copy in the record for anyone to maybe review later.

THE COURT: Response?

MR. LAPPAN: Your Honor, first of all, when I spoke to you previously, I didn't even address the issue about the complaint. There are two exhibits. One is, if you will, the judgment of conviction. The other is the complaint. The complaint in its entirety cannot be introduced any more than an indictment in a criminal trial. It's simply an allegation that has no probative value, so the complaint cannot be introduced. Regarding the document concerning the conviction, Judge, if someone just begins to redact, draw out lines, the jury's just going to wonder, well, what did these say? In my experience, Judge, every time I've confronted this, the prosecution presents to the Court a single document which basically says on this day at this time in this court the defendant was convicted of this crime, signed by the appropriate person. That goes to the jury. What the State has given you, Judge, just can't be corrected. If you redact, you'll have the jury guessing what's on there. I think, Judge, the only possible solution at this point is if you were to allow the state to introduce the prior conviction, I guess the Court could simply tell the jury that at this date in this court Roger pled no contest to this crime. Other than that, Judge, those documents, no matter how you redact them or white them out, are going to be wantonly prejudicial. Thank you, sir.

THE COURT: The complaint cannot come in as it stands. It can be marked for identification purposes only.

MR. SAUCIER: Thank you, sir.

THE COURT: However, the jury will be informed that the defendant was convicted of the crime of attempted aggravated escape from custody in the District Court of Ellis County, Texas --

MR. SAUCIER: Kansas.

THE COURT: Kansas -- excuse me -- on September 27, 2004.

MR. LAPPAN: Your Honor, you're going to tell the jury that when we return?

THE COURT: I'm going to inform the jury that -- when the State is putting on their case in chief, I will make that announcement to the jury.

MR. LAPPAN: Is that document that the State has marked, the conviction, will that come into evidence or not, sir?

THE COURT: That will be for identification purposes only. It will not go to the jury.

MR. LAPPAN: And, Your Honor, before I take my seat, if I could, just one or objection. Mr. Saucier noted that there's no analog crime in Mississippi. It's a crime in Kansas, but he couldn't find an exact match in Mississippi, and I would also object on those grounds, please, sir.

THE COURT: That objection is noted, and I'm going to overrule the same.

Tr. 1632-39.

After providing the trial court with documentation of the relevant Kansas statute[6] and the associated charging instrument the State requested the trial court make a determination as to the admissibility of the requested aggravator. Tr. 1634-35. After review the trial court found

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[6] 21-3810. Aggravated escape from custody.

Aggravated escape from custody is:

(a) Escaping while held in lawful custody (1) upon a charge or conviction of a felony or (2) upon a charge or adjudication as a juvenile offender as defined in K.S.A. 2007 Supp. 38-2302, and amendments thereto, where the act, if committed by an adult, would constitute a felony or (3) prior to or upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto or (4) upon commitment to a treatment facility as a sexually violent predator as provided pursuant to K.S.A. 59-29a01 et seq. and amendments thereto or (5) upon a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting a felony or (6) by a person 18 years of age or over who is being held on an adjudication of a felony or (7) upon incarceration at a state correctional institution as defined in K.S.A. 75-5202 and amendments thereto, while in the custody of the secretary of corrections; or

(b) Escaping effected or facilitated by the use of violence or the threat of violence against any person while held in lawful custody (1) on a charge or conviction of any crime or (2) on a charge or adjudication as a juvenile offender as defined in K.S.A. 2007 Supp. 38-2302, and amendments thereto, where the act, if committed by an adult, would constitute a felony or (3) prior to or upon a finding of probable cause for evaluation as a sexually violent predator as provided in K.S.A. 59-29a05 and amendments thereto or (4) upon commitment to a treatment facility as a sexually violent predator as provided in K.S.A. 59-29a01 et seq. and amendments thereto or (5) upon a commitment to the state security hospital as provided in K.S.A. 22-3428 and amendments thereto based on a finding that the person committed an act constituting any crime or (6) by a person 18 years of age or over who is being held on a charge or adjudication of a misdemeanor or felony or (7) upon incarceration at a state correctional institution as defined in K.S.A. 75-5202 and amendments thereto, while in the custody of the secretary of corrections.

(c) (1) Aggravated escape from custody as described in subsection (a)(1), (a)(3), (a)(4), (a)(5) or (a)(6) is a severity level 8, nonperson felony.

(2) Aggravated escape from custody as described in subsection (a)(2) or (a)(7) is a severity level 5, nonperson felony.

(3) Aggravated escape from custody as described in subsection (b)(1), (b)(3), (b)(4), (b)(5) or (b)(6) is a severity level 6, person felony.

(4) Aggravated escape from custody as described in subsection (b)(2) or (b)(7) is a severity level 5, person felony.

K.S.A. 2002 Supp. 21-3810.

the issue to be suitable for inclusion in the instructions. Tr. 1638. The court agreed with Gillett that the proper way for introduction would be to not show the jury the actual paperwork but instead would simply inform the jury of the prior violent felony conviction orally. Tr. 1637-38. As the statute reads it is clear that not every escape can be considered a crime of violence. *See* FN 6. The trial court was presented with the evidence of the prior crime and after due consideration found it to fit into the circumstances of the instructions. There has been no showing by the Appellant the court abused its discretion in allowing the aggravator in for consideration.

Further, it is noted that Miss.Code Ann. §97-9-47 and §97-9-49, both provide for up to five years imprisonment for escapes or attempts to escape "by force or violence". This would appear to demonstrate that Mississippi does in fact recognize a form of aggravated escape.

The Seventh Circuit has gone so far as to hold that a violation of Miss.Code Ann. §97-9-47, is indeed a crime of violence. *United States v. Franklin*, 302 F.3d 722, 725 (7th Cir.2002).

This claim is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 20. THE TRIAL COURT DID NOT ERR IN ALLOWING JURY INSTRUCTION S-4-S REGARDING THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE TO BE PRESENTED TO THE JURY

Gillette contends the trial court erred in not overruling his objection to the constitutionality instruction S-4-S, which allowed the jury to consider whether or not the aggravator of whether the crimes were especially heinous atrocious or cruel. The exact instruction presented by the State is one that has been found by this Court to be acceptable in numerous cases, including *Havard v. State,* 928 So.2d 771 (Miss.2006), wherein this Court held:

> ¶ 58. The trial court's sentencing instruction S-9 defined for the jury what constituted a heinous, atrocious, or cruel (HAC) capital offense and instructed the jury that it may consider such, if found, an aggravating circumstance. Havard concedes in his brief to this Court that we have held this instruction to be constitutionally sufficient. Nonetheless, Havard challenges this instruction as unconstitutionally vague. The instruction read as follows:
>
> > The Court instructs the jury that in considering whether the capital offense was especially heinous, atrocious or cruel; heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.
> >
> > An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of capital murders-the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence beyond a reasonable doubt that the defendant utilized a method of killing which caused serious mutilation, that there was dismemberment of the body prior to death, that the defendant inflicted physical or mental pain before death, that there was mental torture and aggravation before death, or that a lingering or torturous death was suffered by the victim, then you may find this aggravating circumstance.

