IN THE SUPREME COURT OF MISSISSIPPI
No. 2008-DP-00181-SCT

ROGER GILLETT, Appellant,

versus

THE STATE OF MISSISSIPPI, Appellee.

REPLY BRIEF OF THE APPELLANT

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NOTE CONCERNING ABBREVIATIONS AND CONTENT

References to Mr. Gillett's Original Brief shall be "AB ___."

References to the State's Response to Mr. Gillett's Original Brief shall be "SB ___."

Remaining abbreviations shall be consistent with abbreviations found in Mr. Gillett's Original Brief.

Where Mr. Gillett offers no reply to the State's Response, Mr. Gillett respectfully stands on the argument presented in his Original Brief.

INTRODUCTION

In this death penalty case, Mr. Gillett presented issues of constitutional magnitude to the trial court, preserved these issues for appeal, and briefed these arguments for this Court.

The action that shall be taken by this Court will have a life-or-death consequence.

The Attorney General sought and received over five months of additional time to respond to Mr. Gillett's brief. Because the resolution of this appeal has a life-or-death consequence, it is fitting for the State of Mississippi to have adequate time to respond to the constitutional claims of a human being. In one of its motions for additional time, the State offered the following justification:

> In this case, the appellant has argued 37 issues in a brief that is 237 pages long and incorporates hundreds of other pages by way of reference to pre-trial filing and other documents. There are nearly 700 citations to federal, state and other authorities contained in the brief. The record in the case contains more than 3200 pages, contained in 23 volumes and well more than 100 exhibits introduced into evidence at the trial, and the repeated references to incorporation of parts of the record, in some issues just a few pages and in others hundreds of pages and in still others issues they [sic] are scattered throughout different volumes of the record, tends to make the brief cryptic and difficult to decipher in large part. Appellant also presents issues that require research of the Kansas constitution and Kansas case law to be weighed along with our Mississippi laws. Based on those issues, in addition to the many answers filed in other cases as well as the ongoing briefing

> of other cases, the appellee counsel has not been able to prepare and present a complete answer to the issues in this case.
>
> *Motion for Enlargement of Time to File Brief of Appellee, July 13, 2009, pg. 4.*

Notwithstanding the colossal gravity of this appeal and this Court's accommodation of the State's entreaties for additional time to satisfactorily meet its appellate obligation, the State's Response is most generously described as slapdash. At points it is evasive. At other points, it is dishonest. At one point, it confesses error on the same page that it refutes it. See pages 66-69, infra; see also Footnote 29, infra; Footnotes 54 and 55, infra. *In toto*, it is oblique. While Mr. Gillett's life hangs in the balance, the Attorney General simply declines to take his Claims before this Court seriously.

This Reply shall now justify the immediately preceding paragraph.

REPLY TO STATE'S RESPONSE TO CLAIM 1:

Preface

Mississippi has no analogue for Federal Rule of Criminal Procedure 12(d). See AB Footnote 13; see also AB 27 through 29. As Mississippi trial courts are not required to issue any findings of fact to support a suppression determination, Mr. Gillett put forward that application of Ornelas v. United States, 517 U.S. 690 (1996), "ensures enormous challenges on appeal." See AB 24. Declining to issue findings of fact in the case at bar exacerbates no fewer than two components particular to this appeal: first, the multifarious issues briefed by Mr. Gillett concerning the constitutional admissibility of his custodial statement and constitutionality of his warrantless arrest and warranted searches in Claims 1 through 4; second, as stated at AB 25, "[u]nlike in a criminal prosecution where the facts and circumstances arose in a venue where the trial judge personally resides, the facts and circumstances relevant to this claim arose one

thousand miles from Forrest County, Mississippi." As to this first complication, Mr. Gillett wrote: "Applying the Ornelas standard of review to a claim bereft of factual findings and conclusions of law is, at best, perplexing. Facts cannot be applied to law where the trial court has not bothered to find any facts (historical or otherwise)." See AB 26.

At AB 30, Mr. Gillett noted the prosecution's burden to prove that a warrantless arrest was reasonable and the prosecution's refusal to accept this burden in the matter at bar. Although the State relied on Kansas law to validate the arrest of Mr. Gillett,[1] see AB 30-32, the State astonishingly never identified the crime for which Mr. Gillett was arrested. See AB 32.[2] Paging through Kansas statutory law, Mr. Gillett identified no fewer than three "narcotics violations" classified as misdemeanors. See AB 32-33. Notwithstanding the prosecution's burden to prove the defendant was placed under warrantless arrest for a felony not committed in the presence of the arresting officer, see AB 32-34, and notwithstanding the fact that the local prosecution had

[1] The local prosecution resorted to Kansas law in refutation of Claim 1. KBI Agent Kelly Ralston was in command at the time of Mr. Gillett's warrantless arrest. (R. 154-55). On re-direct examination of Agent Ralston, the State specifically questioned Agent Ralston about Kansas law concerning warrantless arrest. (R. 156-57). Agent Ralston repeated his testimony that the Russell County Attorney specifically instructed that Mr. Gillett would be arrested absent warrant. (R. 157). Agent Ralston testified that it is not "unusual in the state of Kansas to make an arrest on probable cause and later do the formal paperwork" (R. 157) and that a warrantless arrest is "part of your [Kansas] statutes[.]" (R. 157). Unlike the local prosecution, however, the Attorney General relies on Mississippi law in apparent refutation of Claim 1. See SB 18-20. Apparently, the local prosecution selected a *lex fori* approach and the Attorney General selected a *lex loci* approach. As neither the local prosecution nor the Attorney General bothered to address the *lex loci/lex fori* proposition, certainty is unattainable.

[2] Because the State must prove the constitutional legitimacy of a warrantless arrest, the refusal to identify the crime for which Mr. Gillett was arrested is devastating. The Attorney General falls short in its contention to this Court that Claim 1 "boils down to a question of whether or not Sergeant Schneider had probable cause to place Gillett under arrest at Fossil Creek Park[.]" See SB 17. As a matter of Kansas law, Claim 1 actually boils down to question of whether Agent Schneider had probable cause to arrest Mr. Gillett (a) without a warrant and (b) for an offense which was not committed in Agent Schneider's presence. The Attorney's General refusal to embrace the factual lattice underpinning Claim 1 – that Agent Schneider had no warrant to arrest Mr. Gillett, that Agent Schneider has never identified the offense for which Agent Schneider arrested Mr. Gillett (to Mr. Gillett or to anyone else, including the trial court) and that the offense for which he arrested Mr. Gillett was not committed in his presence – is disastrous. Because Kansas law identifies "narcotics violations" which are misdemeanors and because Kansas law permits a warrantless arrest for a misdemeanor only if the misdemeanor occurs in the presence of the arresting officer, Kansas law mandates appellate relief. Could it be the Attorney General ignored the gravamen of Claim 1 because addressing it would only lead to the inescapable result of reversal?

over six months of additional time to offer some response – any response – to this crucial constitutional issue, see AB 11, the local prosecution remained silent. On appeal, the Attorney General, who was provided almost six months of additional time to respond to Mr. Gillett's brief, also elected to disregard Mr. Gillett's argument.[3]

Substance

Mr. Gillett moved that the trial court must suppress evidence seized incident to his unconstitutional warrantless arrest. Namely, Mr. Gillett claimed that (A) his clothing is inadmissible; and (B) "the wallet and personal effects taken from his person at the time of his arrest" are inadmissible; and (C) the "[c]ustodial interrogation at the Russell County Sheriff's Department commencing no later than 4:43 p.m., on March 29, 2004," is inadmissible. See AB 18.

The State argues Mr. Gillett's contention that opinion evidence which utilized the fingerprint card taken from Mr. Gillett incident to his warrantless arrest, see AB 36, is procedurally barred because the fingerprint card taken from Mr. Gillett incident to his warrantless arrest is not a "personal effect taken from his person at the time of his arrest." See SB 15-16.[4] If this Court determines that impressions of an individual's fingerprints involuntarily taken by a government agent do not constitute the "personal effects" of that individual, then the State's argument that suppression of the print card is unpreserved is well taken. Although the State cites no authority for its proposition that fingerprints do not constitute the "personal

[3] Aggregating the time Mr. Gillett's memo of law was pending before the trial court (just over six months) and the total time the Attorney General had to respond to Mr. Gillett's brief (just over seven months), the State of Mississippi has consumed a combined total of well over one year ignoring Mr. Gillett's constitutional arguments in Claims 1 through 4.

[4] The State claims that Mr. Gillett "omits any reference to his earlier demands that his clothing, wallet and personal effects should have been excluded." See SB 15. This is facially erroneous. Mr. Gillett began Claim 1 with a *verbatim* recitation of the material he sought to exclude in the trial court under Claim 1. See AB 18.

effects," the proposition has logical – albeit unconventional – currency insofar as no person can leave his fingertips behind. By the same token, the prints left by one's fingertips are indivisibly "of his body" and, therefore, inextricably personal. For example, in the matter at bar, a State expert utilized Mr. Gillett's fingerprint card to incriminate Mr. Gillett by identification. The term "personal effects" has been held to have no fixed meaning other than things associated with a person or his body. See, e.g., In Re Neefus's Will, 110 N.Y.S.2d 584, 585 (Westchester Co. Surr. Ct. 1952); In Re Pedersen's, 95 N.Y.S.2d 820, 820-21 (N.Y. Co. Surr. Ct. 1950). Obviously, Mr. Gillett is of the opinion that "personal effects" includes ink impressions of his fingerprints involuntarily taken by police incident to the warrantless arrest at bar. The Attorney General is under a different impression, yet cites no authority to support it.

Mr. Gillett also contended that his custodial statement – the same custodial statement that is the subject-matter of Claim 2 – is constitutionally inadmissible as the product of an unlawful, warrantless arrest. See AB 36.

Mr. Gillett and the State agree that Dies v. State, 926 So. 2d 910 (Miss. 2006) (citing Ornelas, supra) requires this Court to apply *de novo* review to the trial court's application of factual findings to the law and an abuse-of-discretion standard as to the trial court's findings on historical facts. See AB 23; SB 16-17. Mr. Gillett and the State also agree that the issues placed before the trial court under Claim 1 were not difficult. See SB 17. Indeed, Mr. Gillett maintains that because the State made no effort to establish that he was placed under warrantless arrest by Agent Schneider for a felony committed outside of Agent Schneider's presence, the trial court had no choice but to grant the relief Mr. Gillett sought. See AB 35-37. Further, the trial court's refusal to do so amounted to reversible error when Mr. Gillett's custodial statement and fingerprint card seized incident to his unlawful arrest were introduced at his trial by the State.

The State admits that "[a]ll law enforcement officers involved in the search warrant met and discussed the warrant prior to its execution." See SB 17. Critically, the State does not address the testimony specifically elicited by the prosecution during the suppression hearing that KBI Agent Ralston – who was in command at the time of this meeting – believed that a warranted arrest of Mr. Gillett was appropriate but was overruled by the County Attorney. See AB 33.[5] Prosecuting a constitutional shell game, the State maintains that KBI Agent Lyon – a police officer who did ***not*** place Mr. Gillett under warrantless arrest at Fossil Creek Park on March 29, 2004 – had probable cause to arrest Mr. Gillett for felonies enumerated in Agent Lyon's affidavit for ***search*** warrant.[6] The State's staggering, substantive response to whether Agent Schneider had probable cause to arrest Mr. Gillett can only be the mere communication from fellow police officers that "they had located a quantity – I was advised that narcotics were located[.]" See AB 33. Necessarily, then, the Attorney's General contention that Agent Schneider "had information that a felony had occurred and that Gillett had committed it" at the time Agent Schneider placed Mr. Gillett under arrest is pure speculation.[7] Indeed, if Agent Schneider had probable cause to arrest Mr. Gillett for a felony committed out of Agent Schneider's presence, Agent Schenider had numerous opportunities to identify this felony at the

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[5] The State did not call the County Attorney to testify at the suppression hearing. See AB 33. Instead, the State called Mr. Gillett's arresting officer who did ***not*** testify that he placed Mr. Gillett under arrest for a felony. See AB 33-34. This officer ***did*** testify that he placed Mr. Gillett under warrantless arrest for "a narcotics violation" that did not occur in his presence. See AB 33-34. Therefore, K.S.A. 22-2401 applies. ***With the arresting officer sworn and on the stand***, the State did bother to establish that ***this*** officer arrested Mr. Gillett for some felony – ***any*** felony – committed outside of the arresting officer's presence. As this failure is fatal, the Attorney General ignores it on appeal. See Footnote 2, supra.

[6] Had the County Attorney merely supported the commanding police officer – KBI Agent Ralston – in his opinion that Mr. Gillett should be arrested under the authority of an arrest warrant Claim 1 disappears. However, he did not. Mr. Gillett was arrested absent warrant. There are constitutional consequences to this decision even if the State declines to acknowledge them.

[7] Musings are insufficient where the party offering the speculation also maintains the burden of proof.

suppression hearing.[8] Because the State did not prove that Mr. Gillett was placed under warrantless arrest for a felony committed outside of Agent Schneider's presence and because a "narcotics violation" could well have been a misdemeanor, see AB 27-28, Mr. Gillett's warrantless custodial arrest was unconstitutional.

According to the State, Claim 1 "boils down to a question of whether or not Agent 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." See SB at 17. As initially addressed in Footnote 2, supra, this is, at best, an incomplete statement of law. Claim 1 "boils down to" precisely what Mr. Gillett contended at AB 37:

> Mr. Gillett's warrantless arrest for 'narcotics violations' was absent probable cause and unlawful under K.S.A. 22-2401. As a result, seizures directly incident to that illegal arrest must be suppressed. Mr. Gillett's custodial statement beginning well less than an hour after this illegal arrest must also be suppressed as a Fourth Amendment violation under Brown v. Illinois, 422 U.S. 590 (1975) and its progeny.
>
> By *at least* a preponderance of the evidence, Mr. Gillett's arrest was absent probable cause and, therefore, unlawful. Furthermore, Ornelas required the trial court to issue findings of fact and conclusions of law addressing the vital constitutional rights raised and fully briefed by Mr. Gillett. However, neither the trial court nor the State responded. The trial court must be reversed.

REPLY TO STATE'S RESPONSE TO CLAIM 2

The State responded to a portion of Claim 2. The partial response to Claim 2 is hampered by an initial misstatement of law concerning the right to silence during custodial interrogation. The State's partial response is then doomed by its refusal to address the Innis error committed when Agent Lyon refused to honor Mr. Gillett's invocation of his right to counsel. Finally, the

[8] As the record clearly reflects, he did not. (CP. 1021, 1046; R. 19, 46). The State did not perform re-direct examination on Agent Schneider. (CP. 1047; R. 47).

Attorney General did not acknowledge, let alone address, Mr. Gillett's free-standing claims for suppression in Part III(C) and Part III(D) of Claim 2.[9]

Part III(A) of the Original Brief: Mr. Gillett never waived his right to remain silent

Discussion

As a matter of constitutional law, failure to secure a waiver of the right to remain silent renders the custodial statement inadmissible. North Carolina v. Butler, 441 U.S. 369, 373 n.4 (1979). Yet, the Attorney General informs this Court that the opposite is true. The Attorney General contends that Mr. Gillett was required to invoke his right to silence.[10]

Mr. Gillett never waived his right to remain silent during custodial interrogation and, therefore, the entirety of his custodial statement is inadmissible under Miranda v. Arizona, 384 U.S. 436 (1966). See AB 38-41. According to a transcript of the interrogation accepted by the State to resolve of Mr. Gillett's motion to suppress, see AB 38, the following conversation took place during the interrogation:

> BY AGENT LYON: And having these rights in mind are you willing to answer questions now? Just want to get things straightened out. Just go ahead and put it in that square right there. Ok, so. You want to go ahead and talk for a little bit, then, right?

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[9] The local prosecution confessed Mr. Gillett's argument that introduction of a constitutionally inadmissible statement in a death case violates Mr. Gillett's Eighth and Fourteenth Amendment rights and his Article Three, Section Twenty-Eight rights. See CP. 79-80, 162, 685-87; see also Footnote 22, infra.

[10] At SB 22, the Attorney General writes: "At no time did Gillett indicate in any manner, at any time, before or during the interview that he desired to remain silent." Later at SB 22, the Attorney General writes: "As Gillett never invoked his right to remain silent the interview properly proceeded until Gillett invoked his right to counsel[.]" As a matter of constitutional law, the State is incorrect. Butler, supra ("We do not today even remotely question the holding in Carnley v. Cochran, 369 U.S. 506, which was specifically approved in the Miranda opinion, 384 U.S. at 475"); see also Montejo v. Louisiana, 129 S.Ct. 2079, 2087-88 (2009) (absent waiver, the suspect cannot be interrogated). At CP. 664-68 and AB 49-51, Mr. Gillett recited renowned authority for the simple proposition of law that (i) the individual undergoing custodial interrogation is presumed ***not*** to waive his right to remain silent and, therefore, (ii) the government ***must*** prove waiver as a precondition to admissibility of the custodial statement and that (iii) in Mississippi, the State's burden of persuasion that the individual affirmatively waived his right to remain silent is beyond a reasonable doubt. It is shocking that the Attorney General would mischaracterize such a facile point of law.

BY MR. GILLETT: Maybe.

BY AGENT LYON: Ok. Will you sign at least then that you'll talk to me for a little bit? We'll get it straightened out. And today is the 29th. And it's about 4:51. (Indecipherable) done with that.

BY MR. GILLETT: What's this about?

(CP. 83-84).

An oral response of "maybe" to the question, "You want to go ahead and talk for a little bit, then, right?" is not a waiver of the right to remain silent. See AB 48-52. At the specific request of Agent Lyon, Mr. Gillett then ***fortified*** his oral refusal to waive the right to remain silent with a written refusal to waive the same right:

> In addition to constructing an *incommunicado* environment where a waiver (if any) uttered by Mr. Gillett would be captured on videotape, Agent Lyon also elected to implement a pre-printed waiver card during his interrogation. Agent Lyon testified that the purpose of having Mr. Gillett make marks on the pre-printed waiver card was to 'definitely in writing and on paper announce his desire to either waive silence or insist upon the right to silence.' [cite deleted.]
>
> The implementation of this 'definitive' device only serves to further prove that Mr. Gillett did not waive his constitutional rights. [footnote deleted]. Agent Lyon testified that Mr. Gillett did place a checkmark the waiver card, but that his checkmark on the pre-printed waiver card was neither in the 'yes box' nor in the 'no box.'
>
> (AB 48-49).