This issue is quickly laid to rest. "This Court has repeatedly held that the 'especially heinous, atrocious or cruel' provision of Miss.Code Ann. §

99-19-101(5)(h) is not so vague and overbroad as to violate the United States Constitution." *Stevens v. State*, 806 So.2d 1031, 1060 (Miss.2001). *See also Crawford v. State*, 716 So.2d 1028 (Miss.1998); *Mhoon v. State*, 464 So.2d 77 (Miss.1985); *Coleman v. State*, 378 So.2d 640 (Miss.1979). Indeed Havard himself concedes this Court's recognition of the constitutionality of this instruction. Despite this concession, Havard urges this Court to find that the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) held this instruction unconstitutional. We briefly revisit what we stated a little more than a year ago with regard to this same challenge:

> Thorson argues that first paragraph of the above instruction was held unconstitutional by the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Thorson further contends that in *Hansen v. State*, 592 So.2d 114 (Miss.1991), this Court announced that the language held unconstitutional in *Shell* should not be submitted to juries. Therefore, Thorson concludes that Instruction SP-2 has been determined by the United States Supreme Court and this Court to be per se objectionable. In *Shell*, the Supreme Court found that when used alone, language identical to that used in the first paragraph of instruction SP-2 was not constitutionally sufficient. 498 U.S. at 2, 111 S.Ct. 313, 112 L.Ed.2d 1. However, in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the Supreme Court determined that the first sentence of the second paragraph was a proper limiting instruction when used in conjunction with the language from *Shell*. This Court has repeatedly held this identical instruction to be constitutionally sufficient. *See Knox v. State*, 805 So.2d 527, 533 (Miss.2002); *Puckett v. State*, 737 So.2d 322, 359-60 (Miss.1999); *Jackson v. State*, 684 So.2d 1213, 1236-37 (Miss.1996).

Thorson v. State, 895 So.2d 85, 104 (Miss.2004). Havard invites us to overturn firmly entrenched Mississippi precedent on this issue. We decline to do so. For these reasons, this issue is without merit.

Havard at 799-800.

As this Court has repeatedly held this exact instruction to be acceptable this claim is without merit. Gillett is entitled to no relief on this claim.

CLAIM 21. THE TRIAL COURT DID NOT ERR IN PRESENTING THE ROBBERY AGGRAVATING CIRCUMSTANCE TO THE JURY FOR CONSIDERATION

Gillett next contends the trial court erred in allowing the jury to consider the aggravating circumstance that the capital offense took place while he was engaged, or was an accomplice in the commission of, or flight after having committed the robbery. Gillett argues that since the State used robbery as the underlying felony to obtain the capital murder conviction that use of the robbery as an aggravating circumstance is not proper under *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Gillett concedes that this Court has ruled converse to his argument and only urges the Court to overrule itself on the issue.

Whether or not the use of the underlying felony may properly be used as an aggravator has been answered by this Court previously:

> ¶ 120. Relying primarily on *Ring* and *Apprendi*, Ross maintains that the use of the underlying felony of armed robbery as an aggravating circumstance upon which the jury relied in returning a sentence was improper. However, evidence of the underlying crime can properly be used both to elevate the crime to capital murder and as an aggravating circumstance. *See Bennett*, 933 So.2d at 954; *Goodin v. State*, 787 So.2d 639, 654 (Miss.2001); *Smith*, 729 So.2d at 1223; *Bell v. State*, 725 So.2d 836, 859 (Miss.1998); *Crawford v. State*, 716 So.2d 1028, 1049-50 (Miss.1998). Furthermore, the United States Supreme Court has held that there is no constitutional error in using the underlying felony as an aggravator. *Lowenfield v. Phelps*, 484 U.S. 231, 233, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). The Supreme Court stated in *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), that

> "[t]he aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)."
>
> ¶ 121. The use of the underlying felony as an aggravator was not error.

Ross v. State, 954 So.2d 968 (Miss.2007).

Also within this claim, Gillett argument in footnote 146, that he was entitled to have the aggravating circumstances included in the indictment. This Court has addressed that specific issue as well:

> ¶ 58. This Court has previously rejected the argument made by Spicer. *See, e.g., Brown v. State*, 890 So.2d 901, 918 (Miss.2004); *Stevens v. State*, 867 So.2d 219, 225-27 (Miss.2003). We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. *Brown*, 890 So.2d at 918. The purpose of an indictment is to furnish the defendants notice and a reasonable description of the charges against them so that they may prepare their defense. *Williams v. State*, 445 So.2d 798, 804 (Miss.1984). Therefore, an indictment is only required to have a clear and concise statement of the elements of the crime the defendant is charged with. *Id.* "Our death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment." *Brown*, 890 So.2d at 918. Therefore, when Spicer was charged with capital murder he was put on notice that the death penalty may result, what aggravating factors may be used and the mens rea standard that was required. *See Stevens*, 867 So.2d at 227. We find that Spicer's ninth assertion of error is without merit.

Spicer v. State, 921 So.2d 292, 319 (Miss.2006).

The issues raised in this claim are without merit. Gillett is entitled to no relief on this claim as this aggravator, as well as those discussed in Claims 18, 19 and 20, were properly presented to the jury.

CLAIM 22. THE TRIAL COURT DID NOT ERR IN THE DENIAL OF SEPARATELY LISTED NON-STATUTORY MITIGATORS PRESENTED AS JURY INSTRUCTIONS

Gillett next contends that he was entitled to separate jury instructions on non-statutory mitigating circumstances. This Court has held that such is not required:

> ¶ 108. Specific instructions on non-statutory mitigating circumstances need not be given, so long as a "catch-all" instruction is included that instructs the jury that they may consider any factors that they may deem mitigating in their deliberations. *See, e.g., Manning v. State*, 735 So.2d 323, 352 (Miss.1999). This Court has also held that "catch-all" instructions do not limit the jury's consideration of mitigating factors. *Simmons v. State*, 805 So.2d 452, 499 (Miss.2001). Under the list of statutory mitigating circumstances in the first sentencing instruction, the trial court instructed the jury that they may consider:
>
> > Any other matter, any other aspect of the defendant's character or record, and any other circumstance of the offense brought to you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant.
>
> The instruction properly informs the jury about what may be considered as mitigation evidence. Therefore, the trial court's refusal of Ross' proposed instruction does not constitute error.

Ross v. State, 954 So.2d 968 (Miss.2007).

The jury in Gillett's case was properly instructed under the "catch-all" instruction:

> Any aspect of the Defendant's character or record and any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death.

R. 921, 926.

The jury was properly instructed and was not limited in the mitigation that could be considered and there was no error by the trial court in rejecting the instructions proposed by Gillett. This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 23. THE TRIAL COURT DID NOT ERR IN ALLOWING INSTRUCTION S-1-S TO BE PRESENTED TO THE JURY AND TO HAVE DENIED INSTRUCTION DA-61 BEING PRESENTED FOR CONSIDERATION

Gillett next contends the trial court erred in allowing instruction S-1-S, because the jury was instructed:

> You should consider and weigh aggravating and mitigating circumstances, as set forth in another instruction, but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

R. 915.

Gillett argues this instruction is improper in that it instructs the jury to not consider sympathy. Tr. 1707. This court has held that the giving of an instruction similar to S-1-S, is not error:

> ¶ 199. In *Turner v. State*, 732 So.2d at 952, the instruction read to the jury was almost the same. This Court upheld the language in the *Turner* instruction which stated "You should consider and weigh any aggravating and mitigating circumstances, as set forth later in this instruction, but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." *Turner v. State*, 732 So.2d at 952. See also *Evans v. State*, 725 So.2d 613, 690-91 (Miss.1997); *Holland v. State*, 705 So.2d 307, 351-52 (Miss.1997). Indeed, this Court held that a defendant is not entitled to a sympathy or mercy instruction and allowing such an instruction results in a jury verdict that is based on "whim and caprice." *Id.* (citing *Holland v. State*, 705 So.2d 307, 351-52 (Miss.1997)). In *Turner*, this Court found that "pity", "mercy" and "sympathy" are synonymous. *Id.* Case law

> precedent clearly allows an instruction such as that given to the jury in this case. Accordingly, this issue is without merit.

Howell v. State, 860 So.2d 704, 760 (Miss.2003).

As this Court has found the above stated language to be properly included in the jury instructions the trial court did not abuse its discretion in allowing Gillett's jury to consider the same instruction. Similarly, the trial court did not abuse its discretion in rejecting the sympathy instruction tendered by Gillett. Pity, mercy and *sympathy* are to be considered synonymous. *Id.* Gillett was not entitled to a specific instruction regarding the issue of sympathy and was properly instructed by the court on the issue as this Court has also held;

> ¶ 75. Yet a jury may not consider *only* sympathy, or passion, or prejudice. That is the warning this instruction provides to a jury, and each time we have considered this instruction we have held accordingly. An instruction that does not inform the jury that it must completely disregard sympathy and that leaves the option to vote for or against the death penalty is a proper statement of law. *See Blue v. State*, 674 So.2d 1184, 1225 (Miss.1996); *Willie v. State*, 585 So.2d 660, 677 (Miss.1991). The given instruction does not make the error of telling a jury to completely disregard sympathy; it is therefore valid. *See also Flowers v. State*, 842 So.2d 531, 563 (Miss.2003). Because the instruction provided to the jury was routine and accurate, this issue is without merit.

Brown v. State, 890 So.2d 901, 920 (Miss.2004)(Emphasis the Court's).

The trial court properly instructed the jury on this issue and did not abuse its discretion in doing so. This claim is without merit. Gillett is entitled to no relief on this issue.

CLAIM 24. THE TRIAL COURT DID NOT ERR BY GRANTING INSTRUCTION S-2-S

Gillett next contends the trial court erred in allowing both S-2-S and S-7-S, regarding instruction to the jury as to mitigating circumstances. Gillett claims that while S-7-S is a

correct statement of the law, he claims S-2-S does not properly state the law by specifically mentioning that the jury considers mitigation individually. This court has previously held:

> ¶ 67. Berry requested several instructions that would have informed the jury that they must determine the existence of mitigating factors on an individual basis. The trial court rejected these instructions, and Berry posits that the central sentencing instruction used by the trial court was erroneous since it did not require the jury to individually find mitigation. Berry argues that because the central sentencing instruction repeatedly referred to other findings that must be made unanimously by the jury, such as aggravating circumstances, the jury was left with the impression that it had to unanimously find the existence of a mitigating factor before it could be considered.
>
> ¶ 68. Berry's argument is founded on the holdings of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). In *Thorson v. State*, 653 So.2d 876, 894 (Miss.1994), this Court "addressed this argument under analogous instructions and found no error." In fact, we have rejected this argument numerous times. *See Chase v. State*, 645 So.2d 829, 859-60 (Miss.1994), cert. denied, 515 U.S. 1123, 115 S.Ct. 2279, 132 L.Ed.2d 282 (1995); *Conner v. State*, 632 So.2d 1239, 1271-73 (Miss.1993), cert. denied, 513 U.S. 927, 115 S.Ct. 314, 130 L.Ed.2d 276 (1994); *Hansen v. State*, 592 So.2d 114, 149-50 (Miss.1991), cert. denied, 504 U.S. 921, 112 S.Ct. 1970, 118 L.Ed.2d 570 (1992), post-conviction relief granted on other grounds, 649 So.2d 1256 (Miss.1994). In light of our past holdings, this claim has no merit.

Berry v. State, 703 So.2d 269, 288-89 (Miss.1997).

Different from the holding in *Berry*, the court in Gillett's case allowed the jury to be instructed as to individual consideration of mitigating circumstances and did not inform the jury that finding mitigation factors required unanimity.

Gillett goes on to argue that the perceived error could have been corrected by inclusion of his rejected instructions DA-28, DA-29, DA-40 and DA-44. DA-28, DA-29 and DA-40 were refused as redundant and covered elsewhere in the instructions. Tr. 1721. "[t]he

trial court is "under no obligation to grant redundant instructions." *Montana v. State*, 822 So.2d 954, 961 ¶ 26 (Miss.2002). "The refusal to grant an instruction which is similar to one already given does not constitute reversible error." *Id.* DA-40 was refused after the State's objection that it was confusing and not a correct statement of the law. Tr. 1724.

The trial court did not abuse its discretion and the jury was properly instructed on this issue. The claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 25. THE TRIAL COURT DID NOT ERR IN DENYING INSTRUCTION DA-13

Gillett next contends he was entitled to have instruction DA-13 presented to the jury. It reads:

> As the death penalty is never required, you may always find that Mr. Gillett should be sentenced to life in prison or life without the possibility of parole.

R. 1379.

In instruction DA-37, the jury was instructed in part, "You, the Jury, always have the option to sentence Mr. Gillett to life imprisonment, whatsoever findings you make". R. 940. The instruction was therefore repetitive since the jury was informed in DA-37 that they were not bound to a sentence of death and could opt for imprisonment regardless of any findings. This Court has held that the trial court is not required to grant repetitive or cumulative instructions on the same point of law. In *Hull v. State*, 687 So.2d 708 (Miss. 1996), this Court held:

> This Court's standard in reviewing jury instructions is to read all instructions together and if the jury is fully and fairly charged by other

> instructions, the refusal of any similar instruction does not constitute reversible error. *Lee v. State*, 529 So.2d 181, 183 (Miss.1988). This Court does not review jury instructions in isolation. *Malone v. State*, 486 So.2d 360, 365 (Miss.1986). Refusal of a repetitive instruction is proper. *Allman v. State*, 571 So.2d 244, 252 (Miss.1990).

687 So.2d at 722.

When all of the jury instructions are read together the jury was fully and fairly charged as to its proper function in determining the sentence to be imposed. This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 26. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE GILLETT'S PRESUMPTION OF LIFE INSTRUCTIONS

Gillett next contends the trial court erred in the denial of four instructions DA-10, DA-11, DA-19 and DA-39 in which he claims he was entitled to have the jury instructed that there was a presumption that life was the appropriate punishment. As to this assertion this Court has held:

> [w]e have repeatedly said that we reject the "proposition that a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment." *Watts v. State*, 733 So.2d 214, 241 (Miss.1999) (internal quotes & citation omitted); *see also Jackson v. State*, 684 So.2d 1213, 1233 (Miss.1996). We adhere to that standard today. Because the judge did not abuse his discretion in excluding the proposed instructions, this assignment of error is without merit.

Brown v. State, 890 So.2d 901, 920 (Miss.2004).

That Gillett was not entitled to the proposed instructions is clear however, it is also clear that by virtue of the court's granting of instructions DA-37 and DA-65, the issue is

fairly covered elsewhere and not required to be repeated by the court. A review of the complained of instructions and those granted reveal that inclusion would have been redundant.

DA-37 states:

> You may sentence Mr. Gillett to life imprisonment if you find that only one mitigating circumstance exists and multiple aggravating circumstances exist. You may also sentence Mr. Gillett to life imprisonment if you find that no mitigating circumstance exists. You are not required to find any mitigating circumstance in order to return a sentence of life imprisonment. Similarly, the finding of an aggravating circumstance does not require that you return a sentence of death, nor would your individual determination that aggravating circumstances outweigh mitigating circumstances.
>
> You, the Jury, always have the option to sentence Mr. Gillett to life imprisonment, whatsoever findings you make.

R. 940.

DA-65 reads:

> Only if all twelve of you unanimously agree beyond a reasonable doubt that death is the appropriate punishment may you impose the sentence of death. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if you are convinced it is wrong. On the other hand, do not surrender your honest conviction as to what you feel the sentence in the case should be just because of the opinions of your fellow jurors or just so that you can all agree on a verdict.

R. 941.

A reading of instruction DA-37 and DA-65, clearly demonstrates that the substance of what was requested in DA-10, 11, 19 and 39 were given in those instructions.

Further, Gillett has little to complain of in the denial of these instructions and would not have had any ground for appeal had DA-37 and DA-65 been denied also. The reason being in that these instructions are flawed. Instructions DA-10 and DA-39 are flawed in that they are mercy instructions and contain improper burdens of proof. Instruction DA-37 is flawed in that it is a mercy instruction. Looking to Instruction DA-10, the instruction reads, in part:

> As such, even if you find that aggravation outweighs mitigation, if the State has not satisfied you that death is the appropriate punishment, you must not return a sentence of death.
>
> R. 1376.

DA-39, reads in full:

> If you determine there are no mitigating circumstances, you may still decide the aggravating circumstances do not justify a sentence of death.