Referring to the memorandum of law specifically incorporated into Claim 2, Mr. Gillett cites to about a dozen cases at CP. 664-672, including the following two paragraphs:

> A Miranda waiver need not be explicit. Butler, 441 U.S. at 373. The Miranda waiver may be inferred from the actions and words of the person who is being subjected to custodial interrogation where these actions or words are components of a course of conduct indicating waiver. Id.; see also Tague v. Louisiana, 444 U.S. 469, 471 (1980) (relying on Butler, supra). Thus, while the State's evidence of the Miranda waiver may be entirely inferential, the State's evidence of waiver must amount to an affirmative relinquishment of the Miranda rights. Juan H. v. Allen, 408 F.3d 1262, 1271 (9th Cir. 2005) (relying on Miranda, 384 U.S. at 474-

> 75); United States v. Collins, 40 F.3d 95, 99 (5th Cir. 1994) cert. denied 514 U.S. 1121 (1995) ("there must be some affirmative action demonstrating a waiver"); [footnote inserted, reading as follows: Moran v. Burbine, 475 U.S. 412, 421 (1986), held that a valid Miranda waiver necessitates affirmative answers to two questions: first, is the waiver "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception?" and, second, is the waiver "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it?" If this Court concludes that Mr. Gillett abandoned his Miranda rights, this Court must do so notwithstanding Mr. Gillett's noncommital oral and written responses to Agent Lyon's orchestrated and specific requests for Mr. Gillett to waive these very same rights. Moreover, if Mississippi law is to apply, then this conclusion must be supported beyond a reasonable doubt. (cite deleted)]; Allen v. State, 38 P.3d 175, 177 (Nevada 2002) overruled on other grounds at Rosky v. State, 111 P.3d 690 (Nevada 2005) ("Allan did not affirmatively waive his Miranda rights, but instead simply responded to Detective Canfield's questions asking him what happened"); Commonwealth v. Wade, 402 A.2d 1360, 1368 n. 4 (Pa. 1979) (citing Butler, supra); see also People v. Shepard, 420 N.E.2d 1156, 1157, 1159 (Ill. App. 1981) (no showing of affirmative waiver).
>
> For this Court to find that Mr. Gillett waived his Miranda rights, the Court must find that Mr. Gillett voluntarily, knowingly, and intelligently agreed to answer Agent Lyon's questions absent ***any*** indication by Mr. Gillett other than (a) Mr. Gillett's oral response of "maybe" to Agent Lyon's question "You want to go ahead and talk for a little bit, then, right?" [footnote deleted] and (b) Mr. Gillett's subsequent, marking on the police-issued "waiver card" indicating neither an affirmative response nor a negative response to the question on the pre-printed waiver card: "Having those rights in mind, are you willing to answer questions now?" (Cite deleted) (emphasis in original).
>
> (CP. 669-671).

The State disregards the above.

The entirety of the Attorney's General response to Mr. Gillett's argument that he did not waive his right to silence consists of one paragraph and a single citation to Miranda. See SB 22. Instead of addressing Mr. Gillett's presentation, the Attorney General asserts that Mr. Gillett's oral response – "maybe" – to Agent Lyon's question – "You want to go ahead and talk for a little

bit, then, right?" – was ambiguous. See SB 22. Because Mr. Gillett's response was ambiguous, the Attorney General contends Mr. Gillett failed to assert his right to remain silent.[11] See SB 22.

The Attorney General's dismissive response is wanting in a number of ways. First, the Attorney General offers no hint as to what is ambiguous about "maybe." "Maybe" is simply less than an affirmative response. The Oxford English Dictionary (Second Edition, 1991), the American Heritage Dictionary (Third Edition, 1992), the World Book Dictionary (2003), and The New Fowler's Modern English Usage (Rev. Third Edition, 2000) all define "maybe" as "possibly, perhaps." As the State has the burden to prove waiver beyond a reasonable doubt, "maybe" is objectively and invariably an insufficient waiver. Assuming *arguendo* any reason to clarify "maybe," then the clarifying question would necessarily probe further or at least differently than the question which drew the less-than-affirmative response in the first place.[12]

Second, the State cites no legal authority for the proposition that "maybe" has been determined to be an ambiguous response requiring clarification. Instead, and ***absent*** citation, the State claims that, after receiving the response of "maybe," Agent Lyon acted constitutionally when he clarified Mr. Gillett's ***oral*** refusal to waive silence by securing a specifically solicited ***written*** refusal to waive the very same right.[13]

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[11] This contention is intellectually insulting. See Footnote 10, supra.

[12] The question preceding Mr. Gillett's response of "maybe" was, "You want to go ahead and talk for a little bit, then, right?" The question that immediately followed Mr. Gillett's response of "maybe" was, "Will you sign at least then that you'll talk to me for a little bit?" What portion of Agent Lyon's second question clarified Mr. Gillett's response to his first question? The Attorney General offers not an iota of guidance. This astonishing deficiency in the State's Response is fully briefed in this Reply infra.

[13] Here the State manages to entangle itself in its own sophistry. In maintaining that an oral response "maybe" to the waiver question is ambiguous and, therefore, properly elicits a clarifying question, it necessarily follows that placing a mark in neither the "yes" nor the "no" box on a pre-printed waiver card is also ambiguous and warrants clarification. Yet, Agent Lyon never sought any clarification concerning Mr. Gillett's written refusal to waive silence. If an oral "maybe" is ambiguous, then so is a written "maybe." Under the Attorney's General own logic, Mr. Gillett simply never waived his right to silence – not orally and, then, not in writing.

Why does the State refuse to address the constitutional components of Mr. Gillett's claim that he never waived silence? Why does the State not acknowledge, let alone respond to, Mr. Gillett's emphasis on his refusal to waive his right to remain silent in writing – especially in light of Agent Lyon's testimony that he provided Mr. Gillett a pre-printed Miranda card "to definitely in writing and on paper announce his desire to either waive silence or insist upon the right to silence"? See AB 41.[14]

Finally, at SB 22, the State writes, "Based on that response ["Maybe"], 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?'" The *verbatim* dialogue from CP. 83-84 follows with emphasis added:

> BY AGENT LYON: And having these rights in mind are you willing to answer questions now? Just want to get things straightened out. Just go ahead and put it in that square right there. Ok, so. *You want to go ahead and talk for a little bit, then, right?*
>
> BY MR. GILLETT: Maybe.
>
> BY AGENT LYON: *Ok. Will you sign at least then that you'll talk to me for a little bit? We'll get it straightened out. And today is the 29th. And it's about 4:51. (Indecipherable) done with that.*
>
> BY MR. GILLETT: What's this about?

Assuming *arguendo* that a reasonable observer would find that Mr. Gillett's response of "maybe" to the question "You want to go ahead and talk for a little bit, then, right?" an

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[14] Even though Agent Lyon testified that a written indication to either maintain or waive silence is definitive, see, e.g., CP. 1106, 1008; R. 107-08, 109-110, the State has obviously resolved that Mr. Gillett's refusal to waive silence on the pre-printed Miranda card is inconsequential as neither the local prosecution nor the Attorney General bothered to address it. Could it be the State declines to acknowledge the written refusal to waive silence because it only serves to fortify Mr. Gillett's contention that he never waived silence? Less ingloriously, it could be understood by the Attorney's General erroneous insistence that Mr. Gillett must ***assert*** his right to remain silent. See Footnote 10, supra. This would surely explain why the Attorney General found it unnecessary to respond to any of the case authority citing the constitutional rule that the government must prove waiver and that the evidence before the trial court indicated only an affirmative ***absence*** of waiver. See AB 49-51.

ambiguous assertion of the right to remain silent, under what logic does the Attorney General maintain that mere regurgitation of the original solicitation – "Ok. Will you sign at least then that you'll talk to me for a little bit?" – serves to clarify the ambiguity? In merely repeating the same question which produced an ambiguous response, exactly ***what*** was Agent Lyon attempting to clarify? More comprehensively, if this Court concludes that a mere regurgitation of a bare request to waive silence constitutes clarification of an objectively ambiguous waiver of that right, a police officer may simply repeat himself until the individual being subjected to custodial interrogation waives silence. This, however, would violate Michigan v. Mosley, 423 U.S. 96, 102 (1975) ("[t]o permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of Miranda by allowing repeated rounds of questioning to undermine the will of the person being questioned"); see also State v. Law, 522 P.2d 320, 324 (Kansas 1974) (citing Jennings v. United States, 391 F.2d 512, 515 (5th Cir. 1968) cert. denied 393 U.S. 868 (1968)) (where individual refuses to waive silence, police are not permitted to periodically repeat a procedure which preceded the refusal to waive silence).

Posture before this Court

Did the trial court determine that "maybe" was ambiguous? The record is silent because the trial court entered no findings.

If the trial court found "maybe" ambiguous, did the trial court determine that the regurgitation of the same question that elicited the ambiguous response in the first place was merely a "clarifying" question? The record is silent because the trial court entered no findings.

If the trial court found "maybe" ambiguous, did the trial court determine that the marking made by Mr. Gillett on the pre-printed, waiver card clarified his oral declaration? The record is silent because the trial court entered no findings.

If the trial court did find that the mark on the pre-printed, waiver card clarified a previous yet entirely repetitious oral assertion of "maybe," how did the trial court arrive at this conclusion? The record is silent because the trial court entered no findings.

Unless the trial court shared the Attorney's General misunderstanding of constitutional law concerning waiver,[15] in denying Mr. Gillett's motion to suppress the entirety of his custodial statement the trial court obviously and necessarily determined that Mr. Gillett waived his Miranda rights. There is, however, no way without findings or conclusions to ascertain when or how the trial court determined that waiver took place.

Notwithstanding the disorder created by the local prosecution's decision not to respond to any of Mr. Gillett's memoranda of law and the trial court's decision not to enter findings of facts or conclusions of law, the Attorney General now asks this Court to determine that "maybe" is an ambiguous response to a request to waive silence. Surely, this is a sensible course for the Attorney General to take since if "maybe" is ***un***ambiguous, then Mr. Gillett never waived his right to remain silent and the trial court committed reversible error in denying his motion to suppress the entire statement. Unfortunately for the State, "sensible" is not synonymous with "correct."

The government must scrupulously honor the right to remain silent. In Part III(A) of Claim 2, Mr. Gillett presented argument that Agent Lyon dishonored that right. The Attorney's General response to this argument begins with a misrepresentation of constitutional law concerning waiver, followed by a pronouncement that Mr. Gillett's oral declaration of "maybe" was an ambiguous waiver of the right to silence wholly unsupported by case authority or argument, and confounded by a refusal to even acknowledge Mr. Gillett's written refusal to

[15] It is impossible to determine the trial court's understanding of the law (Kansas or Mississippi; Tenth Circuit or Fifth Circuit) as the trial court issued no findings nor conclusions.

waive his right to remain silent. The trial court provides no guidance as it entered no findings. The trial court, therefore, must be reversed for refusing to suppress the entirety of Mr. Gillett's custodial statement.

Part III(B) of Original Brief: Agent Lyon did not honor Mr. Gillett's invocation of his right to counsel

Discussion

The State and Mr. Gillett agree that Mr. Gillett invoked his right to counsel. See SB 22, 23. The State's concession is exceptionally curious, however, in that the State then refuses to address Mr. Gillett's Innis claim. See AB 52-56.

Agent Lyon acknowledged that he questioned Mr. Gillett *incommunicado*[16] and that after Mr. Gillett invoked his right to counsel, Agent Lyon continued to speak with Mr. Gillett.[17] In addition to Rhode Island v. Innis, 446 U.S. 291 (1980), Mr. Gillett cited authority at AB 52-56 and incorporated into his argument authority cited in Mr. Gillett's memo of law at CP. 672-80 for the proposition that Agent Lyon dishonored Mr. Gillett's invocation. The totality of the State's "response" to Mr. Gillett's Innis claim is a pointless regurgitation of hornbook law:

> 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) intitates further discussions with the

[16] Agent Lyon testified that (I) Mr. Gillett did not request to speak with him; (II) he set up a video camera in a room where he decided to interrogate Mr. Gillett; (III) he positioned the chair where he would sit Mr. Gillett during the interview; and (IV) he had another government official transport Mr. Gillett from the residential area in the Russell County Jail to the room where he would interrogate Mr. Gillett. See AB 38-39. Agent Lyon testified that Mr. Gillett was under arrest at the time he interrogated him and that Mr. Gillett had a constitutional right to stop speaking to Agent Lyon or, for that matter, never to speak to all to Agent Lyon. See AB 38-39. Thus, at the unilateral behest of Agent Lyon, Mr. Gillett was unquestionably questioned *incommunicado*.

[17] Typically, government attorneys are concerned when a government agent admits he continued speaking to an individual undergoing custodial interrogation after that individual invoked his right to counsel. This is not the case here as the local prosecution and the Attorney General disregard Mr. Gillett's Innis claim.

police (2) knowingly, intelligently and voluntarily waived the right previously invoked. Smith v. Illinois, 469 U.S. 91, 95 (1984).

SB 23.

The above-quoted statement of law is absolutely correct and absolutely irrelevant to Claim 2. Agent Lyon and the State ***concede*** that Mr. Gillett invoked his right to counsel. Mr. Gillett claims that Agent Lyon disregarded that invocation.

The State's only effort to respond to this claim is to misstate the record asserting that Agent Lyon only informed "him [Mr. Gillett] of his charges and prepar[ed] to have Gillett returned to his jail cell." See SB 23. Even Agent Lyon – a police officer who admitted lying to Mr. Gillett no fewer than three times during his interrogation[18] – testified to the patent falsity of this misstatement: Agent Lyon testified that even though Mr. Gillett never asked him if the police would file any criminal charges in addition to his current charges, he told Mr. Gillett that police might file charges in addition to his current charges and that he told Mr. Gillett police might file charges in addition to his current charges ***after*** Mr. Gillett invoked his right to counsel and ***after*** he told Mr. Gillett that he would take him back to jail and ***after*** he had fully itemized every criminal charge for which Mr. Gillett had been arrested. See AB 42-47; CP. 88. Before giving sworn testimony diametrically contradicting Innis, Agent Lyon testified as follows:

Q. [BY MR. LAPPAN]: He [Mr. Gillett] never asked you, *what could you charge me with*, prior to the invocation?

A. [BY AGENT LYON]: No, I told him.

Q. Right. *You offered that to him.*

A. *Sure.*

See AB 47 (emphasis added).

[18] Agent Lyon's deceptive misconduct was presented in Part III(C) of Claim 2 – a portion of Claim 2 entirely ignored by the State.

If the Fifth Amendment right to counsel is to have any meaning, then there was simply nothing more for Agent Lyon to say to Mr. Gillett after he told Mr. Gillett that he would have Mr. Gillett taken back to his jail cell and after he advised Mr. Gillett of every offense for which he was under arrest. As fully briefed before the trial court and before this Court, Agent Lyon's gratuitous,[19] post-invocation statement – "[t]hat what you're being charged with now on account of last night, and um, there might be some more charges that come out of it" – achieved its intended goal of eliciting an incriminating response in violation of Innis and the numerous cases cited to the trial court and to this Court.

Posture before this Court

Did the trial court determine that Mr. Gillett invoked his right to counsel? The record is silent.

Assuming the trial court did determine that Mr. Gillett invoked his right to counsel, did the trial court then determine that Agent Lyon's admittedly gratuitous statement – "[t]hat what you're being charged with now on account of last night, and um, there might be some more charges that come out of it" – did not constitute the functional equivalent of interrogation? The record is silent.

The trial court committed reversible error in denying Mr. Gillett's alternative claim that his custodial statement at and after the time of 4:56:24 must be suppressed.

Parts III(C) and III(D) of Original Brief: The unacknowledged portion of Claim 2

The State did not respond to Mr. Gillett's free-standing claim that the totality of circumstances required suppression of his custodial statement. See AB 56-58. The State also

[19] R. 93-94. Agent Lyon admitted that his advisement to Mr. Gillett that "there might be some more charges that come out of it" was gratuitous. The advisement was not in response to any question Mr. Gillett ever asked him. See AB 47.

did not respond to Mr. Gillett's free-standing claim that the custodial statement must be suppressed as a violation of Mississippi law and Kansas law.[20] Finally, the Attorney General not only declined to address Mr. Gillett's free-standing claim that the custodial statement at bar must have been suppressed under the cruel and unusual punishment prohibitions in the federal charter, the Mississippi charter and the Kansas charter,[21] but in doing so, the Attorney General fails to take into consideration the local prosecution's concession that Mr. Gillett ***does*** have a constitutional foundation to challenge admissibility of his custodial statement under this framework.[22] Therefore, this Court finds itself in a posture where a death-sentenced appellant has raised constitutional claims before the trial court and preserved those claims for this Court; however, the local prosecution and the Attorney General ignored these claims. Finally, the trial court issued no findings of fact or conclusions of law.

The trial court committed reversible error in denying Mr. Gillett's claims at Part III(C) and III(D) of Claim 2.

REPLY TO STATE'S RESPONSE TO CLAIM 3

Standing

It is sadly ironic that the Attorney General contends Mr. Gillett failed to establish standing to challenge the warranted search at 606 North Ash Street in the City of Russell as Mr.

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[20] It is noteworthy that the Attorney General advised this Court that "[a]ppellant also presents issues that require research of the Kansas constitution and Kansas case law to be weighed along with our Mississippi laws." See Page 4 of State's July 13, 2009, "Motion for Enlargement of Time to File Brief of Appellee." Although it sought and received more time to respond to Mr. Gillett's arguments founded in Kansas law, the State chose not to address these arguments in its response. Perhaps the Attorney General simply decided that *lex fori* is the proper choice of law following its July 13 motion and then abandoned any discussion of Kansas law in its response. See AB 14-17 for briefing of the choice of law question unanswered by the prosecution and the trial court; see also Footnotes 1 and 3, supra.

[21] See AB 28.

[22] See Footnote 9, supra.