R. 1405.

A capital defendant is not entitled to an instruction containing this language during the sentence phase of his trial. This Court has held that an instruction that informs the jury that it has the power to return a life sentence even if the mitigating circumstances do not outweigh the aggravating circumstances is nothing more than a mercy instruction. *Manning v. State*, 726 So.2d 1152, 1197, ¶¶ 195 (Miss. 1998); *Foster v. State*, 639 So.2d 1263, 1301 (Miss. 1994). The converse of this statement has been more often spoken to by the Court. The Court has also held that a capital defendant is not entitled to an instruction which states "even if the aggravating circumstances outweigh the mitigating circumstances the jury is free

to return a life sentence." *Holland v. State*, 705 So.2d 307, 354 (Miss. 1997); *Carr v. State*, 655 So.2d 824, 849-50 (Miss. 1995), *cert. denied*, 515 U.S. 1076, 116 S. Ct. 782, 133 L.Ed.2d 733 (1996); *Foster v. State*, 639 So.2d 1263, 1299-1300 (Miss. 1994), *cert. denied*, 514 U.S. 1019, 115 S.Ct. 1365, 131 L.Ed.221, *reh. denied*, 514 U.S. 1123, 115 S.Ct. 1992, 131 L.Ed.2d 878 (1995); *Hansen v. State*, 592 So.2d 114, 151 (Miss.1991). This Court has held that such instructions are nothing more than mercy instructions and results in a verdict based on whim and caprice.

Also, contained in instruction DA-65 is the language, ""you unanimously agree beyond a reasonable doubt that death is the appropriate punishment". R.941. This language is an erroneous statement of the law. This Court has held that a capital defendant is not entitled to an instruction that states the jury must find, beyond a reasonable doubt, that death is the appropriate penalty. As pointed out by this Court the Mississippi statutory scheme does not require any such finding. The statute only requires (1) a unanimous finding, beyond a reasonable doubt, of the existence of one or more aggravating circumstances; (2) that there are insufficient mitigating circumstances to outweigh the aggravating circumstances; and (3) a unanimous finding that the defendant should suffer death. *Simmons v. State*, 805 So.2d 452, 500, ¶ 134 (Miss. 2001); *Williams v. State*, 684 So.2d 1179, 1202 (Miss. 1996). *See* MISS. CODE ANN. § 99-19-103. *See Evans v. State*, 725 So.2d 613, 695-96, ¶¶ 379-80 (Miss. 1997). There is no requirement that the jury find that death is the appropriate sentence beyond a reasonable doubt. Gillett was not entitled to the proposed instructions as they were

improperly mercy instructions. The instructions were fatally flawed and it was not error for the trial court to deny them. In addition, Gillett requested and was given a windfall by the inclusion of instructions DA-37 and DA-65, which served the purpose of presenting to the jury what was requested in these "presumption of life" instructions. This claim is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 27. THE TRIAL COURT DID NOT ERR IN NOT INCLUDING INSTRUCTIONS DA-66 AND DA-67 TO THE JURY FOR CONSIDERATION

Gillett next contends that he was entitled to instruct the jury as to the consequences of their failure to reach a unanimous verdict as to sentencing. Gillett submitted DA-66, which states in relevant part, " If you cannot, within a reasonable time, agree as to punishment, I will dismiss you and impose a sentence of life without the benefit of parole." R. 1433. And also submitted DA-67, which in relevant part reads, " If you do not rech a verdict as to penalty, Mr. Gillett will be sentenced life imprisonment without the possibility of parole or probation." R. 1434.

Nearly identical circumstances and instructions have been presented to this Court on the issue previously and this Court held:

> ¶ 142. Edwards also assigns as error the trial court's refusal of Instruction D-S10 which read:
>
> *The court instructs the jury that if you do not agree upon punishment the court will sentence the defendant to life imprisonment without possibility of parole or early release.*

He claims that this instruction correctly stated the law according to Miss.Code Ann. § 99-19-103. Miss.Code Ann. § 99-19-103 (1994) provides that "[i]f the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

¶ 143. However, jury instructions "are not to be read unto themselves, but with the jury charge as a whole." *Carr v. State*, 655 So.2d 824, 848 (Miss.1995); *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Instructions CS-2 and CS-3 make clear the options the jury had in returning to the courtroom:

> (1) ... we ... unanimously find the Defendant should suffer death.
>
> (2) We, the Jury, find that the Defendant should be sentenced to life imprisonment without the possibility of parole or early release.
>
> (3) We, the Jury are unable to unanimously agree on punishment.

Thus, when read as a whole, the jury instructions properly informed the jury that it could return to the courtroom and report that it was unable to agree unanimously on punishment. *Wilcher v. State*, 697 So.2d 1123, 1136 (Miss.1997). D-S10 was a cumulative instruction. There is no error in the denial of a cumulative instruction. *Walker v. State*, 671 So.2d at 613.

Moreover, even if the jury had never been instructed on what would happen if they could not agree, there would have been no error. In *Stringer v. State*, this Court held that the trial judge did not err by failing to inform the jury that, "if they were unable to agree within a reasonable time on the punishment to be imposed, [the defendant] would be sentenced to life imprisonment." *Stringer*, 500 So.2d 928, 945 (Miss.1986). *Wilcher v. State*, 697 So.2d at 1136-37. Therefore, this assignment of error is without merit.

Edwards v. State, 737 So.2d 275, 316-17 (Miss.1999).

In this case, the jury was correctly informed of the three options available to return to the courtroom with. R. 922-23 and 927-28, the jury was informed of the options of death,

life without parole and the third choice that they were unable to unanimously agree on punishment. As the trial court was not in error for not presenting a cumulative instruction to the jury this issue is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 28. THE TRIAL COURT DID NOT ERR IN DENYING INSTRUCTIONS DA-5 AND DA-63

Gillett next contends the trial court erred in not allowing his proposed instructions DA-5 and DA-63 to the jury during the sentencing phase. DA-5 states:

> You have found Mr. Gillett guilty of capital murder. You must now decide the appropriate punishment in this case.
>
> Before I instruct you on specific matters regarding Mr. Gillett's sentence, I will instruct you on the general principles that will govern your deliberations in this sentencing phase.
>
> In explaining your duties, I must offer as complete an explanation as possible concerning the legal matters that must govern your deliberations. I cannot stress to you enough that the focus of your deliberations during this phase is not the same as in an ordinary case. *Punishment by death is a unique punishment. It is final. It is irrevocable. You must render a decision based on the evidence free from anger and prejudice.*

R. 1371. (Emphasis added).

This exact instruction was discussed by this Court in *Thorson v. State,* 895 So.2d 85 (Miss.2004):

> ¶ 54. Thorson next argues that the trial court erred in refusing to grant Jury Instruction DS-6. The first part of the instruction mirrored an instruction already granted by the trial court which explained the procedure used in a capital murder case. The trial court also explained this procedure to the jury during voir dire. However, the final sentences of the instruction read, *"The death penalty is a unique punishment. It is final and irrevocable. You must*

render a decision based on the evidence free from passion and prejudice." The State objected to this instruction stating that these sentences were improper. The trial court announced his concerns regarding the instruction finding:

It sounds to me in the second paragraph that the Court is arguing to the jury the defense. The only way I will give DS-6 is to delete the second paragraph, which I think is repetitious with the first sentencing instruction actually.

Thorson submitted the instruction as originally read, and the trial court refused the instruction. Thorson argues that the trial court erred in refusing to grant the instruction because the jury was not instructed that (1) the focus of the capital sentencing decision is not the same as an ordinary case, (2) the sentence of death is a unique situation in that it is irrevocable and final, and (3) the jury's sentencing decision must be made free from passion and prejudice.

¶ 55. Thorson cites three cases to support these propositions. *Woodson v. North Carolina*, 428 U.S. 280, 303-04, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) ("[D]eath is a punishment different from all other sanctions in kind rather than degree."); *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976) ("[D]eath as a punishment is unique in its severity and irrevocability."); *Flores v. Johnson*, 210 F.3d 456, 459 (5th Cir.2000) ("Death is the most final, and most severe, of punishments."). While these general propositions are true, none of these cases stands for the proposition that the jury must receive an instruction stating that a death sentence proceeding is different from an ordinary criminal proceeding. Thorson has failed to cite any relevant authority in support of this assertion. This Court has continuously held that such failure to cite relevant authority "obviates the appellate court's obligation to review such issues." *Simmons v. State*, 805 So.2d at 487 (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss.1998)). Therefore, this issue is not properly before the Court and is procedurally barred from our consideration.

¶ 56. Procedural bar notwithstanding, the trial court properly denied Jury Instruction DS-6. As previously stated, during voir dire, the trial court properly informed the jury that sentencing was different in capital cases. The trial court generally explained to the jury that it would determine the penalty which would be imposed. The jury was further subjected to the death qualification process conducted during voir dire. The jury was also instructed that it should "consider and weigh any aggravating and mitigating circumstances, [ ], but you are cautioned not to be swayed by mere sentiment, conjecture, sympathy,

> passion, prejudice, public opinion or public feeling." (emphasis added). Therefore, the jury was fully instructed to make its decision free from "passion" and "prejudice." We find this issue to be without merit.

Thorson at 109-10. (Emphasis added).

Just as Thorson did, Gillett relies upon three cases in support of his argument. However, Gillett adds the case of *Gilmore v. Taylor*, 508 U.S. 333 (1993), and repositions the *Gregg* case in his brief. In spite of the addition of *Gilmore*, Gillett does not overcome the same problem encountered by Thorson, as he fails to cite to relevant authority and this issue is therefore barred from consideration . *Thorson* at ¶55, *see supra.*

In DA-63, Gillett proposed the following:

> If Roger Gillett is sentenced to life imprisonment without the possibility of parole or early release then he will spend the rest of his natural life incarcerated by the Mississippi Department of Corrections. His life sentence without possibility of probation or parole cannot be reduced or suspended.
>
> The court instructs the jury that if you sentence Mr. Gillett to death, he will be executed by the State of Mississippi.

R. 1430.

This Court has held such an instruction is not properly put to the jury. *Flowers v. State*, 842 So.2d 531, 556 (Miss.2003).

Finally, Gillett alleges the trial court erred in not accepted the portions of instruction DA-5 that were not specifically objected to by the State. Gillett made no such request of the trial court. There is no obligation of the trial judge to give jury instructions *sua sponte*. *Gray v. State*, 728 So.2d 36, 60 (Miss.1998). Nor is the trial judge required to draft or give every

instruction allowable in a capital case as it is the duty of the defendant to submit the instructions he desires to be given. *Jordan v. State*, 786 So.2d 987, 1025 (Miss.2001).

The trial court properly refused the instructions as presented. This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 29. THE TRIAL COURT DID NOT ERR IN REFUSING GILLETT'S MERCY INSTRUCTION

Gillett next contends the trial court erred in denying his proposed instruction DA-38 which states:

> The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State had proved beyond a reasonable doubt that the death penalty is warranted".

R. 1404.

Gillett relies upon the case of *Kansas v. Marsh*, 548 U.S. 163 as authority for the instruction. This Court has discussed the issue of this exact instruction in detail in the case of *Chamberlin v. State*:

> ¶ 80. Whether to give a jury instruction is within the sound discretion of the trial court. *Goodin v. State*, 787 So.2d 639, 657 (Miss.2001). Chamberlin argues that the trial court erred when it refused to give two proposed instructions, D-3 and D-10. Proposed instruction D-3 read:
>
> > A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case. *The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the*

State has proved beyond a reasonable doubt that the death penalty is warranted.

¶ 81. Proposed instruction D-10 read:

> If based upon your consideration of the aggravating and mitigating circumstances each and every one of you agrees that death is the appropriate sentence, you must still consider the final step of the penalty phase process. Just as you are the sole judges of the facts, so too are you the sole arbiters of mercy. Regardless of your consideration of aggravating and mitigating circumstances, as the jury, you always have the option to recommend against death. This means that even if you conclude that death is an appropriate sentence based on your consideration of mitigating and aggravating circumstances, you may still show mercy and sentence Ms. Chamberlin to life in prison. As a jury, this option to recommend life must always be considered by each and every one of you before an ultimate and irrevocable sentence may be passed.

¶ 82. Chamberlin argues that *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), required the trial court to give a mercy instruction in this case. **However, *Marsh* does not speak to or even consider the issue of whether a mercy instruction is required.** Rather, the Marsh Court held that "the States enjoy a constitutionally permissible range of discretion in imposing the death penalty." Marsh, 126 S.Ct. at 2525 (quoting *Blystone v. Pennsylvania*, 494 U.S. 299, 308, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990)) (internal quotations omitted). "[T]he States are free to determine the manner in which a jury may consider mitigating evidence," i.e., whether the evidence should be viewed through the lens of mercy. *Marsh*, 126 S.Ct. at 2523.

¶ 83. That discretion allows trial courts to avoid the potential arbitrariness of an emotional decision encouraged by a mercy instruction.

This Court has repeatedly held that "capital defendants are not entitled to a mercy instruction." *Jordan v. State*, 728 So.2d 1088, 1099 (Miss.1998) (citing *Underwood v. State*, 708 So.2d 18, 37 (Miss.1998); *Hansen v. State*, 592 So.2d 114, 150 (Miss.1991); *Williams v. State*, 544 So.2d 782, 788 (Miss.1987); *Lester v. State*, 692 So.2d 755, 798 (Miss.1997); *Jackson v. State*, 684 So.2d 1213, 1239 (Miss.1996); *Carr v. State*, 655 So.2d 824, 850 (Miss.1995);

Foster v. State, 639 So.2d 1263, 1299-1301 (Miss.1994); *Jenkins v. State*, 607 So.2d 1171, 1181 (Miss.1992); *Nixon v. State*, 533 So.2d 1078, 1100 (Miss.1987)). "The United States Supreme Court has held that giving a jury instruction allowing consideration of sympathy or mercy could induce a jury to base its sentencing decision upon emotion, whim, and caprice instead of upon the evidence presented at trial." *Id.* (citing *Saffle v. Parks*, 494 U.S. 484, 492-95, 110 S.Ct. 1257, 1262-64, 108 L.Ed.2d 415 (1990)).

Howell v. State, 860 So.2d 704, 759 (Miss.2003). *See also Ross*, 954 So.2d at 1012 (holding there was no error in refusing the defendant's proposed instruction specifically citing mercy or sympathy as a mitigator since "a capital defendant is not entitled to a sympathy instruction, because, like a mercy instruction, it could result in a verdict based on whim and caprice"); *King v. State*, 784 So.2d 884, 890 (Miss.2001) ("neither side is entitled to a jury instruction regarding mercy or deterrence"); *Wiley v. State*, 750 So.2d 1193, 1204 (Miss.1999) ("[T]he State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.").

¶ 84. Additionally, the requested instruction D-10 states that "even if you conclude that death is an appropriate sentence based on your consideration of mitigating and aggravating circumstances, you may still show mercy and sentence Ms. Chamberlin to life in prison." This Court has found that "a defendant is not entitled to an instruction that the jury may return a life sentence even if the aggravating circumstances outweigh the mitigating circumstances or if they do not find any mitigating circumstances." *King v. State*, 960 So.2d 413, 442 (Miss.2007) (citing *Holland v. State*, 705 So.2d 307, 354 (Miss.1997), *Hansen v. State*, 592 So.2d 114, 150 (Miss.1991), *Goodin v. State*, 787 So.2d 639, 657 (Miss.2001), *Foster v. State*, 639 So.2d 1263, 1301 (Miss.1994)). "[T]his Court has repeatedly refused to accept instructions that would nullify the balancing of aggravating and mitigating factors, since such instructions might induce verdicts based on whim and caprice." Ross, 954 So.2d at 1012 (citing *Manning v. State*, 726 So.2d 1152, 1197 (Miss.1998), overruled in part by *Weatherspoon v. State*, 732 So.2d 158 (Miss.1999)).

¶ 85. The trial court did not abuse its discretion in refusing either instruction. This issue is without merit.