Gillett established standing ***entirely*** through information provided in the State's discovery. Mr. Gillett referred to police statements given by Patty Hulett (his aunt and resident of 606 North Ash Street), and by Vickie Kinkade (his niece and resident of 606 North Ash Street) and police photographs taken at 606 North Ash Street incident to the warranted search. See CP. 99-100. Mr. Gillett then cited case authority estalishing that "overnight house guests maintain a constitutionally recognized expectation of privacy in their host's home." See CP. 101. As a fall-back position, Mr. Gillett cited authority for the proposition that "individuals who are not house guests but are merely traveling maintain a personal and reasonable expectation of privacy in their carry-on luggage." See CP. 101. "As Mr. Gillett's personalty was searched while Mr. Gillett was an overnight house guest, Mr. Gillett seeks an evidentiary hearing concerning the constitutionality of the March 29, 2004, search at 606 North Ask Street, Russell, Kansas." See CP. 102.

Notwithstanding the above, and relying entirely on the local prosecution's pre-hearing response to Mr. Gillett's motion, see SB 24, the Attorney General asserts Mr. Gillett did not demonstrate a legitimate expectation of privacy. Turning to the local prosecution's response,[23] the prosecution referred to Mr. Gillett as a "temporary guest" of the resident at 606 North Ash Street – Patty Hulett. See CP. 198. The local prosecution continues: "During the brief stay,

[23] The Attorney General utilizes the local prosecution's pre-hearing response as a dialectic talisman – citing it in bare refutation and then abruptly departing without elaboration or explanation. The Attorney's General position is clear and conclusory: "Mr. Gillett did not have standing and the local prosecution said so." Of note, at least the local prosecution recognized the *lex loci/ lex fori* issue in this case and presented argument under Kansas law (CP. 198-200) and Mississippi law (CP. 201-02). Like the Attorney General, however, the local prosecution took no position on what law applies other than to make the following request in its pre-hearing responses to Motion 007 and Motion 008: "[T]he State of Mississippi request [sic] this Court to review the applicable law of the State of Kansas and Mississippi [and] offer a ruling under the laws of each state and permanently rule under the guidelines of the state that is most strict against the prosecution." (CP. 202; 209). As the Attorney General relies entirely on the local prosecution's pre-hearing response to challenge standing in this Court, Mr. Gillett limits his reply to the content of that trial-court filing.

duffel bags and other personal items were stored in the living room area of the residence." See CP. 198.[24] Finally, "Roger Gillett has not yet identified the personality [sic] seized that he proclaims ownership to; and, further, has never claimed ownership through affidavit nor sworn statement, that any items seized by law enforcement specifically belonged to him." See CP. 198.

The local prosecution's response to the trial court – which is, at the election of the Attorney General, now the sole response before this Court – neglected to address any of the following averments from Mr. Gillett's motion to suppress the search at 606 North Ash Street:

- That Agent Lyon, affiant for the search warrant at bar, testified that Mr. Gillett lived at 606 North Ash Street when he was in Russell, Kansas. CP. 98.
- That Agent Lyon swore out an affidavit for an additional search warrant based upon "property belonging to Suspects" found at 606 North Ash Street. CP. 98-99.
- That Patty Hulett advised police that her overnight guest, Mr. Gillett, had been a guest in her house for several days. CP. 99.
- That Patty Hulett advised police that Mr. Gillett placed duffel bags in her living room at 606 North Ash Street containing, at least in part, his personalty. CP. 99.
- That Vickie Kinkade advised police that Mr. Gillett kept his property in the southwest part of the living room at 606 North Ash Street. CP. 100.
- That Patty Hulett advised police that additional clothing belonging to Mr. Gillett began to collect where he had previously stored his personalty inside her 606 North Ash Street residence. CP. 99.
- That Vickie Kinkade advised police that Mr. Gillett arrived at 606 North Ash Street three days before the warranted search – March 26, 2004. CP. 99.
- That Vickie Kinkade advised police that Mr. Gillett has slept at 606 North Ash Street since his March 26 arrival. CP. 99-100.
- That, based on the police statements given by Vickie Kinkade and Patty Hulett, and based on digital photographs of the interior of 606 North Ash Street taken by police and provided to Mr. Gillett through discovery, "the personalty of Mr. Gillett was located by police in a warranted search of 606 North Ash Street in one corner of the living room at 606 North Ash Street[.]" CP. 100. "Upon further information and belief, the source being digital

[24] Any non-temporary guest is a resident. Mr. Gillett is uncertain how the modifier "temporary" enhances the State's opposition to standing. Mr. Gillett is certain, however, that information provided by the State through discovery substantiates that Mr. Gillett stayed overnight at 606 North Ash Street. If by "temporary" the local prosecution meant "overnight," then the local prosecution conceded standing in the written response to Mr. Gillett's motion. Because the Attorney General relies entirely on this pre-hearing response to Mr. Gillett's motion, the same point is conceded before this Court as well.

> photographs of 606 North Ash Street provided by the State thus far, all personalty referred to [above] was situated in one location and consisted of opaque containers that were zipped or otherwise sealed." CP. 100.

Simply stated, based on the facts and legal authority recited in his motion, Mr. Gillett more than adequately established standing to proceed to an evidentiary hearing to challenge the legality of the search and seizure at bar. The State provided Mr. Gillett with the requisite facts and Mr. Gillett provided the trial court with the requisite law. The State's claim that Mr. Gillett is required to personally claim ownership of items seized is constitutionally erroneous and constitutionally intolerable.[25]

Procedural bar

The State follows its hollow opposition to standing with a ludicrous assertion – that Claim 3 is procedurally barred: "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." See SB 24. To the contrary, Mr. Gillett – at *all* stages –

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[25] It is constitutionally unnecessary to personally claim ownership of anything once standing is successfully established. Alderman v. United States, 394 U.S. 165, 176-77 (1969); Mancusi v. DeForte, 392 U.S. 364, 367 n. 4 (1968); see also United States v. Vega, 221 F.3d 789, 796-97 (5th Cir. 2000). Because of this, it is below professional norms for defense counsel who satisfactorily moves for suppression to subject the defendant to prejudice through needless waiver of a Fifth Amendment right. See Mills v. State, 757 S.W.2d 630, 634 (Mo. App. 1988) (defense counsel's erroneous belief concerning suppression law is cognizable where the erroneous belief prejudiced defendant); see also United States v. Grandison, 783 F.2d 1152, 1156-57 (4th Cir. 1986) cert. denied 479 U.S. 845 (1986) (allegation that defense counsel was ineffective for failure to properly establish standing to challenge search and seizure is cognizable); Massey v. State, 820 So. 2d 1003, 1004 (Fla. Dist. Ct. App. 2002) (collateral petitioner states claim for relief on allegation that trial counsel was ineffective for failing to move to suppress evidence); Adams v. State, 677 S.W.2d 408, 411-12 (Mo. App. 1984) (ineffective handling of a suppression claim is cognizable as a collateral claim). See generally Kimmelmann v. Morrison, 477 U.S. 365, 385 (1986) (mistaken belief concerning applicable duty and obligation at the pre-trial motion stage can amount to ineffective assistance of counsel); State v. Silvers, 587 N.E.2d 325, 332-35 (Neb. 1998). Cf. State v. Cintra, 889 A.2d 284, 2005 WL 3526321, *1, *3 (Del. 2005) (counsel ineffective for failing to challenge constitutional admissibility of custodial statement); People v. Cokley, 807 N.E.2d 568, 576 (Ill. App. 2004) modified 817 N.E.2d 534 (Ill. 2004) (remanded to trial court for suppression hearing that competent counsel would have secured); Commonwealth v. Carusone, 506 A.2d 475, 478 (Pa. Super. 1986) (offbeat conduct of defense counsel at suppression hearing – whether it be the product of gamesmanship or incompetence – may be cognizable as an ineffective claim).

painstakingly announced and developed the underpinnings of Claim 3. Mr. Gillett's October 2, 2006, six-page motion to suppress the search and seizure at 606 North Ash Street is entitled "Motion to Suppress Evidence Seized Subsequent to Warranted Search at 606 North Ash Street, Russell, Kansas." CP. 98. Mr. Gillett's March 30, 2007, 56-page memorandum of law in support of this motion is entitled "Memorandum of Law in Support of Motion 007: Motion to Suppress Direct and Derivative Seizures at 606 North Ash Street, City of Russell, as Violations of Mr. Gillett's Federal and State Constitutional Rights." CP. 589. At the evidentiary hearings in this matter, the trial court announced that the search at 606 North Ash Street was at issue (R. 2) and Mr. Gillett agreed, further clarifying that Motion 007 – the motion concerning the search at 606 North Ash Street – was at issue. (R. 3). Finally, Mr. Gillett sought and received a ruling on the instant motion to suppress. (R. 464). The Attorney's General contention that Mr. Gillett is procedurally barred from presenting Claim 3 is shameless mendacity.

The remainder of the State's Response to Claim 3

After reviewing the direct and derivative evidence from the warranted search at 606 North Ash Street introduced at trial, see AB 62-63, Mr. Gillett presented the relevant facts and case authority which required suppression of that evidence because:

> Part V(A). The affidavit in support of warrant was wholly conclusory. As a result, the seizures made on the warrant premised on that affidavit were absent probable cause. See AB 73-74.
>
> Part V(B). Even if this Court affirms as to Part V(A), the affidavit at bar never contained sufficient, particularized facts from which Magistrate Clark could find a substantial basis for probable cause. See AB 74-77.
>
> PartV(C). In addition to the infirmities detailed in Parts V(A.) and V(B.) of this Claim, the seizures from this search must be suppressed as the search was premised entirely on the uncorroborated information provided by an informant whose reliability was not established. See AB 77-80.

Part V(D). The direct and derivative seizures of the search at 606 North Ash Street must be suppressed under the Mississippi Constitution and the Kansas Bill of Rights. See AB 81.

Part V(E). The direct and derivative seizures of the search at 606 North Ash Street must be suppressed under the Eighth Amendment to the federal constitution and its correlatives under the Mississippi Constitution and the Kansas Bill of Rights. See AB 81.

Part V(F). The derivative seizures at 606 North Ash Street must be suppressed as fruit of the poisonous tree. See AB 81-83.

Mindful of the array of claims required to be presented to this Court in light of the trial court's refusal to enter findings of fact or conclusions of law, Mr. Gillett offered the following analysis of Claim 3 as a salutary convenience:

> For this Court to affirm, this Court, at minimum [footnote deleted], must conclude:
>
> - The unsworn declarations attributed to informant Milam that Mr. Gillett "stays" at 606 North Ash Street "when he is in Russell" – an unsworn declaration that affiant Lyon testified was the only information in the affidavit connecting Mr. Gillett to 606 North Ash Street – constituted something more than a "bare bones" affidavit. See Part III(A) and Part V(A) of this Claim.
>
> - The Court would be required to arrive at this determination without benefit of findings of fact or conclusions of law from the trial court.
>
> - After determining that the affidavit at bar was not defective on grounds that it is a "bare bones" affidavit, this Court is required to find that the affidavit at bar also contained sufficient, particularized facts from which the issuing magistrate had a substantial basis for concluding that probable cause existed. See Part III(A) and Part V(B) of this Claim.
>
> - The Court would be required to arrive at this second determination without benefit of findings of fact or conclusions of law from the trial court.
>
> - After determining that the affidavit at bar is not a "bare bones" affidavit and after determining that the affidavit embraces a constitutionally sound, particularized announcement of probable cause, this Court is required to find that the failure to corroborate any unsworn declaration from an informant whose reliability was not established also provided the issuing magistrate with a substantial basis for concluding that probable cause existed. See Part III and Part V(C).

- The Court would be required to arrive at this third determination without benefit of findings of fact or conclusions of law from the trial court.

- The Court would be required to resolve whether Kansas law or Mississippi law applies to each of these determinations. Additionally, the Court would be required to resolve whether Tenth Circuit or Fifth Circuit law applies to each of these determinations.

Should this Court determine that a constitutional infirmity exists, Mr. Gillett's contention that evidence gathered during a March 30 search of 606 North Ash Street was an unconstitutional derivative of the March 29 search must prevail as the State did not respond to Mr. Gillett's argument that the March 30 search. See [AB] Part V(F).

See AB 83-84.

The Attorney's General response to Mr. Gillett's delineated argument appears at SB 25-29. The State writes "Gillett's argument boils down to a question of whether or not there was probable cause to issue the search warrant." See SB 25. Insofar as Mr. Gillett did not challenge the scope of the search conducted at 606 North Ash Street, the State's mere assertion is accurate. Rather than respond to Mr. Gillett's argument, the Attorney General offers the Court an alternative narrative.[26] Unfortunately for the State, not one aspect of its alternative narrative – not even the aspects actually supported by the record – connects Mr. Gillett to 606 North Ash Street.[27] The Attorney's General alternative narrative is:

[26] While no appellee need file a point-by-point refutation of an appellant's brief, surely an appellee who disregards appellant's presentation in preference for his own might fail to respond to all of appellant's argument. Mr. Gillett presented the argument in support of Claim 3 through seven parts: Parts A through G of Section V. The State disregarded this regimen and, in doing do, failed to respond to numerous free-standing claims in support of suppression.

[27] The essence of Claim 3 is that Affiant Lyon never established that Mr. Gillett had a sufficient nexus to 606 North Ash Street. The Attorney General either never understood this or refused to answer it.

1. The Agent Lyon determined Mr. Gillett was wanted in Oregon.[28] This corroborated Informant Milam's information to Agent Lyon that Mr. Gillett "had committed computer crimes in Oregon." See SB 27, 29.

2. Informant Milam told Agent Lyon that there was a stolen pickup truck at the farmstead – about seventeen miles from the Russell City Limits. See SB 27, 29 and CP. 1174-75 and R. 177. A neighbor to the farmstead reported seeing a white pickup truck at the farmstead. See SB 27.

3. Informant Milam led police "to the abandoned trash bag in the dumpster which did in fact contain a methamphetamine lab." See SB 29.

4. Informant Milam "consented to a search of her vehicle which produced the propane tank she said Gillett left there." See SB 29.

The Attorney General offers no guidance as to how the four items inventoried above provide probable cause to locate Roger Gillett at 606 North Ash Street – a City of Russell residence at least seventeen miles from the farmstead, and a residence where there was no allegation of criminal activity whatsoever. With the exception of a brief discussion of hornbook law which only supports Mr. Gillett's claim for relief under Claim 3,[29] the State offers no further response to Claim 3.

Mr. Gillett presented well-delineated constitutional argument before the trial court. The local prosecution had more than six months to offer a response – oral or written – to Mr. Gillett's memorandum of law in support of suppression of seizures at 606 North Ash Street. See AB 10.

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[28] Mr. Gillett understands that Agent Lyon's affidavit states that "SSA Lyon determined there was an active felony warrant for GILLETT in Pendleton, Umatilla County, Oregon...[.]" See SB 27. However, Agent Lyon never testified that he made this determination. Instead, Agent Ralston testified that he determined that Mr. Gillett was wanted in Oregon and that he also determined that Oregon would not extradite Mr. Gillett if Kansas authorities detained him. CP. 1150; R. 152.

[29] The Attorney General writes: "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 can be attached to the informant. [cite deleted]" See SB 28. This is precisely the legal basis for relief advanced by Mr. Gillett under Part V(C) of Claim 3. See AB 77-81. As the State explicitly acknowledges the mischief of an "affidavit [that] does not state that Milam had been the source of any reliable information in the past[,]" it is nothing short of bizarre that the Attorney General would then decline to respond to Part V(C) of Claim 3!

The local prosecution remained silent. The Attorney General has also not responded to the constitutional argument put forth by Mr. Gillett. The trial court entered no findings or conclusions in support of its order denying suppression. As such, the trial court must be reversed.

REPLY TO STATE'S RESPONSE TO CLAIM 4

The subterfuge[30] continues in the State's Response to Claim 4.

Standing: Upon what basis does the State contend Mr. Gillett lacked standing?

The Attorney General offers that Mr. Gillett failed to establish standing and relies entirely on the local prosecution's response to Mr. Gillett's pre-hearing motion to suppress. See SB 30. Turning then to the local prosecution's response,[31] on November 30, 2006, the local prosecution alleged the following before the trial court: that the farmstead in question was owned by Rex Gillett in March 2004; that Van Mullender "rented the aforesaid property from the owner, Rex Gillett;"[32] that Van Mullender "was not aware of the presence of seized items, nor was he aware that the Defendant had 'stashed' property on the premises;"[33] that "[n]o seized items were locked

[30] The Attorney General disregards entire portions of Mr. Gillett's argument. See, e.g., "Parts III(C) and III(D) of Original Brief: The unacknowledged portion of Claim 2," at pages 17-18 supra ; Footnotes 40 through 42, and their accompanying text, infra. This is not chicanery. It is plain evasion.

[31] See Footnote 23, supra.

[32] Sworn testimony filed with the trial court and provided to the local prosecution proves this allegation false. Vanan Mullender leased only the pasture at the farmstead. (CP. 119).

[33] Neither the local prosecution nor the Attorney General explain the relevance of this assertion – particularly in light of Vanan Mullender's sworn testimony that: "While I lease the pasture and land at Rex's farmhouse, Roger helped maintained [sic] the property. He came and went as he pleased. He changed locks when he pleased. [...] This was the way things operated at the farmhouse since Rex Gillett moved from the farmhouse and established his residence in Russell." (CP. 119). Does the State simply ignore sworn testimony it deems unsuitable? Vanan Mullender testified that Mr. Gillett "came and went as he pleased" at the farmstead and that Mr. Gillett "changed locks [at the farmstead]" when he pleased. Not only is it irrelevant that Vanan Mullender knew or did not know what items – if any – Mr. Gillett brought to the farmstead, it is also unsurprising as Vanan Mullender testified that Mr. Gillett would change locks at the farmstead as he saw fit.

in any manner whatsoever and the items remained at all times in the open area of the metal shed and/or granary;"[34] and that 'Roger Gillett has not yet identified the personality [sic] seized that he proclaims ownership to; and further, has never claimed ownership through affidavit nor sworn statement, that any items seized by law enforcement specifically belonged to him."[35] (CP. 205-06).

The local prosecution goes on to assert that Mr. Gillett's motion to suppress is defective on grounds that Mr. Gillett did not allege any of the following: fraud, mistake, impartial magistrate, police vendetta or insufficient affidavit. The local prosecution cites no authority requiring Mr. Gillett to make these allegations to secure an evidentiary hearing. The Attorney General, in merely adopting the local prosecution's response in its entirety and without further elaboration and explanation, is also unhelpful.

Standing: What sworn testimony did Mr. Gillett provide to establish standing (or, what sworn testimony establishing standing does the State of Mississippi continue to ignore?)