Chamberlin, 989 So.2d at 341-43.(Emphasis added).

As Gillett relies solely on *Marsh* for his contention that he was entitled to a mercy instruction the claim is due to be dismissed as barred for failing to cite to relevant authority. *Thorson,* 895 So.2d 85 (¶55). Alternatively, the holding in Chamberlin discusses the long line of cases that affirm mercy instructions are not permissible. *See Chamberlin, supra.*

This claim is procedurally barred and wholly without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 30. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT AT EITHER THE GUILT OR PENALTY PHASES OF THE TRIAL

Prior to trial, Gillett filed a notice that he may object to certain points brought out in the trial of co-defendant Chamberlin if brought out by the State at his trial. R. 834-55. Gillett offered no objection at trial as to any of the complained of issues under this claim and his attempt at explaining away that lack of objections is spurious as well as completely without merit or foundation. Gillett cites to *United States v. Sawyer*, 347 F.2d 372, 374 (4th Cir.1965), for the proposition that the lack of an objection may be understandable so as not to underscore a remark in the minds of the jury. What is more appropriate in this case is in line with the ultimate holding in *Sawyer* that:

> However, we are satisfied that in this case the conduct of the prosecutor is not open to criticism and that the reason no objection was voiced against the Assistant United States Attorney's argument is simply that the defense counsel perceived no ground for objection, as we perceive none.

Id. at 374.

As in Sawyer, there were no grounds to object to the State's closing arguments and Gillett therefore sat silent. It is inconceivable that Gillett maintains he sat idle as the State allegedly, repeatedly committed reversible error. Nor did Gillett make this accusation in his motion for new trial. Again, there was no error, however, even if there were error Gillett's failure to contemporaneously object bars the issue from consideration. That Gillett failed to object to the arguments of the State at trial he is procedurally barred from raising the issue on appeal. The failure to interpose a contemporaneous objection at trial waives any claim of error on appeal. *Howell v. State*, 860 So.2d 704, 756, ¶ 185 (Miss. 2003); *Walker v. State*, 671 So.2d 581, 597 (Miss.1995); *Foster v. State*, 639 So.2d 1263, 1270(Miss. 1994).

Without waiving the procedural bar, the State alternatively asserts that no issue included in the appellant brief, and only designated as error by reference to his pre-trial notice, rises to the level of misconduct sufficient to require reversal of the convictions or sentences. The standard of review for prosecutorial misconduct is: "Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow." *Goodin v. State,* 787 So.2d 639, 653 ¶ 41 (Miss.2001). At no time did the prosecution engage in misconduct of any degree and certainly not to any degree warranting reversal. This issue is barred from consideration and also without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 31. THE TRIAL COURT DID NOT ERR IN ALLOWING THE INTRODUCTION OF AUTOPSY PHOTOS

Gillett contends the trial court erred in allowing autopsy photographs into evidence during the trial. Gillett points out that he offered to stipulate to the identities, manner and cause of death for Vernon Hulett and Linda Heintzelman. This Court has held that the offer of a stipulation by the defendant as to what the State hopes to prove by photographs does not bar their admission. *Simmons v. State*, 805 So.2d 452, 485, ¶ 80 (Miss. 2001); *Hughes v. State*, 735 So.2d 238, 263, ¶ 100 (Miss. 1999); *Noe v. State*, 616 So.2d 298, 303 (Miss. 1993); *Stevens v. State*, 458 So.2d 726, 729 (Miss. 1984). The State was not required to accept Gillett's stipulation as to the identities of the victims in this case. This is not a ground for error in the introduction of the complained of photographs.

Photographs, whether original or copies, are admissible as primary evidence upon the same grounds and for the same purposes as diagrams, maps and drawings of objects, places or people. *Ledbetter v. State*, 233 So.2d 782, 785 (Miss. 1970) (citing *Willette v. State*, 224 Miss. 829, 80 So.2d 836 (1955)). Photographs that aid in describing the circumstances of a killing, the location of the body and cause of death, or that supplement or clarify a witness's testimony, have evidentiary value and are admissible before a jury. *Neal v. State*, 805 So.2d 520, 523, 524 (Miss. 2002). Photos of murder victims must almost certainly be considered relevant evidence.

Admission of photos of a deceased is within the sound discretion of the trial court, and is proper so long as the photos serve some useful, evidentiary purpose. *Some* probative value is the only requirement needed to buttress a trial judge's decision to allow photos into

evidence. *Jordan v. State*, 728 So.2d 1088, 1094 (Miss. 1998); *Holland v. State,* 705 So.2d 307, 350 (Miss. 1997); *Parker v. State*, 514 So.2d 767, 771 (Miss. 1986). The comment to Rule 401 of the Mississippi Rules of Evidence make clear that, "[i]f the evidence has any probative value at all, the rule favors its admission."

If prejudice slightly outweighs probative value, evidence still must be admitted. "To tip the scale is not enough. The [Rule 403 factors must [...] 'substantially outweigh' probative value before the evidence may be excluded." *Williams v. State*, 543 So. 2d 665, 667 (Miss.1989). The discretion of a trial judge to admit photos in criminal cases, "runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and extenuation of probative value." *Woodward v. State*, 726 So.2d 524, 535 (Miss. 1997) (quoting *Brown v. State*, 690 So. 2d 276, 289 (Miss. 1996)).

This Court's position as to the admissibility of photographs is well settled:

> In *Westbrook v. State*, 658 So. 2d 847, 849 (Miss. 1995), this Court found that photographs of a victim have evidentiary value when they aid in describing the circumstances of the killing, *Williams v. State*, 354 So. 2d 266 (Miss. 1978); describe the location of the body and cause of death, *Asheley v. State*, 423 So.2d 1311 (Miss. 1982); or supplement or clarify the witness testimony, *Hughes v. State*, 401 So. 2d 1100 (Miss. 1981).
>
> The admissibility of photographs rests within the sound discretion of the trial court. *Jackson v. State,* 672 So. 2d 468, 485 (Miss. 1996); *Griffin v. State*, 557 So. 2d 542, 549 (Miss. 1990); *Mackbee v. State*, 575 So. 2d 16, 31 (Miss. 1990); *Boyd v. State*, 523 So. 2d 1037, 1039 (Miss. 1988). Moreover, the decision of a trial judge will be upheld unless there has been an abuse of discretion. *Westbrook*, 658 So. 2d at 849

Gray v. State, 728 So.2d 36, 57 (Miss. 1998).

> This [abuse of discretion] standard is very difficult to meet. In fact, the "'discretion of the trial judge runs toward almost unlimited admissibility regardless of the gruesomeness, repetitiveness, and the extenuation of probative value.'" *Brown*, 690 So. 2d at 289; *Holley*, 671 So. 2d at 41. "At this point in the development of our case law, no meaningful limits exist in the so-called balance of probative/prejudicial effect of photographs test." *Chase*, 645 So. 2d at 849 (quoting *Williams v. State*, 544 So. 2d 782, 785 (Miss. 1987)).

Woodward, 726 So. 2d at 535; *See Stevenson v. State*, 733 So. 2d 177, 180 (Miss. 1998).

The State, regarding each and every photograph objected to here in this appeal, established the relevancy and probative value of each through testimony. The Appellant made a continuing objection to the introduction of all autopsy photographs as gruesome and prejudicial. Tr. 1345. The State qualified all of the autopsy photographs it intended to offer into evidence as being of assistance to the pathologist, Dr. Pojman, in explaining the injuries suffered by the victims:

> BY MR. WEATHERS:
>
> Q. Before proceeding any further, would it be a fair statement, Doctor, to make to this jury that during the course of your examination of both Ms. Heintzelman and Ms. Hulett that a number of photographs were taken to document not only what you saw and observed but also what occurred as you proceeded with both the external examination and also the internal examination?
>
> A. There were numerous photographs taken by myself and also by law enforcement.

Q. All right. Would you have an estimate as to how many photographs were taken, say, of Ms. Heintzelman during the course of the examination that you're describing today?