Mr. Gillett annexed three affidavits to his pre-hearing motion to suppress. (CP. 118-121). They are "Exhibit B to Motion 008" (an affidavit from Rex Gillett, grandfather to Mr. Gillett and title holder to the farmstead); "Exhibit C to Motion 008" (an affidavit from Vanan Mullender, cousin to Mr. Gillett and individual who rents the pasture at the farmstead from Rex Gillett); and

[34] Assuming *arguendo* that all items seized were unlocked (requiring, of course, nescience that the freezer containing human remains located by police in the wooden shed was sealed shut) and assuming *arguendo* that the local prosecution has any source of knowledge as to what items were in what location immediately prior to the warranted search at the farmstead (requiring, of course, nescience that the government's sole informant, Debbie Milam, did not admit she and two others burglarized the farmstead until the trial of this matter in November 2007), what is the relevance of where items were seized and in what condition? In his pre-hearing motion, Mr. Gillett challenged "the constitutionality of the issuance of search warrants on and between March 29, 2004, and April 1, 2004 at the location and its improvements that are the subject matter of this motion, the searches that took place pursuant to these warrants on and between March 29, 2004 and April 1, 2004 at the location and its improvements that are the subject-matter of this motion, and the seizures that took place as a result of these searches." (CP. 110). The only relevant question is did government agents seize an item located at the farmstead?

[35] This allegation is cockamamie. See Footnote 25, supra, and its accompanying text.

"Exhibit D to Motion 008" (an affidavit from Bobby Zweifel, nextdoor neighbor to the farmstead since 1974).

Mr. Gillett's pre-hearing motion to suppress was filed on October 2, 2006. (CP. 105).

The local prosecution's pre-hearing response to this motion was filed on November 20, 2006. (CP. 204).

Mr. Gillett specifically addressed standing in his post-hearing memorandum of law. (CP. 570-74).

The local prosecution never mentions the affidavits annexed to Mr. Gillett's motion.

As the local prosecution never mentions the affidavits, the local prosecution necessarily never responded to the content of the affidavits.

In Mr. Gillett's pre-hearing motion to suppress, Mr. Gillett alleges the following:

> [Paragraph 6]. Annexed hereto as '*Exhibit B*,' is an affidavit of Rex Gillett. While the affidavit speaks for itself, the affidavit is testimony to the following:
>
> A. Identification of the improvements at 5482 190th Street, County of Russell.
>
> B. That the property at 5482 190th Street, County of Russell, is posted against trespassers.
>
> C. That the property at 5482 190th Street is fenced.
>
> D. That the property at 5482 190th Street is posted against trespassers because the property is not abandoned and because Rex Gillett does not 'want people on the property without my permission.'
>
> E. That the property is fenced for this same reason and to permit raising of livestock.
>
> F. That Rex Gillett and his family moved to, and resided at, 5482 190th Street, County of Russell, 'at least 45 years ago.'
>
> G. That Rex Gillett moved from 5482 190th Street, County of Russell, to 339 West 5th Street, Russell, Kansas, over a decade ago.

H. That Roger Gillett is Rex Gillett's grandson.

I. That Rex Gillett and Roger Gillett lived together at 5482 190th Street, County of Russell, when Roger Gillett attended high school.

J. During the time that Rex Gillett and Roger Gillett lived together at 5482 190th Street, County of Russell, Roger Gillett helped maintain that property.

K. Following high school, and after Rex Gillett moved to 339 West 5th Street, Russell, Kansas, Roger Gillett "would return to the farmhouse property to maintain it."

L. For over a decade, Rex Gillett has leased the cropland and pasture at 5482 190th Street, County of Russell, to Vanan Mullender.

M. Regarding the repairs and maintenance that Roger Gillett performed following the time that Roger Gillett lived together with Rex Gillett at 5492 190th Street, County of Russell, Rex Gillett testified as follows:

'Typically, Roger would visit my residence and load his Aunt Marsha's El Camino with tools. He would then drive to the farmhouse to clean the property, make repairs and mow the yard. At all times, Roger had my permission to make whatever repairs were needed on the property. Because of this, Roger had 'the run of the property.' He had my permission to come and go as he pleased. Roger had my permission to change locks on doors and, in fact, did change locks on doors. I did not have keys to these locks after Roger changed them because, as far as I was concerned, the farmhouse property was Roger's property to use as he pleased. Roger was free to occupy the farmhouse and make it his residence. At different times after high school, Roger did reside at the farmhouse. The only thing Roger could not do at the farmhouse was interfere with Vanan's lease of the pasture and cropland'

[Paragraph 7]. Annexed hereto as '*Exhibit C*,' is an affidavit of Vanan Mullender. While the affidavit speaks for itself, the affidavit is testimony to the following:

A. That Vanan Mullender resides in Waldo, Kansas.

B. That Vanan Mullender leases the pasture owned by Rex Gillett on 190th Street, Waldo, Kansas. This pasture is located 'just north of Bobby Zweifel's property.'

C. Identification of improvements at Rex Gillett's farm.

D. That Vanan Mullender is a blood relative of Rex Gillett and Roger Gillett.

E. That Vanan Mullender has known Roger Gillett since Roger Gillett was born.

F. That Rex Gillett is Roger Gillett's grandfather.

G. That Vanan Mullender pays the utility bill at Rex Gillett's farm.

H. That Vanan Mullender tends to his livestock at Rex Gillett's farm.

I. That '[t]he farmhouse property is posted for trespassing and, because of livestock, necessarily is fenced.'

J. Mr. Mullender then testifies as follows:

'In the summer or autumn of 2003, I received a telephone call from Roger Gillett. Roger said he was calling from Bobby Zweifel's house and that he was going to be at the farmhouse property. I got in my car and drove to the farmhouse property. When I arrived, I saw Roger at the property. He was in the house tearing up carpeting. Roger commented to me that he was heartbroken that the property had been vandalized while he was away. I was aware that people had come onto the property and that they had damaged the inside of the house. Roger took up all of the carpet and then cut the grass around the farmhouse.

'I was not surprised to receive a call from Roger because when Roger was home, he would come onto Rex's property to maintain it and, obviously, repair it when necessary.

'Roger telephoned me again in early 2004. He told me he had cut an old lock off of the machine shop at the farmhouse and he had replaced it with a new lock. He told [me] that he left a key for this new lock for me with Bobby Zweifel. Roger said to me he had since realized that he left the wrong key with Bobby Zweifel. I told him that would not be a problem.

'While I lease the pasture and land at Rex's farmhouse, Roger helped maintain the property. He came and went as he pleased. He changed locks when he pleased. He did not tend to my livestock at the farmhouse property. That was my responsibility. This is the way things operated at the farmhouse since Rex Gillett moved from the farmhouse and established his residence in Russell. Prior to that time, Rex lived at the farmhouse as long as I can remember and, while Roger was in high school, Roger lived at the farmhouse with his grandfather."

[Paragraph 8]. Annexed hereto as '*Exhibit D*,' is an affidavit of Bobby Zweifel. While the affidavit speaks for itself, the affidavit is testimony to the following:

A. That Mr. Zweifel resides at 5448 190th Street, Waldo, Kansas.

B. That Rex Gillett owns farm property located next door and immediately to the north of Mr. Zweifel's residence.

C. That Rex Gillett has owned this farm property as long as Mr. Zweifel can remember.

D. That Mr. Zweifel has resided immediately south of Rex Gillett's farm property since 1974.

E. That Mr. Zweifel has always known Rex Gillett's farm to be posted for trespassers and fenced in for livestock.

F. That Roger Gillett lived with Rex Gillett at Rex Gillett's farm when Roger Gillett was in high school.

G. Mr. Zweifel then testifies as follows:

> 'More recently, I know that Roger has been on the farmhouse property. For example, during 2003, Roger returned to the farmhouse property. He was cleaning the property and cutting the grass at the property. He drove to my house and asked my wife to use our phone.
>
> 'I also remember that during the winter months of late 2003 or early 2004, Roger came to my house. We had just had an ice storm. Roger walked to my house. Roger said his car was frozen in by ice. My son, Roger and myself got into my truck and drove to the farmhouse. The tires of Roger's car were surrounded by a build up of ice that had occurred overnight. I hooked the truck up to the car, but I could not free the car from the ice. I returned to my house and drove my tractor back to Roger's farmhouse. With the tractor, I was able to free Roger's car. We also changed a tire on Roger's car that day.
>
> 'In 2004, Roger came to my house with a key for a lock he placed on the machine shop at the farmhouse property. He told me that the key was for Vanan Mullender. I also know Vanan. He leased the pasture and land at the farmhouse property.'

(CP. 106-110).

Mr. Gillett established standing in his pre-hearing motion and the local prosecution offered nothing to defeat standing. As the Attorney General merely adopted the local prosecution's non-response, the State of Mississippi's continuing contention that Mr. Gillett lacked standing is utterly specious.

The remainder of the State's Response to Claim 4

After reviewing the direct and derivative evidence from the warranted search at the farmstead introduced at trial, see AB 85-86, Mr. Gillett presented the relevant facts and case authority which required suppression of that evidence because:

> Part V(A). The search warrants at 5482 190th Street entered by the issuing court at 2:54 p.m., March 29, 2004, is facially invalid for failure to describe with any particularity the place to be searched. See AB 93-95.
>
> Part V(B). In addition to the failure to particularly describe the place to be searched, the warrant fails on its face as it is not premised in probable cause. See AB 95-100.
>
> Part V(C). Based on the totality of the circumstances, the search and seizure on March 29, 2004, at 5492 190th Street must be suppressed as the warrant for this search was premised entirely on uncorroborated information provided by an informant whose reliability was not established. See AB 100-04.
>
> Part V(D). The search conducted by police was beyond the scope of the warrant as police officers invaded the farmstead without the warrant and its accompanying papers and then did not circumscribe the search to the objectively reasonable confines of the facially overbroad warrant. See AB 105-08.
>
> Part V(D)(1). The search conducted by Undersheriff Barrett and Deputy Whitman exceeded the lawful scope of the warrant. See AB 105-07
>
> Part V(D)(2).The search conducted by police officers who relieved Undersheriff Barrett and Deputy Whitman exceeded the lawful scope of the warrant. See AB 107-08.
>
> Part V(E). The direct and derivative seizures of the search at 5482 190th Street must be suppressed under the Mississippi Constitution and the Kansas Bill of Rights. See AB 108.

Part V(F). The direct and derivative seizures of the search at 5482 190th Street must be suppressed under the Eighth Amendment to the federal constitution and its correlatives under the Mississippi Constitution and the Kansas Bill of Rights. See AB 108-09.

Part V(G). The derivative seizures at 5482 190th Street must be suppressed as fruit of the poisonous tree. See AB 109-11.

As with Claim 3, mindful of the array of claims required to be presented to this Court in light of the trial court's refusal to enter findings of fact or conclusions of law,[36] Mr. Gillett offered the following analysis of Claim 4 as a salutary convenience:

> For this Court to affirm, this Court, at minimum [footnote deleted], must conclude:
>
> - The search warrant for the farmstead issued at 2:54 p.m., March 29, 2004, was facially valid notwithstanding the failure to particularly describe the place to be searched, contrary to the argument presented in Part V(A.) of this Claim.
> - The Court would be required to arrive at this determination without benefit of findings of fact or conclusions of law from the trial court.
> - The same search warrant, on its face, is premised in probable cause, contrary to the argument presented in Part V(B.) of this Claim.
> - The Court would be required to arrive at this second determination without benefit of findings of fact or conclusions of law from the trial court.
> - After determining that the search warrant is facially satisfactory in all respects, the Court must also find that the failure to corroborate any unsworn declaration from an informant whose reliability was not established also provided the issuing magistrate with a substantial basis for concluding that probable cause existed. This will require the Court to reject the argument presented in Part V(C.) of this Claim.
> - The Court would be required to arrive at this third determination without benefit of findings of fact or conclusions of law from the trial court.

[36] The constitutional deprivations emanating from the warranted search at the farmstead are of a greater magnitude that those emanating from the warranted search at 606 North Ash Street. Mr. Gillett's memorandum of law to the trial court in support of suppression of direct and derivative seizures at the farmstead is eighty-five pages in length. (CP. 496-580). Fortunately, the local prosecution and the trial court had over six months to review this memorandum of law before commencement of jury trail. Similarly, Claim 4 is almost 28 pages in length and, as stated at AB 85, incorporates as much of Claim 3 and the aforementioned 85-page memorandum of law as possible to avoid needless repetition in Mr. Gillett's Original Brief. Fortunately, this Court provided the Attorney General over five months of additional time to review and professionally respond to this claim.

- In addition to the above, the Court must find that the search that was actually conducted at the farmstead did not exceed the scope of the warrant and, therefore, did not constitute a general search in derogation of the Fourth Amendment. This will require the Court to reject the argument presented in Part V(D.) of this Claim.

- The Court would be required to arrive at this fourth determination without benefit of findings of fact or conclusions of law from the trial court.

- The Court would be required to resolve whether Kansas law or Mississippi law applies to each of these determinations. Additionally, the Court would be required to resolve whether Tenth Circuit or Fifth Circuit law applies to each of these determinations.

Should this Court determine that a constitutional infirmity exists, Mr. Gillett's contention that evidence gathered during the warranted search fully described at Part V(G.) of this Claim must prevail as the State did not respond to Mr. Gillett's argument that this subsequent search was an unconstitutional derivative of the search at bar.

See AB 112-13.

The Attorney's General entire response to the above argument consumes fewer than two pages and appears at SB. 30-32. After incorporating the entirety of its Response to Claim 3, the State contends, without reference to factual support and without benefit of analysis, that "the totality of the circumstances presented for review established probable cause to believe crimes had been committed and were being committed by Gillett and co-defendant Chamberlin at that location." See SB at 30. This is mere contradiction. Had the Attorney General merely written "Mr. Gillett is wrong," his resistance relinquishes no force.

The Attorney General continues: "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." See SB 31. This assertion is less than

entirely correct. Mr. Gillett submitted to the trial court, and now submits to this Court, that ***no*** structure could have been lawfully searched at farmstead[37] as the search warrant was facially insufficient[38] and, because of this, police officers who actually conducted the search at the farmstead exceeded the lawful scope of the warrant.[39]

The State chose not to respond to Mr. Gillett's argument at Part V(D.) of Claim 4 that police officers conducting the search exceeded the lawful scope of the search warrant.[40] The State also chose not to respond to Mr. Gillett's argument at Part V(C.) that seizures must be suppressed as the warrant was premised entirely on uncorroborated information provided by an informant whose reliability was never established.[41] See AB 100-04. Finally, and

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[37] Mr. Gillett conceded that if the affidavit did establish probable cause for a search, then it only established probable cause to search "a shed." See AB 106. As there was more than one shed at the farmstead, the affidavit failed to establish probable cause to search any structure. See AB 86-88, 93-95. In part, this is why the scope of the search conducted at the farmstead violated Mr. Gillett's constitutional rights. See Footnote 39, infra.

[38] Because Affiant Lyon breached his duty to disclose necessary information to the issuing magistrate that Affiant Lyon had a duty to discover, the warrant issued upon Agent Lyon's affidavit unconstitutionally failed to describe with any particularity the place to be searched. See AB 93-95. The Attorney General arguably responds to this claim insofar as the Attorney General isolates it and then categorically insists the warrant at bar is sufficient because "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)." See SB 31-32. The Attorney's General reliance on Dunn is astonishing. Dunn, 480 U.S. at 301 held: "Drawing upon the Court's own cases and the cumulative experience of the lower courts that have grappled with the task of defining the extent of a home's curtilage, we believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." All structures at 5492 190th Street, County of Russell, are set back no less than several hundred yards from the 190th Street. CP. 511 (citing to Undersheriff Barrett's testimony and Deputy Whitman's testimony). The four primary structures at the farmstead were separated by no less than twenty yards each. CP. 519. The distance between the wooden shed and the farmhouse was at least fifteen yards. Id.; see also Pretrial Exhibits 10 through 15, 21 and 22 (farmstead photographs). Dunn requires a hearing court to consider factors unique to each search – factors which Mr. Gillett continually briefed and which the State has consistently ignored. The Attorney's General reliance on Dunn is inexplicable.

[39] See AB 105-08.

[40] See AB 105-08. The scope of a warranted search is a critical constitutional concern. See CP. 556-60.

[41] Affidavits premised entirely on uncorroborated information provided by a informant whose reliability is unknown are decrepit. See CP. 538-554. The State's disconcern for this Fourth Amendment lodestar is demonstrated in its decision to disregard this aspect of Mr. Gillett's motion to suppress in the trial court and again before this Court.

notwithstanding the Attorney's General specific request for additional time to address Kansas law in its Response,[42] the Attorney General ignored Mr. Gillett's state constitutional claims at Part V(E.). See AB 108.

Mr. Gillett presented well-delineated constitutional argument before the trial court. The local prosecution had more than six months to offer a response – oral or written – to Mr. Gillett's memorandum of law in support of suppression of seizures at 5492 190th Street, County of Russell. See AB 10. The local prosecution remained silent. The Attorney General has also not responded to the constitutional argument put forth by Mr. Gillett. The trial court entered no findings or conclusions in support of its order denying suppression. As such, the trial court must be reversed.

REPLY TO STATE'S RESPONSE TO CLAIM 5

The State's Response to Claim 5(A) is adventurous.[43] Success for the State requires this Court to confirm that the Mississippi Court of Appeals, without resort to case authority or to legal analysis, overruled this Court's holding in Thomas v. State, 278 So. 2d 469, 472 (Miss. 1973).

The State proved Linda Heintzelman owned the pick-up truck that was the object of the alleged robbery. See AB 113-14. Mr. Gillett unsuccessfully moved for a directed verdict as to Count Two of the instant indictment as "it is clear that Mr. Hulett had no interest in the vehicle therefore he could not have been robbed of the vehicle." See AB 113-14. Further, "[t]here is no

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[42] See Footnote 20, supra.

[43] Claim 5 consumes almost eight pages of Mr. Gillett's Original Brief, consisting of Parts 5(A), 5(B) and 5(C). See AB 113-120. The Attorney's General Response to Part 5(A) covers three pages and is founded upon a single case citation to a Mississippi Court of Appeals disposition. See SB 32-34. The Attorney General offered no response to Part 5(B) or Part 5(C).

evidence that Mr. Hulett ever operated Ms. Heintzelman's truck [nor] evidence that Mr. Hulett even relied on the use of Ms. Heintzelman's truck." See AB 114. Subsequently, the trial court also refused Mr. Gillett's coordinate peremptory instruction on Count Two and denied all post-trial motions, including a motion for judgment notwithstanding the verdict. See AB 115.[44]

The Attorney General assumes an all-or-nothing position which, if successful, requires this Court to overrule its own precedent. Citing Grant v. State, 8 So. 3d 213, 216 (Miss. App. 2009), the Attorney General contends that Count Two of the instant indictment properly went to Mr. Gillett's jury because a conviction under Miss. Code. Ann. 97-3-19(2)(e) where the State alleges robbery merely requires evidence that a person – ***any*** person – was killed during the commission of the alleged robbery. See SB 32-34. The Attorney's General response to Claim 5 is limited to this single asseveration. Entirely and only because Grant, supra expands Miss. Code Ann. 97-3-19(2)(e) to envelope ***any*** killing of ***any*** person so long as that killing takes places during the commission of the alleged robbery, the State asserts Claim 5 fails.

Thomas, supra held that robbery, the underlying felony in the instant indictment, is a specific-intent crime. See AB 116. So long as this Court overrules Thomas v. State, 278 So. 2d 469, 472 (Miss. 1973), Grant, supra is correctly decided.[45] If this Court declines to overrule Thomas, supra, however, then Claim 5 requires Grant, supra to be repudiated.

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[44] This issue was isolated and briefed for the trial court well in advance of jury selection. CP. 38-47; 60-68; 857-869. The trial court declined to rule on the issue prior to trial however. R. 466.

[45] In Pinkney v. State, 538 So. 2d 329, 354-55 (Miss. 1988), this Court affirmed a capital murder conviction with the underlying offense of burglary where the jury was provided the following specific-intent instruction: "If the Jury finds, beyond a reasonable doubt, that the Defendant, Bobby Joe Pinkney, *did break and enter the dwelling house of Tracey Thompkins Hickman*, said dwelling house being then and there occupied by Tracey Thompkins Hickman, with his intent to then and there unlawfully, feloniously and burglariously take, steal and carry away *the personal property of Tracey Thompkins*, then and there situated in said dwelling house, then and in that event, such acts constitute the crime of burglary[.]" (emphasis added). Mr. Pinkney unsuccessfully claimed he was entitled to a different specific-intent instruction. Id. This Court held that the specific-intent instruction given was sufficient. Id.

In addition to Thomas, supra, and Pinkney v. State, 538 So. 2d 329 (Miss. 1988), Mr. Gillett cited other case authority supporting the elementary proposition that Claim 5(A) is meritorious because capital murder, as defined at Miss. Code Ann. 97-3-19(2)(e), and robbery as defined at Miss. Code Ann. 97-3-73 are each specific-intent crimes. See AB 116-17. Footnote 76 of Mr. Gillett's Original Brief, see AB 115, is particularly instructive:

> Case authority cited *infra* leaves no doubt that Miss. Code. Ann. 97-3-19(2)(e) is not a general-intent crime. Specific intent looks at the intent to produce a specific result. General intent looks at the intent to perform a physical act with that act then producing a result. United States v. Berrios-Centero, 250 F.3d 294, 299 (5th Cir. 2001) cert. denied 534 U.S. 928 (2001) ("specific intent concerns willful and knowing engagement in criminal *behavior,* while general intent concerns willful and knowing *acts"*) (emphasis in original); State v. Esters, 927 P.2d 1140, 1142 (Wash. App. 1996) appeal denied 937 P.2d 1101 (1997); Brian D. Roark, State v. Lea: Attempt Plus Felony-Murder Does Not Equal Attempted Felony Murder, 76 N.C.L. Rev. 2360, 2376 n.111 (1998); see also State v. Weaver, 473 S.E.2d 362, 368 (N.C. App. 1996). Cf. United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000) (discussing the movement in the legal community to supersede 'specific intent' and 'general intent' with 'purpose' and 'knowledge,' respectively – a person who acts with "specific intent" is a person who acts purposely to achieve a specific result rather than a person who consciously acts knowing that the act is criminal but not to achieve a specific result); State v. Morris, 677 N.W.2d 787, 791 (Iowa 2004) (Larson, J., dissenting) (quoting from a trial court jury instruction that "specific intent means not only being aware of doing an act and doing it voluntarily, but also doing it with a specific purpose in mind"); Whitfield v. State, 868 P.2d 272, 287 (Cal. 1994) (Mosk, J., concurring & dissenting).[46]

Precisely because Miss. Code. Ann. 97-3-19(2)(e) and robbery are specific-intent crimes, the trial court erred in overruling Mr. Gillett's motion for a directed verdict and, in the aftermath of

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[46] See also Phillips & Woodman, The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense, 28 Pace L.R. 455, 491 (2008); Kim, Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants, 17 U.Fla. J.L. & Pub. Pol'y 199, 213 (2006); Milhizer, Group Status and Criminal Defenses: Logical Relationship or Marriage of Convenience, 71 Mo. L.Rev. 547, 604 n. 294 (defining rape as a general-intent crime permits criminalization of rape perpetrated for non-sexual reasons).

that error, then erred in refusing Mr. Gillett's peremptory instruction at D-72 and, in the aftermath of that subsequent error, erred again in refusing to grant Mr. Gillett's motion for judgment notwithstanding the verdict. See AB 116.

Claim 5(B) provides case authority and argument for the Due Process proposition that because Count Two of the instant indictment never should have gone to Mr. Gillett's jury, the conviction on Count Two is legally insufficient and must be vacated. See AB 117-19. Satisfied that the Mississippi Court of Appeals overruled Thomas, supra in Grant, supra, the Attorney General disregards this argument. Unless Grant, supra did, in fact, overrule Thomas, supra, the State has left Claim 5(B) uncontested.

Claim 5(C) provides case authority and argument for the Eighth Amendment proposition that because Mr. Gillett's conviction under Count Two of the instant indictment is legally insufficient, the death sentence for Count Two must be vacated. See AB 119-120. Satisfied that the Mississippi Court of Appeals overruled Thomas, supra in Grant, supra, the Attorney General disregards this argument. Unless Grant, supra did, in fact, overrule Thomas, supra, the State has left Claim 5(C) uncontested.

The relief sought under Claim 5 is required. Mr. Gillett should have been granted a directed verdict or, in the alternative, a preemptive instruction on the specific-intent offense alleged in Count Two. Further, as Count Two should never have gone to Mr. Gillett's jury, Count Two is unsupported by legally sufficient evidence. Because of this, the death sentence for the conviction under Count Two cannot stand as Count Two is not a death-eligible offense.

REPLY TO STATE'S RESPONSE TO CLAIM 6

Claim 6 provides case authority and argument for the proposition that because evidence for Count Two of the instant indictment was legally insufficient, it necessarily follows that the death sentence for the conviction under Count One must be vacated as it is premised on inadmissible evidence of bad character. See AB 120-23. "[T]he net effect of the trial court's refusal to dismiss Count Two as legally insufficient was to require the jury to consider the evidence concerning Count Two as bad character evidence during the penalty phase." See AB 121.

Satisfied with its adventurous response to Claim 5 that the Mississippi Court of Appeals overruled Thomas, supra in Grant, supra, the Attorney General dismisses the entirety of Claim 6. This expeditious approach returns extraordinary dividends if this Court were to rule that Grant, supra indeed overruled Thomas, supra and eliminated an element of the offense of robbery by converting capital murder as alleged in the instant indictment to a general-intent crime. The converse remains true. Should this Court determine that Grant, supra is wrongly decided and that Miss. Code Ann. 97-3-19(2)(e) and/or Miss. Code Ann. 97-3-73 are the specific-intent crimes that this Court has pronounced them to be, then Claim 6 – like Claim 5(B) and 5(C) – stands uncontested. Put differently, the Attorney's General fall-back position is certain failure.

Because Mr. Gillett's jury considered inadmissible evidence of bad character in reaching its death sentence in Count One, the death sentence for that Count must be vacated for reasons presented in Claim 6.

REPLY TO STATE'S RESPONSE TO CLAIM 7

The most dangerous untruths are truths moderately distorted.

- Georg Christoph Lichtenberg[47]

I. Background

Mr. Gillett argued a jury charge was unconstitutional that included language permitting Mr. Gillett's jury to convict him as charged without a determination that Mr. Gillett at least formed the intent to rob prior to the death of Ms. Heintzelman (Count One and the State's coordinate Jury Instruction S-5) and prior to the death of Mr. Hulett (Count Two and the State's coordinate Jury Instruction S-6). See R. 1550-51; SB 35-37; AB 124-26. Put differently, Mr. Gillett argued that jury instructions submitted by the State diminished the constitutional requirement that his jury find all of the elements of the alleged offense.

Resorting to the impertinent doctrine of single continuous transaction,[48] the local prosecution defeated Mr. Gillett's facile contention in the trial court. As the Attorney General merely regurgitates this sophistry[49] on appeal, this Court must decide whether the misappropriation of a doctrine of evidentiary expedience to diminish the State's burden to prove every element of the alleged offense shall be tolerated on appeal.

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[47] www.quotationsbook.com/quote/32786/

[48] The doctrine of single continuous transaction negates the necessity to prove completion of the predicate offense *antemortem*. The doctrine of single continuous transaction is a substantive rule of law concerning *res gestae*. See, e.g., People v. Cavitt, 33 Cal.4th 187, 207, 14 Cal.Rptr.3d 281, 296, 91 P.3d 222, 234-35 (2004); State v. Morris, 555 S.E.2d 353,356 (N.C. App. 2001) aff'd 562 S.E.2d 421 (N.C. 2002). The doctrine of single continuous transaction does not negate the necessity to prove no less than the *mens rea* to attempt the predicate offense as required by Pickle v. State, 345 So. 2d 623, 626 (Miss. 1977).

[49] Implementing a doctrine of *res gestae* to dilute the State's burden to prove the elements of the offense in a prosecution where the State insists on death may well have been the type of "dangerous untruth" denounced by Professor Lichtenberg in the epigraph of this Reply.

II. Discussion

Mr. Gillett opposed Jury Instructions S-5 and S-6 because they permit a guilty-as-charged verdict without requiring the State to prove that, at bare minimum, Mr. Gillett formed the intent to rob the person killed before that person died. It is black-letter law that Mississippi follows the single continuous transaction doctrine. See generally SB 36-37. Indeed, in opposing Jury Instructions S-5 and S-6, Mr. Gillett accepted this proposition and relied on the same case authority cited by the State to defeat Claim 7 – Pickle v. State, 345 So. 2d 623 (Miss. 1977). Referring to Mr. Gillett's brief:

> Mr. Gillett's contention in Claim 5 and in this Claim is that, as to Mr. Hulett, there was no robbery and, therefore, Count Two could not be legally sustained. As to Ms. Heintzelman, if there was robbery of her truck and that robbery was *res gestae* with the crime of capital murder, then either the criminal taking of her truck – or at least the intent to commit that specific offense – must be proven to have existed before she died. Pickle, 345 So. 2d at 626 (for capital murder, "the underlying crime begins where an indictable attempt is reached"); see, e.g., Holly v. State, 671 So. 2d 32, 40 (Miss. 1996) (quoting Fisher v. State, 481 So. 2d 203, 212 (Miss. 1985)) (a capital-murder conviction is legally sufficient when the murder and the underlying felony are proven had they been charged alone); Mackbee v. State, 575 So. 2d 16, 36 (Miss. 1990) ("we note that the jury was instructed fully that it was necessary for them to find that Mackbee had the intent to rob when the act of the killing was done"); West v. State, 553 So. 2d 8, 13 (Miss. 1989) (so long as the State presents a prima facie case that at least an attempt to commit the underlying felony took place prior to death, the State would survive directed verdict as the attempt would constitute "while engaged in the commission of" language under Miss. Code Ann. 97-3-19(2)(e)).
>
> AB. 125-26.

The Attorney General does not address the case authority cited at AB 125-27 for the proposition that the State must prove to each juror, at minimum, the intent to rob the slain individual before

that individual died.[50] Instead, and regrettably, the Attorney General resorts to subterfuge at SB 37:

> Gillett claims the State failed to produce any evidence that supports the instruction however, in contradiction to the [sic] 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 possession of the [sic] Linda Heintzelman's personal property. *See* Appellant's Brief at 127-28.

Mr. Gillett never "acknowledge[d] that the State is properly able to have instruction S-6" under Knox or any other authority. To the contrary, Mr. Gillett's maintained it was error to submit S-6:

> As to Jury Instruction S-6 (the instruction treating Mr. Hulett), unlike the Simmons case, the State did not produce a scintilla of evidence as to any sequence of events the State claims to have occurred at 908 South Gulfport Street in Hattiesburg, Mississippi. [footnote inserted reading: Contra Simmons, 805 So. 2d at 477-78 (wherein the prosecution actually produces evidence of some sequence of events supporting the prosecution's felony murder charge).] In itself, this does not obstruct the State from pursuing a conviction under Count One as this Court has held that when "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." Knox v. State, 805 So. 2d 527, 532 (Miss. 2002) cert. denied 536 U.S. 965 (2002). [footnote inserted reading: As mentioned in Claim 5, the State produced evidence that Ms. Heintzelman owned the truck that was the object of the alleged robbery.] The difficulty raised in Claim 5 reappears under this same logic – because the State did not produce a scintilla of evidence as to any sequence of events at 908 South Gulfport Street, and because the truck that is the object of the robbery under Count Two was proven by the State not to be the personal property of Mr. Hulett, *Mr. Gillett's objection to Jury Instruction S-6 should have been sustained.* The conviction under Count II must be reversed.
>
> As to Jury Instruction S-5 (the instruction treating Ms. Heintzelman), Mr. Gillett's objection should have been sustained based on case authority cited in Part I of this claim and because neither Simmons, supra nor Pickle, supra defeat Mr. Gillett's objection.
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> AB. 127-28 (emphasis added).

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[50] The Attorney's General maintains, instead, that it is inconsequential whether the robbery occurs when the decedent is alive. See SB 36-37. This statement of law is entirely correct and entirely irrelevant to Claim 7.

Finally – and perhaps most remarkably– the sworn testimony cited by the Attorney General to refute Claim 7 actually buttresses Claim 7. At SB 38, the Attorney General writes: "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." Review of these citations reveals no declaration from Mr. Gillett concerning a stolen truck.[51]

At R. 1070, the following exchange takes between Assistant District Attorney Saucier and Ronnie Burns:

> Q. [BY MR. SAUCIER:] Did he [Mr. Gillett] tell you what he had done, if anything, to the owners?
>
> A. [BY MR. BURNS:] Yes.
>
> Q. What did he say he had done?
>
> A. He said he had taken care of them.
>
> (R. 1070).

The State did not elicit any information concerning a robbery – let alone when any person was killed in temporal relationship to any robbery. Mr. Burns did not gratuitously testify to any information concerning a robbery and, therefore, did not provide any testimony concerning when any person was killed in relationship in time to any robbery. This omission affronts the case authority cited by the local prosecution (see R. 1551) and specifically relied upon by Mr. Gillett (see AB 127) – Simmons v. State, 805 So. 2d 452 (Miss. 2001). See Part III of this Reply, infra, for the discussion of Simmons, supra disregarded by the Attorney General.

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[51] As related in the discussion of these citations to the record infra, Mr. Burns testified that Mr. Gillett told him that he killed "the owners" of the truck. Ms. Crumbless testified Mr. Gillett said he needed help disposing of two bodies in the truck. According to Mr. Burns, then, Mr. Gillett "confessed" to killing "the owners." According to Ms. Crumbless, Mr. Gillett "confessed" that he needed help disposing of the bodies in the truck. Neither Mr. Burns nor Ms. Crumbless testified that Mr. Gillett told them that he "robbed the owners" or that he decided to rob "the owners" of "their" truck before he killed "the owners." Ironically, this evidentiary gap is troubling under the case authority cited by the prosecution in support of Jury Instruction S-5 and S-6 – Simmons v. State, 805 So. 2d 452 (Miss. 2001). See R. 1551; AB 127.

At R. 1094, the following exchange takes place between Assistant District Attorney Saucier and Laray Crumbless:

> Q. [BY MR. SAUCIER:] What part of the conversation did you hear in the presence of Roger Gillett?
>
> A. [BY MS. CRUMBLESS:] Roger said that he needed help to get rid of this white pickup. Ronnie asked why, and he said because there was two bodies in the back – two dead bodies.
>
> (R. 1094).

The State did not elicit any information from Ms. Crumbless concerning a robbery – let alone when any person was killed in temporal relationship to any robbery. Ms. Crumbless did not gratuitously testify to any information concerning a robbery and, therefore, did not provide any testimony concerning when any person was killed in relationship in time to any robbery. This omission affronts the case authority cited by the local prosecution (see R. 1551) and specifically relied upon by Mr. Gillett (see AB 127) – Simmons v. State, 805 So. 2d 452 (Miss. 2001). See Part III of this Reply, infra, for the discussion of Simmons, supra disregarded by the Attorney General.

III. Conclusion

Whether or not Mr. Gillett is put to death by lethal injection depends at least in some part on the cogency of his legal argument. Because the clarity and the content of his legal argument is to some extent proportionate to his chances of remaining alive, Mr. Gillett offered the trial court, and now this Court, a remarkably uncomplicated discussion of law entirely consistent with the single continuous transaction doctrine in Claim 7. Mr. Gillett wrote:

> Mississippi is in line with other states on the felony-murder rule; as felony murder is an elevated offense, it is necessary to prove the defendant at least had the specific intent to commit the underlying felony before the homicide was completed. See, e.g., Campos v. Bravo, 161 P.3d 846, 849 (N.M. 2007); State v.