A. I know I took probably around one hundred plus photographs. And then, again, law enforcement, I do not know how many they took.

Q. So quite a number there?

A. There are a large number, yes.

Q. All right. Would the same thing be true of Mr. Hulett?

A. That is correct. There's not as many but there are still quite a few.

Q. And before coming here today, is it not true that I asked you to simply select a few photographs that would be representative that would assist you in explaining the injuries that you saw to the jury?

A. That is correct.

Tr. 1357-58.

As the prosecution qualified each photograph that has been objected to as relevant, aiding in describing the circumstances of the killings, the cause of death and/or aiding in the clarifying or supplementing the witnesses's testimony to the jury the trial court did not abuse its discretion in allowing the photographs into evidence. *Simmons v. State*, 805 So.2d 452, 485 (Miss.2001). This claim is without merit. Gillett is entitled to no relief on this assignment of error.

CLAIM 32. THERE WAS NO ERROR IN THE PENALTY PHASE OF THE TRIAL REQUIRING THE SENTENCE BE VACATED

Gillett's argument under this assignment is that because of the errors demonstrated in claims 18 through 29, his sentence is unreliable, arbitrary and capricious. This is nothing more than a cumulative error argument repeating Gillett's claim that the State failed to carry it's burden of proof throughout the penalty phase. This Court has previously encountered an identical claim:

> ¶ 69. Thorson argues that in light of the previous issues, his sentence of death is the end result of an invalid penalty phase. Therefore, his execution would amount to an "arbitrary and capricious" killing in violation of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article 3, Section 28 of the Mississippi Constitution. This argument amounts to a cumulative error argument. This Court has previously found no reversible errors. If there is "no reversible error in any part, so there is no reversible error to the whole." *McFee v. State*, 511 So.2d 130, 136 (Miss.1987). *See also Caston v. State,* 823 So.2d 473, 509 (Miss.2002); *Hicks v. State*, 812 So.2d 179, 195 (Miss.2002). Therefore, this issue is without merit.

Thorson at 114.

The State would assert that it has demonstrated that there is no error under any of these previous assignments of error. That makes the cumulative or aggregate error law applicable. If there is no error in part then there is no error in the whole. *See Simmons v. State*, 805 So. 2d 452, 508, ¶ 164 (Miss. 2001); *Foster v. State*, 639 So.2d 1263, 1303 (Miss. 1994); *Mullen v. Blackburn,* 808 F.2d 1143, 1147 (5th Cir.1987). This claim of cumulative error is without merit and Gillett is entitled to no relief as to this assignment.

CLAIM 33. GILLETT'S DEATH SENTENCE IS NOT ARBITRARY

Gillett's argument under this assignment is that because of the errors in all of the preceding claims his sentence is arbitrary. Again, this is nothing more than a cumulative

error argument. Basically, his contention is that when this Court preforms its review of the sentence to determine whether it was "imposed under the influence of passion, prejudice or any other arbitrary factor" as required by Miss. Code Ann. § 99-19-105 (3), it must come to the conclusion that his sentence is arbitrary. The basis of this argument is that the combination of the errors in all previous claims constitute error.

Again, the State would assert that it has demonstrated that there is no error under any of these previous assignments of error. That makes the cumulative or aggregate error law applicable here also. If there is no error in part then there is no error in the whole. *See Simmons v. State*, 805 So. 2d 452, 508, ¶ 164 (Miss. 2001); *Foster v. State*, 639 So.2d 1263, 1303 (Miss. 1994); *Mullen v. Blackburn,* 808 F.2d 1143, 1147 (5th Cir.1987). This claim of cumulative error is without merit and Gillett is entitled to no relief on this assignment.

CLAIM 34. GILLETT'S DEATH SENTENCE IS NEITHER EXCESSIVE OR DISPROPORTIONATE

This Court is required by statute to review the proportionality of the death sentence in every direct appeal, including: whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and, whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant. *See* Miss. Code Ann. § 99-19-105; *Cabello v. State*, 471 So.2d 332, 350 (Miss.1985); *Locket v. Ohio*, 438 U.S. 586 (1978).

Gillett only argues the death sentence is disproportionate generally. Gillett presents no evidence that his sentence was imposed under the influence of passion or prejudice. As such the issue does not warrant consideration. *See Conley v. State*, 790 So.2d 773 (Miss.2003)(citing MRAP 28(a)(6)), and noting that an assignment of error is not properly before this Court, where the appellant fails to "cite any specific instance in the record" of the alleged error). Without appropriate argument from Gillett on the issue, the State would submit that, considering the crime and the appellant, the death penalty in this case was neither excessive nor disproportionate. This case is similar to other cases where this Court, in accordance with the legislative mandates of § 99-19-105, studied both the defendant and the crime to affirm the imposition of the death penalty.

The death penalty has been upheld in cases involving capital murders during the commission of a robbery. *See Doss v. State*, 709 So.2d 369 (Miss.1997)(death sentence proportionate where defendant robbed and shot victim); *Cabello*, 471 So.2d 332 (death sentence proportionate where defendant strangled and robbed victim); *Evans v. State,* 422 So.2d 737 (Miss.1982)(death penalty proportionate where defendant shot and robbed victim).

The death penalty has been upheld in cases involving capital murders committed by defendants that have claimed to have mental problems. *See Berry v. State*, 703 So.2d 269 (Miss.1997)(death sentence proportionate where defendant claimed to be paranoid schizophrenic, functioning with brain damage and having impaired intellectual capability); *McGillberry v. State*, 741So.2d 894 (Miss.1999)(death sentence proportionate where

defendant was diagnosed with a significant mental defect, "sociopathic personalty structure.").

Gillett participated in the brutal and tortuous murders of Linda Heintzelman and Vernon Hulett. After consideration of this evidence by way of direct and cross-examination, including mitigation evidence from witnesses, the jury was correctly instructed upon both the aggravating and mitigating circumstances put forward by both parties. Gillett has presented no argument, and has presented no evidence that the death sentence in his case was in violation of § 99-19-105. The death sentence in this case is neither disproportionate or excessive, nor was it imposed arbitrarily. This claim is without merit. Gillett is entitled to no relief regarding this assignment of error.

CLAIM 35. THERE IS NO AGGREGATE ERROR UNDER FEDERAL LAW THAT REQUIRES REVERSAL OF THE CONVICTIONS OR DEATH SENTENCES

Gillett next contends that the aggregate of errors in this case requires vacation of his conviction and sentence under federal law. First, Gillett fails to specifically point out which claims he is relying on to cumulate. Thus, the State would submit that Gillett has failed to allege this claim with sufficient specificity for the Court to decide the claim. This Court is not required to provide the list of "near errors" Gillett has failed to set forth. *See Blue v. State*, 674 So.2d 1184, 1235 (Miss. 1996); *Foster v. State*, 639 So.2d 1263, 1303 (Miss. 1994). The State would assert that Gillett has failed to present a meaningful and relevant argument to support this claim of error. This Court has held that when an appellant fails to

present a relevant and meaningful argument the Court will decline to address the issue. *Brown v. State*, 798 So.2d 481, 494, ¶ 16 (Miss. 2001); *Brown v. State*, 690 So.2d 276, 297 (Miss. 1996). Therefore, the State would submit this claim is procedurally barred from consideration on this appeal.

Without, waiving the procedural bar to the consideration of this claim, the State would point out that the federal law regarding cumulative error offers no aid to Gillett. Looking to the law of cumulative error in this federal circuit we find our own Fifth Circuit relying on the case of *Derden v. McNeel*, 978 F.2d 1453 (5th Cir. 1992) *en banc*, *cert. denied*, 508 U.S. 960, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993) (a Mississippi case), to hold the following in *Westly v. Johnson*, 83 F.3d 714 (5th Cir. 1996):

> Finally, appellant alleges a violation of his due process right by cumulative error. In *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir.1992), *cert. denied*, 508 U.S. 960, 113 S.Ct. 2928, 124 L.Ed.2d 679 (1993), the *en banc* court recognized an independent claim based on cumulative error only where "(1) the individual errors involved matters of constitutional dimensions rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors 'so infected the entire trial that the resulting conviction violates due process.'" *Id.*, *quoting Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). Meritless claims or claims that are not prejudicial cannot be cumulated, regardless of the total number raised. *Derden*, 978 F.2d at 1461.
>
> 83 F.3d at 726.