Lanham, 639 S.E.2d 802, 807 (W.Va. 2006); State v. Burkhart, 103 P.3d 1037, 1045 (Mont. 2004); Williams v. State, 818 A.2d 906, 912 (Del. 2002); State v. Harris, 589 N.W.2d 782-791-92 (Minn. 1999); Diaz v. State, 728 P.2d 503, 509 (Okla. Crim. App. 1986); State v. Norwood, 279 S.E.2d 550, 554 (N.C. 1981) ('to convict of first degree murder under the felony murder rule, the State need show only that the killing was done in the perpetration or attempt to perpetrate a felony'); State v. Underwood, 615 P.2d 153, 160 (Kan. 1980) ('the ostensible purpose of the felony murder doctrine is to deter those engaged in felonies from killing negligently or accidentally, and that the doctrine should not be extended beyond its rational function which it was designed to serve'); Commonwealth v. Austin, 906 A.2d 1213, 1220 (Pa. Super. 2006) appeal denied 920 A.2d 830 (Pa. 2007) ('all the felony murder statute requires is for the jury to conclude that a criminal homicide was committed while the defendant participated in a completed or an attempted delineated, *i.e.,* predicate, offense'); People v. Ruiz, 795 N.E.2d 912, 917 (Ill. App. 2003) appeal denied 806 N.E.2d 1071 (Ill. 2003); Griffin v. Commonwealth, 533 S.E.2d 653, 658-59 (Va. App. 2000); People v. Kelly, 588 N.W.2d 480, 488-89 (Mich. App. 1998); State v. Amado, 680 A.2d 974, 979 (Conn. App. 1996) certified and remanded on other grounds at 697 A.2d 368 (Conn. 1997) (prosecution need not prove intent to kill, but must prove intent to commit underlying felony to punish those who kill while committing a felony or attempting to commit a felony); People v. Braxton, 807 P.2d 1214, 1217 (Colo. App. 1990); People v. Jennings, 243 Cal.App.2d 324, 327-28, 52 Cal.Rptr. 329, 331 (Cal. App. 1969).

As quoted above, the State also relied on Simmons v. State, 805 So. 2d 452 (Miss. 2001), stating 'this instruction was actually given in [Simmons].' (T. 1551). While a review of the Simmons opinion fails to reveal whether or not an analogue of S-5 and S-6 were given in that case, a review of the Simmons opinion indicates that this Court addressed Mr. Simmons's claim that the trial court should have granted his motion for directed verdict [footnote inserted which reads: See Claim V in the Simmons case, see Simmons, 805 So. 2d at 476-77, and Claim 5 in this brief. As in the instant case, the underlying felony for the capital murder charge in Simmons was robbery. Simmons, 805 So. 2d at 465] and found that the 'one continuous transaction' rule defeats Mr. Simmons's claim as the prosecution in Simmons introduced the following:

A. Testimony of an individual that the defendant told her to remove her clothes and jewelry. Simmons, 805 So. 2d at 477. *There is no comparable testimony in the instant matter.*
B. Testimony from that individual that the defendant then took those items from her. Id. *There is no comparable testimony in the instant matter.*
C. Testimony in the form of a custodial statement from the defendant that the defendant stole $1,000 from the individual who was killed. Id. *There is no comparable testimony in the instant matter.*

D. This Court wrote: "Simmons's confession to [Police Officer] Guess clearly reveals that the robbery occurred in connection with the killing. Also, the fact that he told Leaser before he raped her that he was 'on a time frame' points out that he had a plan of some sort he tried to adhere to." Id. at 477-78. *There is no comparable finding that can be made by this Court because there is no comparable evidence in the instant matter.*

The State's errant reliance on Simmons v. State, 805 So. 2d 452 (Miss. 2001) brings into clear light the evidentiary gap the prosecution did not complete, and how that gap was unconstitutionally compressed, mangled and unlawfully resolved by Jury Instruction S-5 and S-6.

AB. 126-27.

The local prosecution's argument in support of Jury Instruction S-5 and S-6 on the grounds that "[a]ll you have to do is prove a continuous chain of events," see AB 125, was and remains spurious for reasons made clear in Claim 7. Ignoring Mr. Gillett's argument in Claim 7, the Attorney General adopts the local prosecution's spurious argument, enhancing it with a misstatement that Mr. Gillett conceded the propriety of S-6 and garnishing its misstatement with references to sworn testimony which, upon examination, do not support the Attorney's General position.

No criminal defendant is guilty of an offense just because the government asserts that he is. See, e.g., Speiser v. Randall, 357 U.S. 503, 523-24 (1958). The State of Mississippi has the burden to overcome the presumption of innocence with evidence of the alleged offense. See, e.g., Johnson v. Florida, 391 U.S. 596, 598 (1968). This burden is not met with a fictitious assertion that a violation of Miss. Code Ann. 97-3-19(2)(e) is established merely by evidence that a truck that did not belong to Mr. Gillett and dead bodies were found at a Kansas farmstead owned by Mr. Gillett's grandfather. In actuality, and as made clear in Claim 7, the State satisfies this burden by merely proving Mr. Gillett at least had the specific intent to rob Ms. Heintzelman (Count One) and Mr. Hulett (Count Two) at some time before Ms. Heintzelman and Mr. Hulett

died.[52] As the State was unwilling or unable to meet this mere burden, S-5 and S-6 were wrongly included in the jury charge. Therefore, the relief sought in Claim 7 must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 8

The only refutation the State offers to Claim 8 actually reinforces Claim 8.

In lieu of addressing the well-delineated substance of Claim 8, the Attorney General submits Claim 8 is meritless because the State pathologist testified it is inconsequential whether DNA analysis is performed on cadaver blood stored in purple-topped tubes or red-topped tubes. If the pathologist's testimony did not subvert the testimony of State's DNA expert, the State's refutation of Claim 8 is significant. Because the pathologist's testimony – and the collection procedure implemented by the pathologist during autopsy – contradicts the testimony of the State's DNA expert, and because the Attorney General elected to entirely rely on the pathologist's testimony to defeat Claim 8, the appellate relief sought in Claim 8 is required.

At trial, the State elicited expert testimony from Donald Pojman in the field of forensic pathology and death investigation. R. 1357.

At trial, the State elicited expert testimony from William Jones in the field of forensic DNA analysis. R. 1529. Mr. Jones testified at trial that, in his opinion, a DNA profile found on a shoe the State attributed to Mr. Gillett matched the DNA profile of Linda Heintzelman. R. 1539-41. Dr. Peter D'Eustachio, an expert in the fields of biochemistry and DNA analysis as they apply to human DNA typing, testified at a pre-trial hearing that Mr. Jones's opinion was premised on scientifically unreliable results. R. 429-30.

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[52] Failure to prove guilt beyond a reasonable doubt carries enormous constitutional consequences. See, e.g., United States v. Jackson, 368 F.3d 59, 65-66 (2nd Cir. 2004). As made clear in Claim 5, because the State presented no evidence that Mr. Gillett robbed Mr. Hulett, Jury Instruction S-6 is doomed from its inception. See AB 125. This stands in further negation to the State's feckless assertion that Mr. Gillett "acknowledges that the State is properly able to have instruction S-6 under Knox v. State[.]" See SB 37.

Whether admission of Mr. Jones's testimony concerning the DNA profile of Ms. Heintzelman violates Mr. Gillett's constitutional rights[53] and Miss. R. Evid. 702 is the issue briefed in Claim 8. Mr. Gillett's argument that Mr. Jones's opinion was inadmissible is found at R. 453-54 and is summarized as follows:

A. That Mr. Jones's opinion is premised neither on reliable facts nor reliable methodology. See R. 453; CP. 768-772 (citing case authority); CP. 773-75 (citing case authority); AB 140. 'Without a validation study for the red-top sample after Mr. Jones informed the prosecution that a purple-top sample 'was needed,' the results reported in State's Exhibit 6 amounted to nothing more than 'an experiment.' State's Exhibit 6, therefore, amounts to a science report wherein Mr. Jones conducted an experiment which could, someday, lead to a reliable methodology but which, when performed, had no reliable methodology to support it." See AB 140 (cite deleted).

B. In addition to the contention that Mr. Jones's opinion is the product of an unvalidated science experiment, the results of the unvalidated science experiment are so irregular that they are not reliable and must be excluded. See R. 453-54; CP. 768-772 (citing case authority); CP. 775-78 (citing case authority); AB 140-41.

Not one word of the Attorney's General response repudiates Mr. Gillett's contention that the "expert" testimony of Mr. Jones was not premised on a validation study. Not one word of the Attorney's General response denies that the results of Mr. Jones's unvalidated study are so statistically irregular that they must be excluded. Instead, at SB 39-41, the Attorney General contributes a single-spaced block-quote from Mississippi Transp. Com'n v. McLemore, 863 So. 2d 31, 39-40 (Miss. 2003) which only serves to substantiate each of Mr. Gillett's objections to Mr. Jones's opinion. Specifically, at SB 41, the Attorney General includes this language from McLemore, 863 So. 2d at 40:

> 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 field. Every substantive decision requires immersion in the subject matter of the case.

[53] See CP. 767-77 for discussion of the gatekeeping function as vital for the preservation of constitutional rights.

As the Attorney General consumes nearly three pages of his Brief in a block-quote from McLemore, it is nothing less than astonishing that the Attorney General then fails to appreciate how "the body of knowledge and research [presented by Mr. Gillett] to aid the court in establishing criteria which indicate reliability" particularly when "[e]very substantive decision requires immersion in the subject matter of the case" is only ***supported*** by the State's Response to Claim 8.

Dr. Pojman initially testified that purple-top tubes contain EDTA to prevent the blood from clotting. See SB 43.[54] In derogation of this testimony, Dr. Pojman then testified that all blood he collects from corpses are placed into the same collection tubes and capped as desired by the requesting agency. See SB 43. Dr. Pojman testified that his lab does not discriminate on tube-top covers as "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." See SB 44. Thus, rather than confront (A) the absence of a validation study for red-top tubes and/or (B) the irregular results generated by Mr. Jones's unvalidated experiment, the Attorney's General argument that Claim 8 is meritless is hinged on the testimony of one expert witness for the State that it does not matter whether cadaver blood is collected in a purple-top tube even though another witness for the State – a witness who happens to be the State's expert

[54] Mr. Jones testified that purple-topped tubes contain EDTA, which he describes as a preservative that "chelates ions that are in the blood and prevents it from clotting." R. 347. EDTA "also inhibits putrefaction so it will not decompose as nearly as fast." R. 347. Dr. D'Eustachio agreed with this testimony. R. 410-11. Dr. Pojman, however, testified that he does not preserve purple-topped blood with EDTA. See SB 43-44. Rather, Dr. Pojman testified that all cadaver blood is collected in untreated tubes and that he simply covers the untreated tube with the color top sought by the requesting agency. See SB 43. After the Attorney General admits that a "purple top tube contains EDTA which prevents the blood from clotting or otherwise deteriorating[,]" see SB 41-42, the Attorney General then makes the bizarre contention that Claim 8 is meritless even though the State's forensic pathologist did not comply with this collection procedure! See SB 43-44, and SB 44, quoting Dr. Pojman as follows: "[I]t 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 tube, it's going to be the same specimen."

in the field of DNA analysis – testified that the type of collection tube does matter.[55] If anything, the State's reliance on McLemore, supra, on Dr. Pojman's testimony that he does not preserve cadaver blood in the manner described by Mr. Jones, and on Dr. Pojman's testimony that it is inconsequential whether cadaver blood is preserved in a purple-top tube only serves to sustain Claim 8: Dr. Pojman's testimony ***dis***establishes criteria indicating reliability because Mr. Jones disagrees with Dr. Pojman that the presence of EDTA is inconsequential and ***dis***establishes reliability in the particular technical field of DNA typing in that Dr. Pojman testified he places all cadaver blood in untreated tubes and merely caps the tubes with the color top sought by the requesting agency.

Introducing Dr. Pojman's opinion into the Daubert discussion does nothing but support Mr. Gillett's argument that the trial court abused its discretion in permitting Mr. Jones to provide an expert opinion based on an unreliable, unvalidated experiment that generated irregular results. The Attorney General offered no resistance to the argument presented in Claim 8 other than Dr. Pojman's opinion. The relief sought in Claim 8 must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 9

I. What falsehoods are contained in the State's Response to Claim 9?

Citing Walker v. State, 913 So. 2d 198, 234 (Miss. 2005), the Attorney General agrees that Mr. Gillett "is entitled to have jury instructions which present his theory of the case" so long as the instructions correctly state the law, have a foundation in the evidence, and are not fairly

[55] Responding on direct examination to the question "Would it be fair to say that your chances of getting a match or getting a call to where you can conclusively say one way or the other is better with a red-top tube – I mean with a purple-top tube," Mr. Jones responded: "Yes, I would say that a purple-top tube in general would preserve the sample a little bit better, which would decrease any kind of degradation that might occur over a period of time because of the EDTA, which I mentioned, that actually chelates ions inside there and inhibits exo and endonuclease activity. And that is an extremely good thing as far as preserving the blood if you're going to keep it in a liquid form." R. 354.

covered elsewhere in the jury charge. See SB 44. After pronouncing the correct legal standard, it is remarkable that the Attorney General then either misunderstands it or declines to apply it.[56]

Claim 9 consumes more than twelve pages of the Original Brief. See AB 142-54. Mr. Gillett provides record-based discussion of six instances of police actions or omissions that supported his jury instructions containing his theory of defense. See AB 144-49. Mr. Gillett provides the case authority and legal argument supporting these instructions. See AB 150-54. In response, the Attorney General resorts to dishonesty, claiming the following:

- That "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." See SB 45-46. To the same extent, the Attorney General stated that "no evidence to support the instructions was produced at trial[.]" See SB 46. These statements are shamelessly false as demonstrated in the following:

(1) At AB 144-45, Mr. Gillett discusses the facts in support of his first heading: "Cigarette butts and a chewed plastic straw: photographed and collected, but never analyzed for biological evidence."

(2) At AB 145, Mr. Gillett discusses the facts in support of his second heading: "The cigarette lighter photographed and collected but never tested for fingerprints."

(3) At AB 145-46, Mr. Gillett discusses the facts in support of his third heading: "Further justification for [the two previous headings]: Biological information and fingerprints seized from Mr. Gillett."

(4) At AB 146-47, Mr. Gillett discusses the facts in support of his fourth heading: "The handsaw scabbard that police photograph and collected but never used for cut-margin comparisons."

(5) At AB 147-49, Mr. Gillett discusses the facts in support of his fifth heading: "The hammer that police photographed but did not collect."

(6) At AB 149, Mr. Gillett discusses the facts in support of his sixth heading: "The videotape of 908 South Gulfport Street, Hattiesburg, that police lost." In the inconceivable event that the individually nominated and underlined headings encompassing five pages from Mr. Gillett's Original Brief escaped the attention of

[56] See Part II of this Reply wherein the Attorney's General response does not maintain that Jury Instruction D-42 is an incorrect statement of law nor that it was fairly covered in the charge. Pursuant to Walker v. State, 913 So. 2d 198, 234 (Miss. 2005), so long as D-42 was supported by the record-based facts presented at R. 142-50, it should have been included in the jury charge. See Footnote 57, infra.

the Attorney General, Mr. Gillett then included a separate discussion of all of the police actions and omissions headed: "Summary of the above recitation." See AB 149-50.

- That "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." See SB 46.

(1) Mr. Gillett cited two cases to the trial court in support of D-44 on the annotated version of D-44. See CP. 1323. In United States v. Shyllon, 10 F.3d 1, 3-4 (D.C. Cir. 1993) cert. denied 510 U.S. 1206 (1994), Judge Edwards wrote: "Surely testimony that the investigator had intimidated Tessamichael bears on the probability that he had also intimidated the Government's witnesses." In People v. Wimberly, 5 Cal.App.4th 773, 792-93, 7 Cal.Rptr.2d 152, 153-64 (Cal. App. 1992), Justice Chin wrote: "Here, the trial court informed the jury that the employees of the police department had destroyed evidence in violation of court order, described the destroyed items, and concluded: 'Because of the destruction of evidence after the Superior Court issued a discovery order, you may draw an adverse inference to the Prosecution in the proof of Counts 1, 2, 3, and 4 of the information. Such adverse inference may be sufficient to raise a reasonable doubt as to' those counts."

(2) At AB 151, Mr. Gillett also cites to Commonwealth v. Bowden, 399 N.E.2d 482, 491 (Mass. 1980) in support of D-44. As to D-45, Mr. Gillett cites two Mississisppi cases at CP. 1324. They are Staten v. State, 813 So. 2d 775, 778 (Miss. App. 2002) (citing DeLaughter v. Lawrence County Hospital, 601 So. 2d 818, 820 (Miss. 1992) and Jackson v. State, 766 So. 2d 795, 801-02 (Miss. App. 2000).

(3) At AB 151, Mr. Gillett cites no fewer than eleven additional cases in support of D-45.

II. Other than the falsehoods dispelled in Part I, what remains of the State's Response?

The Attorney General never disputes Mr. Gillett's assertion that inadequate police investigation constitutes a theory of defense.

The Attorney General never contends that the jury charge fairly covered Jury Instruction D-42 and/or D-44 and/or D-45.

The Attorney General never claimed that Jury Instruction D-42 is an incorrect statement of law.[57]

Implementing the only case authority included in the Attorney's General response to Claim 9 – Walker v. State, 913 So. 2d 198 (Miss. 2005) – it is fairly indisputable that the State has conceded that Mr. Gillett is entitled to relief under Claim 9. As D-42 is proper theory of defense and a correct statement of law that was not fairly included in the jury charge, it was error to exclude it. Walker, supra; see AB 152-53. For this reason, and for reasons briefed in Claim 9, the trial court erroneously excluded Mr. Gillett's theory of defense from the jury charge. This is constitutionally intolerable for reasons briefed in Part D of Claim 9. See AB 152-54. The appellate relief sought in Claim 9 must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 10

Mr. Gillett cited authority for the proposition that lesser offense instructions are authorized if a reasonable juror could vote acquittal to the charge but guilty to the lesser. See AB 156-58. Mr. Gillett cited to the annotated instructions at CP. 1333-34 and CP. 1342-43 for the proposition that a juror could acquit on the capital-murder charge and then acquit on the lesser offense of murder. See AB 158-59. In this event, Mr. Gillett cited to the annotated instructions at CP. 1333-34 and CP. 1342-43 for the proposition that a juror who votes acquittal on the capital-murder charge[58] may consider aggravated assault as a lesser-included offense of robbery. See AB 158-59. If this juror "finds that Mr. Gillett committed aggravated assault upon [either Ms. Heintzelman or Mr. Hulett] and that the aggravated assault was the cause of [either

[57] Insofar as the Attorney General explicitly maintained, without discussion, that D-44 and D-45 were unsupported by case authority, see SB 46, it certainly stands to reason that the Attorney General concedes the vitality of D-42 as D-42 was specifically excluded from the State's inventory.

[58] A likely event in the case of Count Two as it was legally impossible for Mr. Hulett to have been robbed of the pickup truck. See Claim 5.

Ms. Heintzelman's death or Mr. Hulett's death], Mr. Gillett could be found guilty of manslaughter as defined at Miss. Code. Ann. 97-3-2." See AB 159.

The Attorney General responds that "Gillett never offered an alternative evidentiary scenario to show how the killing merited his version of manslaughter found in his instructions." See SB 47. As detailed in the preceding paragraph, Mr. Gillett indeed presented an alternative theory to the trial court and case authority for its imposition.

For reasons stated in Claim 10, the relief sought must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 11

I. Did the State respond to Mr. Gillett's argument?

If Jury Instruction D-19 was simply an instruction concerning the burden of persuasion, the Attorney's General claim that D-19 was covered in the jury charge would be well taken.

However, Jury Instruction D-19 is not an instruction concerning the burden of persuasion.

Jury Instruction D-19 is an instruction to each juror concerning ***that*** juror's duty to Mr. Gillett.

Because D-19 is not solely concerned with the burden of persuasion, it is immaterial that the jury charge included proper instruction on the burden of persuasion.

D-19 advised each juror that (A) the trial court would not define "reasonable doubt" and (B) each juror was free to determine what he believed to be a reasonable doubt for himself and (C) "it is not necessary that a reasonable doubt be a collected doubt shared by all or a majority of the jurors." See AB 160. D-19 concludes: "If a reasonable doubt is present in the mind of only a single juror, then the jury must vote to acquit." See AB 160.

The Attorney General asserts that D-19 was covered under Jury Instruction C-2 and, therefore, the trial court did not err in refusing to include redundant D-19. See SB 49-50. The Attorney General recites C-2 at SB 49. ***Nowhere*** in C-2 is any of the following found:

A. That the trial court shall not define "reasonable doubt."

B. That each juror should decide what is a "reasonable doubt."

C. That after deciding for himself what a "reasonable doubt" is, if the juror believes there is a "reasonable doubt," then that juror must vote to acquit.

Instruction C-2 does nothing to dispel a juror from believing that the decision to convict may be a collective decision. Instruction C-2 does nothing to empower each juror with the knowledge that ***that*** juror determines what a reasonable doubt is for himself.

II. Even though Jury Instruction C-2 did not cover Jury Instruction D-19, why should relief be granted for the failure to include D-19 in the jury charge?

The Attorney General maintains that "[w]hen 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."[59]

Should this Court overrule Whittington v. State, 523 So. 2d 966, 979 (Miss. 1988), the Attorney's General assertion that Mr. Gillett's jury was properly covered by Jury Instruction C-2 gains traction. Whittington, supra held that "[i]n order to return a verdict of guilty, each juror must be convinced beyond all reasonable doubt that an accused is guilty. While the law requires this absolutely, it does not require more." See AB 160. Whittington, supra is not the only authority on point. Mr. Gillett continued at AB 160-61:

> The Whittington, supra requirement that each juror must be convinced of guilt beyond a reasonable doubt is constitutional in nature. See United States v. Kemp, 500 F.3d 257, 304 n. 26 (3rd Cir. 2007); United States v.

[59] Of course, D-19 has nothing to do with Mr. Gillett's sentence and everything to do with the discussion of constitutional law at AB 160-61 that was ignored by the Attorney General.

> Eastern Medical Billing, Inc., 230 F.3d 600, 608 (3rd Cir. 2000); United States v. Adkinson, 135 F.3d 1363, 1377-78 (11th Cir. 1998) (citing United States v. Gipson, 553 F.2d 453, 458 (5th Cir. 1977) ("[r]equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required").

Either the Attorney General did not read Mr. Gillett's Whittington, supra argument or elected to ignore it. Although constitutionally required, the duty of each juror to determine reasonable doubt for himself is not contained in the language of C-2. The State's argument fails, and the relief sought in Claim 11 must be granted.

REPLY TO THE STATE'S RESPONSE TO CLAIM 12

Although the Attorney General complains "Gillett does not identify which witness this instruction [D-25] may have applied to[,]" see SB 50, the local prosecution had no quarrel with the factual predicate for Jury Instruction D-25 and made no such objection before the trial court. See R. 1558; AB 162. It is respectfully submitted that the Attorney's General difficulty with D-25 was not shared by the local prosecution because it was painfully obvious to all trial counsel that Jury Instruction D-25 pertained to the State's Informant Debbie Milam – a government witness who:

(1) Testified she spent "most of the day and most of the night" on March 29, 2004, with police. R. 1153.
(2) Testified she assisted in the clandestine manufacture for methamphetaime at the Gillett farmstead on March 28, 2004, although she advised police throughout her March 29 involvement that she had no criminal involvement with any event at the farmstead.[60]
(3) Testified she burglarized the farmstead during the early morning hours of March 29 but, in agreeing to act as a police informant, neglected to relate this information to police. R. 1153-54. See AB 104.
(4) Testified that although she told police that she was tired on March 29 because she was up during the previous night caring for an ill granddaughter, the truth was that she was tired because she committed a nighttime burglary at the farmstead. R. 1153.

[60] Ms. Milam previously advised police that she did not know about criminal activity at the farmstead. See AB 104, 146.

(5) Testified she was so concerned that she would be linked to the farmstead after the burglary she committed there that she ditched her shoes to prevent footprint comparison. R. 1154. Testified that she neglected to relate this information to police when she agreed to act as a police informant. R. 1153-54. See AB 146.
(6) Testified she agreed to lie to Mr. Gillett as part of a plan with the police to have him arrested. Testified that, serving as a police informant, she phoned Mr. Gillett to set up a meeting with "Amy" – a woman Ms. Milam knew to be an undercover police officer. R. 1152-53.

At AB 162, Mr. Gillett conceded "[t]he State is correct that D-25 contains the first paragraph of the Ellis[v. State, 790 So. 2d 813 (Miss. 2001)] instruction and does not contain the second paragraph of the Ellis instruction." Mr. Gillett continued: "As will be demonstrated below, had Ellis been the only case cited by Mr. Gillett in his annotation for D-25, the State's objection to D-25 would have been well taken." See AB 162.

Neither the local prosecution, see AB 163, nor the Attorney General addressed any of the case authority cited by Mr. Gillett in addition to Ellis, supra. That authority appears at CP. 1301 and is as follows: United States v. Whitson, 587 F.2d 948, 953 (9th Cir. 1978); United States v. Ragghainti, 560 F.2d 1376, 1379 (9th Cir. 1977); First Circuit Pattern Instruction 2.03 (2003); Fifth Circuit Pattern Jury Instruction 1.10 (2001); Seventh Circuit Federal Jury Instruction – Criminal – 3.09 (1999); Federal Judicial Center, Pattern Criminal Jury Instruction 32 (1988). As stated by Mr. Gillett at Footnote 115 of his Original Brief:

> Lines are not to be parsed in an instruction. The instruction is to be considered as a whole. California v. Brown, 479 U.S. 539, 543 (1987). Mr. Gillett submits that D-25, as a whole, was required to be given in light of the authority Mr. Gillett provided rather than a selected portion of that same authority offered by the State in refutation of the instruction.

Ms. Milam admitted that previous statements she made to police in what became the instant investigation were false. Ms. Milam admitted she telephoned Mr. Gillett and lied to him

in an effort to have Mr. Gillett arrested for offenses at the same farmstead that she and two others had just finished burglarizing. The relief sought in Claim 12 must be granted.

REPLY TO THE STATE'S RESPONSE TO CLAIM 16

Because a Mississippi police officer was on the verge of testifying to the substance of an out-of-court telephonic communication from a Kansas police officer who never testified in the proceedings below,[61] Mr. Gillett objected on hearsay grounds. See AB 169. The trial court overruled the objection, stating: "I'm going to allow him to testify to the information he received." See AB 170. As a result of this ruling, Mr. Gillett's jury heard the following hearsay testimony: "He [Agent Mellor] asked me to go over to 908 South Gulfport Street for a welfare concern." See AB 170.

Citing no fewer than thirteen authorities for the proposition that the testimony permitted by the trial court was "textbook source hearsay and inadmissible," see AB 170-71,[62] Mr. Gillett claimed that the trial court must be reversed for permitting evidence in violation of the rule against hearsay.

The Attorney General does not respond to the authorities cited by Mr. Gillett.

In response to Claim 16, the Attorney General cites two cases: Thorson v. State, 895 So. 2d 85, 126 (Miss. 2004) and Butler v. State, 758 So. 2d 1063, 1066-67 (Miss. App. 2000).

In Butler, 758 So. 2d at 1065-66, a police officer related to the jury the out-of-court declarations of Wayne Boyte, the civilian complainant and eyewitness to the instant offense.

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[61] After State's witness Carson testified he spoke on the telephone with KBI Agent Mellor, he was interrupted by counsel for Mr. Gillett when he was about to testify as to the substance of what Agent Mellor related to him. See AB 169. Agent Mellor never testified in the matter at bar. Further, State's witness Carson was never asked to relate the hearsay testimony he attributed to Agent Mellor. Rather, Detective Carson was asked if he received a telephone call from Kansas police officials. Responding to this question, Detective Carson was about to offer unsolicited hearsay when defense counsel objected on hearsay grounds. See AB 169.

[62] Since Mr. Gillett filed his Original Brief earlier this year, at least one Court has reversed for the failure to enforce the rule against hearsay for information provided to police. Parker v. State, 970 A.2d 320, 330-31 (Md. 2009).

Also at trial, Mr. Boyte testified for the State. Butler, 758 So. 2d at 1066. "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." Id. The Mississippi Court of Appeals held that the testimony "*sub judice*, the out-of-court statement made by Boyte was not admitted for 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." Id.

If Claim 16 was premised upon the testimony of an out-of-court declarant not admitted for its truth but admitted because the declarant was an eyewitness who also personally appeared to testify at trial, the Attorney's General reliance on Butler, supra would be persuasive. Because Claim 16 is premised upon the testimony of an out-of-court declarant (a police officer) admitted for its truth (to explain why the witness took the action that he took) in a matter where the out-of-court declarant did not testify, see, e.g. Footnote 118 of AB, the Attorney's General reliance on Butler, supra is specious.

The Attorney's General reliance on Thorson, supra appears limited to the black-letter rule that an out-of-court declaration is only hearsay when it is offered to prove the truth of a proposition. In Thorson, 895 So. 2d at 126-27, this Court held that a defendant's testimony that a police officer's out-of-court declaration that "we know you did this, we just want to know why" during custodial interrogation was introduced merely to show its effect upon the defendant during that interrogation is not hearsay. The facts of Thorson, supra bear no relation to the facts of Claim 16.

In Claim 16, Mr. Gillett precisely isolated the issue and supported his argument with authority directly on point. The Attorney General ignores Mr. Gillett's presentation. The

Attorney General cites to two cases, neither of which respond to the argument nor the case authority contained in Claim 16. Mr. Gillett's contention that his jury was infected with inadmissible source hearsay stands unchallenged by the State. This Court must grant the relief sought in Claim 16.

REPLY TO THE STATE'S RESPONSE TO CLAIM 18

I. Introduction

In Claim 18, Mr. Gillett argues the evidence was legally insufficient to include the Miss. Code Ann. 99-19-101(5)(e) aggravator in his jury charge and, failing that, that Miss. Code Ann. 99-19-105(3)(b) was contravened because the evidence did not permit the jury to find the aggravator beyond a reasonable doubt.

The Attorney General responds that Mr. Gillett's enterprise to "cover his tracks" no fewer than three days after Ms. Heintzelman and Mr. Hulett were dead satisfies Miss. Code Ann. 99-19-101(5)(e). As illustrated in Part II of this Reply, infra, this reading[63] of Miss. Code Ann. 99-19-101(5)(e) is arbitrary, unprincipled and constitutionally intolerable.

II. Discussion

At AB 173-74, Mr. Gillett wrote:

> Obviously – and preposterously – the State's support of the 'avoiding arrest' aggravator amounted to a contention that the dead bodies of Mr. Hulett and Ms. Heintzelman were removed from the location where they were killed [footnote deleted] to another location to prevent their bodies from being found. This is not homicide to avoid arrest. This is removal of dead bodies the State contends were

[63] Mr. Gillett cited no fewer than twelve cases to support his claim that the "avoiding arrest" aggravator must bear some relationship to "avoiding arrest" other than the conventional, and entirely understandable, desire to remain undetected. See AB 175-76; see also Footnote 68, infra, and its accompanying text. Mr. Gillett advanced his right to procedural fairness, see AB 173, his right to having his jury only consider aggravators supported by legally sufficient evidence, see AB 174-75, and his Sixth and Fourteenth Amendment rights to jury trial. See AB 177. Rather than address the argument presented in Claim 18, the Attorney General merely proposed an interpretation of Miss. Code Ann. 99-19-101(5)(e) absurd enough to encompass the aspiration of all criminal offenders to remain at liberty after completing their crime.

> dead for no less than three days to avoid discovery of those bodies. At no point does the State argue anyone was killed to prevent the arrest of the killer.

If nothing else, the Attorney General remains consistent with the local prosecution on this final point: the Attorney General offers no argument at all that ***anyone*** was killed to prevent the arrest of the killer. Instead, and without citation to pertinent case authority,[64] the Attorney General offers this discussion:

> 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.[65] (cite deleted). 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.[66] (cite deleted). 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. Heintzelman.[67] (cite deleted). Gillett also made further attempts to have friends or relatives help him dispose of the stolen truck.[68] (cite deleted).

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[64] At SB 65, the Attorney General cites one case to contest the substance of Claim 18: Ross v. State, 954 So. 2d 968 (Miss. 2007). The State's reliance on Ross is misplaced. In Ross, 954 So. 2d at 1010, this Court held that the Miss. Code. Ann. 99-19-101(5)(e) aggravator was properly included in the jury charge. The facts of Ross indicate that Mr. Ross performed a "stick up" at the home of his victim, shooting the victim during the course of the stick up. Ross, 954 So. 2d at 982-85. The victim's wallet, television and VCR were missing from his home and there was no sign of forced entry at his home. Ross, 954 So. 2d at 982. The State's theory at trial was that Mr. Ross, who was a friend and coworker of the victim, robbed him of the aforementioned items from his home, shooting him to death during that robbery. Ross, 954 So. 2d at 983-85. In particular, the State adduced evidence from Margaret Jones that Mr. Ross went to the victim's home and shot the victim to death. Ross, 954 So. 2d at 984. In light of the facts of Ross, the Attorney's General citation to Wiley v. State, 750 So. 2d 1193, 1206 (1999) for the well-worn proposition that every challenge to the Miss. Code Ann. 99-10-101(5)(e) aggravator must be determined on the facts of each case, see SB 64, is astonishing. The facts of Ross – the only authority relied upon by the Attorney General to defeat Claim 18 – are readily distinguishable from the instant facts. Ross does nothing to refute Claim 18. The Attorney General cites Wiley, supra only to then spurn its command for individual determination.

[65] "This is removal of bodies the State contends were dead for no fewer than three days to avoid discovery of those bodies." See AB 173-74 (emphasis in original).

[66] See Footnote 65, supra.

[67] See Footnote 65, supra.

[68] See Footnote 65, supra.

SB 64. (emphasis added)

As recounted in Part I of this Reply, the Attorney General argues that Gillett's enterprise to "cover his tracks" no less than three days after Ms. Heintzelman and Mr. Hulett were dead satisifies Miss. Code Ann. 99-19-101(5)(e). As revealed at AB 175-76,[69] taking measures not to be apprehended following the commission of capital murder does not itself provide a sufficient basis for including Miss. Code Ann. 99-19-101(5)(e) in the jury charge. Indeed, evidence that the perpetrator took measures not to be apprehended is commonplace in all criminal prosecutions and, therefore, not a narrowing factor. See, e.g., United States v. Bourgeois, 423 F.3d 501, 510 (5th Cir. 2005) (as an aggravating circumstance "must not be so broad that it could apply to every murderer potentially eligible for the death penalty"); see also Arave v. Creech, 507 U.S. 463, 474 (1993) (aggravating factor does not genuinely narrow "[i]f the sentencer fairly could conclude that [it] applies to every defendant"); Consolvo v. State, 697 So. 2d 805, 819 (Fla. 1996) (obvious statements – for example, the victim of any criminal enterprise is a witness against the perpetator of that enterprise – are insufficient to support the "avoiding arrest" aggravator). The Attorney's General assessment of Claim 18 merely perverts Miss. Code Ann. 99-19-101(5)(e): the Attorney General seeks an unprincipled application of Miss. Code Ann. 99-19-101(5)(e) that would render Mr. Gillett's death sentences arbitrary and, therefore, intolerable under the Eighth Amendment. Bourgeois, supra (citing Tuilaepa v. California, 512 U.S. 967, 973 (1994)); see Godfrey v. Georgia, 446 U.S. 420, 427 (1980) ("capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not").

[69] The Attorney General neither acknowledges this argument nor addresses any of the cases cited at AB 175-76.

In Part A of Claim 18, Mr. Gillett argued the State adduced insufficient evidence to justify inclusion of the Miss. Code Ann. 99-19-101(5)(e) aggravator in the jury charge. See AB 172, 174-75. This Court must review this claim *de novo*. See AB 172. "As there is not a scintilla of evidence that Mr. Gillett killed anyone to avoid arrest, and as the State's forensic argument only serves to defeat the 'avoiding arrest' aggravator, the Miss. Code Ann. 99-19-101(5)(e) aggravator should never have been submitted to the jury." See AB 175-76 (citing no fewer than twelve cases for this proposition, none of which the Attorney General deemed appropriate to address). Because the evidence was legally insufficient to include the Miss. Code Ann. 99-19-101(5)(e) aggravator in the jury charge, Mr. Gillett contends his right to jury trial, secured by the Sixth and Fourteenth Amendment, was abrogated. See AB 177.[70] Citing Zant v. Stephens, 462 U.S. 862, 877 (1983), for the proposition that the constitutional function of an aggravating circumstance is to ***narrow*** death-eligible offenses rather than ***expand*** the universe of death-eligible offenses,[71] Mr. Gillett wrote at AB 177:

> The Miss. Code Ann. 99-19-101(5)(e) aggravator is not applicable where the defendant removes human bodies that have, according to the State, been dead for at least three days purely to avoid discovery of these bodies. To the contrary, the avoiding arrest aggravator must find an evidentiary nexus to the fatal injury. There is no such evidence in this case, nor is there any such forensic argument advocating that result. Indeed, the State argued the decedents were dead at least three days before being removed from Mississippi. (emphasis in original).