The State would assert that Gillett's attempt to cumulate claims that lack merit, lack prejudice or are procedurally barred in an attempt to secure vacation of his conviction and death sentence is without merit. The State has responded to each and every claim raised by

Gillett and demonstrated they are either procedurally barred or totally without merit. Therefore, Gillett's claim of error is procedurally barred from consideration and without merit. Gillett is entitled to no relief on this claim.

CLAIM 36. THERE IS NO AGGREGATE ERROR UNDER STATE LAW THAT REQUIRES REVERSAL OF THE CONVICTIONS OR DEATH SENTENCES

Gillett's next claim of aggregate error is that state law requires the vacation of his conviction and death sentence. Gillett has failed to identify any specific claims which he wishes to aggregate. The State would again submit that Gillett has failed to provide sufficient information on which this Court can adjudicate this claim. *See Blue*, 674 So.2d at 1235; *Foster*, 639 So.2d at 1303. This Court has held that when an appellant fails to present a relevant and meaningful argument the Court will decline to address the issue. *Brown v. State*, 798 So.2d 481, 494, ¶ 16 (Miss. 2001); *Brown v. State*, 690 So.2d 276, 297 (Miss. 1996). Therefore, the State would submit this claim is procedurally barred from consideration on this appeal.

Without waiving the bar to consideration of this claim, the State asserts that it has demonstrated, Gillett has utterly failed to show any reversible errors were committed during trial or sentencing. Therefore, no prejudice can be shown individually or cumulatively. In *Simmons v. State*, 805 So. 2d 452 (Miss. 2001) this Court stated:

> ¶ 164 . . . "[w]here there is no reversible error in any part, ... there is no reversible error to the whole." *Doss v. State*, 709 So. 2d 369, 401 (Miss. 1996). Additionally, this Court has held that a murder conviction or a death sentence will not warrant reversal where the cumulative effect of alleged

errors, if any, was procedurally barred. *Doss*, 709 So. 2d at 401. Cumulatively, these errors do not warrant reversal.

805 So.2d at 508.

Earlier, in *Foster v. State*, 639 So.2d 1263 (Miss. 1994), this Court held:

> Foster suggests that even if this Court declines to find reversible error in any one of Foster's sentencing assignments, he is entitled to a resentencing under the doctrine of cumulative error. *Griffin v. State,* 557 So.2d 542, 552-54 (Miss.1990) (improper *voir dire,* introduction of victim-impact material and defective closing argument amounted to cumulative error requiring vacation of sentence and remand for new trial); *Stringer v. State,* 500 So.2d 928, 946 (Miss.1986) (improper *voir dire,* a defective closing argument and wrongful admission of irrelevant photographs comprised a series of "near-errors" which "effectively killed any chance that Stringer could receive a fundamentally fair sentencing trial[.]") Foster argues that what this Court may consider harmless error in a non-capital case could be found to be reversible error under the heightened review required in a capital case. *Irving v. State,* 361 So.2d 1360, 1363 (Miss.1978), *cert. denied,* 441 U.S. 913, 99 S.Ct. 2014, 60 L.Ed.2d 386 (1979).
>
> However, Foster does not provide a listing of the "near errors" he found in the record. We are left to create this list ourselves. As previously discussed under the individual propositions, no reversible error was committed in the trial of this case. We find no "near errors" in either phase of this trial, so we find no cumulative error. *Mullen v. Blackburn,* 808 F.2d 1143, 1147 (5th Cir.1987) (Court of Appeals rejected argument that even if no individual claim entitles petitioner to relief, the claims collectively do, and found that "twenty times zero equals zero"). We find no merit to this issue by Foster.

639 So.2d at 1303.

This claim is procedurally barred from consideration and is totally without merit.

Gillett is entitled to no relief under this assignment of error.

CLAIM 37. § 99-19-101 IS NOT UNCONSTITUTIONAL

Gillett lastly contends that the Mississippi capital sentencing scheme is unconstitutional as the death penalty constitutes cruel and unusual punishment in violation of *Baze v. Rees*, 128 S.Ct.1520.(2008).

In support of this claim Gillett only cites the Court to dissenting or concurring opinions from the United States Supreme Court and this Court.[7] This claim is specious as these opinions do not represent authority that is to be followed. In any event, the United States Supreme Court and this Court have considered this issue on previous occasions and held that the death penalty is a constitutional form of punishment.

Gillett ignores this Court's holding regarding this very issue in the case of *Bennett v. State*, 990 So.2d 155, Miss.2008):

> ¶ 20. Bennett next argues that death by lethal injection violates his First- and Eighth-Amendment rights under the U.S. Constitution. Although Bennett failed to raise this issue on direct appeal, we do not hold that it is procedurally barred from further review on collateral appeal. *Jordan v. State*, 918 So.2d 636, 661-62 (Miss.2005).
>
> ¶ 21. On April 16, 2008, the United States Supreme Court decided *Baze v. Rees*, upholding the State of Kentucky's lethal-injection protocol as not being violative of the Eighth Amendment. *Baze v. Rees*, 553 U.S. ----, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). In so doing, Chief Justice Roberts's plurality opinion announced the standard which we must use to determine whether our method of execution violates the Eighth Amendment. *Id.* The Supreme Court's plurality found that cruel and unusual punishment occurs where lethal injection as an execution method presents a "substantial" or "objectively intolerable risk of serious harm" in light of "feasible, readily implemented" alternative procedures. Id. at 1531, 1532. However, the analysis was focused on the

[7]Gillett cites to one concurring opinion in *Baze* as authority for declaring Mississippi's death penalty protocol unconstitutional and ignores Justice Stevens agreement as to the constitutionality of the death penalty.

manner of lethal injection, and did not question the validity of lethal injection or the constitutionality of the death penalty as such. *Id.* at 1537. The *Baze* Court held:

> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States ... [which] if administered as intended ... will result in a painless death. The risks of maladministration ... such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel-cannot be remotely characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment.

Baze, 128 S.Ct. at 1537.

¶ 22. For "the disposition of other cases uncertain," Justice Roberts clearly stated that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets [the 'substantial risk'] standard." *Id.* at 1537 (emphasis added).FN1

> FN1. Such comparative analysis is followed by other jurisdictions as well. *See Emmett v. Johnson*, 532 F.3d 291, 299 (4th Cir.Va. 2008) (comparing Virginia's protocol to Kentucky's to prove it does not violate the Eighth Amendment); *Jackson v. Houk*, 2008 WL 1946790, **75-76 2008 U.S. Dist. LEXIS 36061, at *215-217 (N.D.Ohio May 1, 2008) (declaring Ohio's method of execution, same as followed by Kentucky, to be constitutional).

¶ 23. If differences exist between Mississippi's execution protocols and those used in Kentucky, then, the inquiry is whether Mississippi's lethal-injection protocol meets Constitutional muster in light of this recent Supreme Court decision. The Fifth Circuit, when considering inmate Dale Leo Bishop's Eighth-Amendment challenge to Mississippi's lethal-injection procedures, recently announced that "Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in *Baze*." *Walker v. Epps*, 2008 WL 2796878 at *3, 2008 U.S.App. LEXIS 15547 at *3

(5th Cir.Miss. July 21, 2008). We agree with the Fifth Circuit's analysis, and hold that Bennett's Eighth Amendment challenge to the lethal injection protocol in Mississippi is without merit.

Bennett at 160-61.

This claim is totally without merit. Gillett is entitled to no relief on this assignment of error.

CONCLUSION

For the above and foregoing reasons, the State submits that Gillett's conviction of capital murder and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE

I, Pat McNamara, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing Brief for Appellee to the following:

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