In Part B, Mr. Gillett argued that even if this Court finds the Miss. Code Ann. 99-19-101(5)(e) was supported by legally sufficient evidence, the evidence fails to support the jury's affirmative determination of Miss. Code Ann. 99-19-101(5)(e), in violation of Miss. Code Ann. 99-19-105(3)(b). See AB 178-80. In addition, "insofar as the legislature has enacted Miss. Code

[70] The Attorney General did not acknowledge this argument.

[71] See Tuilaepa, supra; Godfrey, supra; Bourgeois, supra.

Ann. 99-19-105(3)(b), Mr. Gillett has a due process right under the Fourteenth Amendment to the federal constitution for this Court to make a determination whether the evidence supports the Miss. Code Ann. 99-19-101(5)(e) aggravator." See AB 179 (citing cases). Apparently satisfied that the inapposite facts of Ross, supra extinguish Part A of Claim 18, the Attorney General ignores the entirety of Part B of Claim 18.

Because the "avoiding arrest" aggravator should not have been included in the jury charge, Mr. Gillett's death sentences are premised on constitutionally infirm aggravation. The Attorney's General response to Claim 18 is meaningless. Therefore, the death sentences must be vacated. See, e.g., Johnson v. Mississippi, 486 U.S. 578, 586-87 (1988) (jury consideration of invalid aggravation prejudicial).

REPLY TO THE STATE'S RESPONSE TO CLAIM 19

A Miss. R. Evid. 801(d)(2) admission made by the Attorney General in the State's Response to Claim 19 removes the Kansas conviction at bar from the category of offenses contemplated by Miss. Code Ann. 99-19-101(5)(b).[72] Because the local prosecution succeeded in having this Kansas conviction submitted to Mr. Gillett's jury as a Miss. Code Ann. 99-19-101(5)(b) aggravator, the Attorney's General admission confesses Claim 19.

As in Claim 18, Mr. Gillett challenged the constitutional legitimacy of the State's Miss. Code Ann. 99-19-101(5)(b) aggravator on the grounds that the evidence was legally insufficient to justify its inclusion in the jury charge and that, failing that, that Miss. Code Ann. 99-19-105(3)(b) was contravened because the evidence did not permit the jury to find the aggravator

[72] Whether this Court applies a categorical approach to the Miss. Code Ann. 99-19-101(5)(b) aggravator, see Footnote 80, infra, and its accompanying text, or an evidentiary approach to the Miss. Code Ann. 99-19-101(5)(b) aggravator, see Footnote 79, infra and its accompanying text, the Attorney's General admission that conduct delineated in the Kansas statute at bar does not always constitute a "crime of violence" in tandem with the local prosecution's failure to introduce any evidence concerning the Kansas conviction other than its mere existence mandates a new sentencing hearing for Mr. Gillett.

beyond a reasonable doubt. The objections to the Miss. Code Ann. 99-19-101(5)(B) aggravator that were overruled by the trial court are inventoried at AB 181. They are:

- Under Hansen v. State, 592 So. 2d 114, 145 (Miss. 1991) cert. denied 504 U.S. 921 (1992), "in the State of Mississippi[,] escape does not satisfy the 5(b) aggravator[.]" (R. 1633). Therefore, assuming Mr. Gillett was convicted of the completed escape – rather than "attempted aggravated escape" – the State still could not rely on Miss. Code Ann. 99-19-101(5)(b) to introduce evidence of that conviction.

- The documents that were presented to the trial court "do not sufficiently provide a factual basis to support the aggravating circumstance of a prior violent felony." (R. 1633).

- "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." (R. 1633).

Mr. Gillett maintained that the local prosecution's argument in support of the "prior violent felony" aggravator was anecdotal. See AB 181-83. The local prosecution referred to Kansas case authority, but never provided any citation for the authority. See AB 182 and Footnote 132 of AB.[73] While the local prosecutor did cite to Holland v. State, 587 So. 2d 848 (Miss. 1991), Mr. Gillett's review of Holland indicates it is entirely unhelpful to the State.[74]

The tenor of the Attorney's General response to Mr. Gillett's previous claims make it unsurprising that the State elects not to confront Claim 19 by addressing Mr. Gillett's specific

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[73] If a judicial disposition reciting the content claimed by the local prosecution at Footnote 132 of AB exists, the Court provided the Attorney General more than five months of additional time to include that citation in the State's Response. Yet, the State's Response to Claim 19 is silent on this point.

[74] At AB 182, Mr. Gillett quotes from Holland and notes that Holland requires (i) analysis of the out-of-state conviction under Mississippi law and (ii) requires the jury to find the existence of this aggravator beyond a reasonable doubt. Holland provides the prosecution no quarter because Hansen, supra held that a completed escape, in itself, does not satisfy Miss. Code Ann. 99-19-101(5)(b). Because of this, proof establishing nothing more than an attempted aggravated escape cannot suffice. See Footnote 134 of AB and accompanying text. Additionally, the Attorney's General admission that the Kansas statute under which Mr. Gillett was convicted is not always "a crime of violence" undermines the value of any comparative discussion; as the Attorney General admits the Kansas statute at bar is categorically not "a crime of violence," Claim 19 is confessed. See Footnote 79 and 80, infra, and their accompanying text.

arguments. On the same basis, it is also unsurprising that the Attorney General provides not a single authority for its statement that Mr. Gillett's Kansas conviction constitutes a legally sufficient basis to proceed under Miss. Code Ann. 99-19-101(5)(b). It is surprising, however, that the Attorney General contends Claim 19 is meritless on the same page of the State's Response where the Attorney General makes the admission that "as the [Kansas] statute reads it is clear that not every escape can be considered a crime of violence." See SB 70. Furthermore, it is surprising that the State would make this admission in a prosecution where the only evidence of any felony is the bare existence of the Kansas conviction:[75] without knowledge of the facts supporting the conviction, it is unknowable whether the conviction fits within the portion of the Kansas statute that the Attorney General admits would not constitute a "crime of violence."[76]

An assertion of fact made by a prosecutor is admissible as an admission of a party-opponent. Miss. R. Evid. 801(d)(2); see Hoover v. State, 552 So. 2d 834, 839-40 (Miss. 1989); see also United States v. Branham, 97 F.3d 835, 851 (6th Cir. 1996); United States v. DeLoach, 34 F.3d 1001, 1005 (11th Cir. 1994); United States v. Orena, 32 F.3d 704, 716 (2nd Cir. 1994); United States v. GAF Corp., 928 F.2d 1253, 1262 (2nd Cir. 1991); CP. 857-69 (pre-trial motions concerning party admissions made by the local prosecution and their admissibility in the trial of the indictment at bar). Similarly, factual assertions made in briefs may be considered party admissions. Purgess v.

[75] The facts surrounding and/or supporting the Kansas conviction are unknown. To secure inclusion of the Miss. Code Ann. 99-19-101(5)(b) aggravator, the State merely offered a judgment of conviction. R. 1632-33. Indeed, Mr. Gillett objected to inclusion of the Miss. Code Ann. 99-19-101(5)(b) aggravator on the ground "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." R. 1633. The trial court overruled Mr. Gillett's objections as to the appropriateness of the Miss. Code Ann. 99-19-101(5)(b) aggravator. R. 1632-38 (Mr. Gillett's objections); R. 1711 (same); R. 1638 (trial court's ruling); R. 1715 (trial court's ruling). The trial court then advised the trial jury as follows: "I am instructing you that this defendant was convicted of the crime of attempted aggravated escape from custody on September 27, 2004, in the District Court of Ellis County, Texas, and you may consider that as evidence in this case." R. 1649. Subsequently, the trial court corrected its pronouncement to the jury, advising the jury that the aforementioned conviction was from Ellis County, Kansas. R. 1649-50.

[76] See Footnotes 79 and 80, infra, and their accompanying texts.

Sharrock, 33 F.3d 134, 143-44 (2nd Cir. 1994); American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226-27 (9th Cir. 1988); Tulsa Co. Deputy Sheriffs' Fraternal Order of Police v. Board of County Commissioners, 995 P.2d 1124, 1137 n. 26 (Okla. 2000). Because the State must prove the existence of any aggravator beyond a reasonable doubt[77] and because Mr. Gillett's contention at the trial court and before this Court is that the evidence supporting a determination that Mr. Gillett's conviction for "the crime of attempted aggravated escape from custody on September 27, 2004, in the District County of Ellis County"[78] was legally insufficient, the Attorney's General admission that not every "aggravated escape from custody" as defined by the statute at bar is "a crime of violence" is definitive. See, e.g., United States v. Higgs, 353 F.3d 281, 316-17 (4th Cir. 2003) cert. denied 543 U.S. 999 (2004) (at penalty phase, use of categorical approach to establish the existence of a "prior violent offense" aggravator – that is, whether the defendant was convicted of an offense categorized as a "prior violent offense" – and/or use of a factual approach to establish the same aggravator – that is, whether there is evidence the defendant committed a "prior violent offense" other than that the defendant was convicted of a categorical violent offense – are each permissible);[79] see also State v. Ivy, 188 S.W.3d 132, 151-52 (Tenn. 2006). But see United States v. Smith, 630 F.Supp.2d 713, 716 (E.D.La. 2007) (limiting the government to categorically-defined

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[77] Williams v. State, 684 So. 2d 1189, 1196 (Miss. 1996); Nixon v. State, 533 So. 2d 1078, 1099 (Miss. 1987) cert. denied 490 U.S. 1102 (1989) overruled on other grounds at Wharton v. State, 734 So. 2d 985, 991 (Miss. 1998).

[78] See Footnote 75, supra; see also AB 180 ("[t]o eliminate repetition, the argument and case authority cited in Part A (legal sufficiency) and Part B (weight of the evidence) of Claim 18 is respectfully incorporated herein").

[79] The Attorney's General admission that "as the statute reads it is clear that not every escape can be considered a crime of violence" is an admission that K.S.A. 21-3810, as recited at Footnote 6 of SB, is categorically ***not*** a violent crime. Because there is no evidence concerning the facts of the conviction – as in, for example, the transcription of the plea colloquy used in Higgs, 353 F.3d at 316 – there is simply no evidence to support the Miss. Code Ann. 99-19-101(5)(b) aggravator. See also Footnote 75, supra.

offenses as aggravation and barring the government from introducing information concerning the offense).[80]

Mr. Gillett maintained before the trial court and in Claim 19 that the evidence was legally insufficient to support the Miss. Code Ann. 99-19-101(2)(b) instruction and that, even if the evidence was legally sufficient, it was nonetheless insufficient to permit the jury to find the a "prior violent felony" beyond a reasonable doubt, in contravention of Miss. Code Ann. 99-19-105(3)(b). The totality of the State's Response is the admission that, indeed, not every escape delineated by the Kansas statute at bar "can be considered a crime of violence." See SB 70. Claim 19 is meritorious not only because Mr. Gillett's argument is uncontested, but also because the Attorney General admits that it is meritorious. The relief sought by Mr. Gillett in Claim 19 must be granted.

REPLY TO THE STATE'S RESPONSE TO CLAIM 22

In Claim 22, Mr. Gillett argues that he is entitled to have the penalty-phase jury instructed on his theory of defense to the death penalty. "The trial court's action [in refusing to instruct Mr. Gillett's jury on his theory of defense to the death penalty] was devastating: it eliminated Mr. Gillett's theory of defense in whole and in part. [footnote deleted]. Without his theory of defense in the jury charge and unable to compensate for this omission by mere argument, Mr. Gillett was 'charged out' of his own penalty phase." See AB 193-94. Following explication of the eleven refused instructions that comprise Claim 22, see AB 194-200, Mr. Gillett provided case authority for the proposition that the "catch-all" instruction did not

[80] Under the Smith approach, relief under Claim 19 must be granted in light of the State's admission that K.S.A. 21-3810 is not a categorical "crime of violence." Under the Higgs approach, see Footnote 79, supra, relief under Claim 19 must be granted as, in addition to the State's admission that K.S.A. 21-3810 is not a categorical "crime of violence," the State also introduced no evidence concerning the K.S.A. 21-3810 conviction other than the mere fact of the conviction itself.

satisfactorily present his theory of defense to the death penalty. See AB 200-01; see also AB 152-54 (specifically incorporated legal argument from Claim 9, Mr. Gillett's claim that the trial court erred in refusing to instruct the jury on theory of defense during the culpability phase). The error precipitated in refusing to include Mr. Gillett's theory of defense to the death penalty in the jury charge was compounded by the error briefed in Claim 23. See AB 201. Citing authority, Mr. Gillett argued: "Juries must be permitted to give meaningful consideration and effect to the mitigation evidence and, therefore, a capital defendant is entitled to a specific instruction if necessary for this purpose." See AB 201.

The Attorney General responds to this constitutional argument with a single citation to Ross v. State, 954 So. 2d 968, 1011 (Miss. 2007). The Attorney General block quotes Paragraph 108 from Ross, supra. See SB 75. Had the Attorney General selected to block quote Paragraph 107 from Ross, supra, the factual chasm separating the unrealistic aspiration of the appellant in Ross[81] from the constitutionally founded, theory-of-defense argument in Claim 22 would be plain. Paragraph 107 of Ross, supra reads as follows:

> Ross maintains that the trial court erred in refusing his second proposed sentencing instruction, which set out elements of the crime that the State had to prove, a list of the aggravating circumstances the State would attempt to show, and a list of twenty-four non-statutory mitigators, *presented as illustrations of the type of information that the jury could consider mitigating circumstances.* The crux of Ross' contention is that the refusal of this instruction impermissibly restricted the mitigation evidence the jury could consider.
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> Ross v. State, 954 So. 2d 968, 1011 (Miss. 2007) (emphasis added).

[81] That Mr. Ross sought to have his jury instructed on two dozen illustrative nonstatutory mitigators has no relation to Mr. Gillett's demand to have his jury specifically instructed on nonstatutory mitigation abundantly established by the evidence adduced at the penalty phase.

As made clear at AB 194-200, there was nothing illustrative concerning the refused jury instructions that are the gravamen of Claim 22. Mr. Gillett submitted these instructions because these instructions were – like any other theory of defense – supported by the evidence.

As in the State's Response to Claim 18, the State's reliance on Ross v. State, 954 So. 2d 968 (Miss. 2007) is misplaced in Claim 22.

As in the State's Response to Claim 18, as the State's sole refutation rests in its faulty reliance on Ross, supra, Claim 22 stands uncontested before this Court.

Mr. Gillett's theory of defense was not included in his jury charge. Mr. Gillett preserved this critical issue for appellate review. The State has failed to adequately response to Mr. Gillett's argument. Appellate relief under Claim 22 must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 23

Citing Jordan v. State, 786 So. 2d 987, 1025 (Miss. 2001) cert. denied 584 U.S. 1085 (2002) and King v. State, 784 So. 2d 884, 889 (Miss. 2001), Mr. Gillett maintained that Jury Instruction S-1-S should not be given. See AB 205. Using the same authority, Mr. Gillett unsuccessfully urged the trial court to include Jury Instruction DA-61. See AB 205. In Claim 23, Mr. Gillett wrote "the failure to give DA-61 and the inclusion of S-1-S in the jury charge more than sufficiently meets the Chatman [v. State, 761 So. 2d 851, 854-55 (Miss. 2000)] standard in that S-1-S affirmatively misstates the law and DA-61 correctly states the law. As a result of giving S-1-S and refusing DA-61, Mr. Gillett's jury was erroneously instructed that the law was the opposite of what it is." See AB 205.

The Attorney General misapprehends Claim 23, responding that Mr. Gillett was not entitled to DA-61 as DA-61 is a mercy instruction. See SB 76-77 (citing Howell v. State, 860 So. 2d 704, 760 (Miss. 2003) relying on Turner v. State, 732 So. 2d 937, 954 (Miss. 1999))

("[p]ity, mercy and sympathy are to be considered synonymous"). Had Mr. Gillett contended that DA-61 was a mercy instruction,[82] the Attorney's General argument would be persuasive. The Attorney General cited Brown v. State, 890 So. 2d 901, 920 (Miss. 2004), for the proposition that S-1-S, in and of itself, is proper. See SB 77. Had Mr. Gillett merely contended the trial court erred only because S-1-S was included in the jury charge, this argument from the Attorney General would be persuasive. However, as made abundantly clear in the opening paragraph of this Reply and in Mr. Gillett's Original Brief, Claim 23 reads: "The trial court erred in giving Jury Instruction S-1-S and erred in refusing to give Jury Instruction DA-61." See AB 204.

DA-61 reads: "I instruct you that you may not totally disregard sympathy for Mr. Gillett in your deliberations as to the appropriate sentence in this matter." Insofar as S-1-S "cautioned" the jury not to be "swayed by mere... sympathy," DA-61 correctly advised the jurors that they may not totally disregard sympathy. As the State succeeded in having the jury instructed on S-1-S over the objection of Mr. Gillett, DA-61 served to achieve the unambiguous ambition of King v. State, 784 So. 2d 884, 889 (Miss. 2001): "While we have approved [S-1-S], we have guarded against any undue emphasis on the anti-sympathy admonition so as not to fetter unduly reasoned consideration of factors offered as mitigating. See Willie v. State, 585 So. 2d 660, 667 (Miss. 1991). We do this in full recognition of the fact that the line between a rational and an emotional response is often dim." Cf. People v. Leonard, 40 Cal.4th 1370, 1420, 58 Cal.Rptr.3d 368, 412, 157 P.3d 973, 1010-11 (2007) (jury is properly instructed that the law permits the sentencing decision to be influenced by, among other things, sympathy).

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[82] At no point does Mr. Gillett assert DA-61 is a mercy instruction. DA-38 at CP. 1404 was Mr. Gillett's mercy instruction. It was refused. R. 1724. The Attorney's General declaration that DA-61 is a mercy instruction is unsound and *de hors* record.

The Attorney General neither addresses the admonition of King, supra nor the ameliorative refinement of DA-61 in a jury charge containing S-1-S. Mr. Gillett's right to have his jury clearly and completely instructed on the law of death selection is constitutionally mandated. See AB 201-203. The Attorney's General mere contention that S-1-S is, in itself, proper is, in itself, unresponsive. Claim 23 requires appellate relief.

REPLY TO THE STATE'S RESPONSE TO CLAIM 24

The trial court recognized the incongruity of including an instruction advising each juror to determine and weigh mitigation (Jury Instruction S-7-S) in the same jury charge with an instruction advising jurors that the jury determines which mitigators exist (Jury Instruction S-2-S). See AB 206-08. Nonetheless, the trial court included both S-7-S and S-2-S in the jury charge concluding that, taken together, S-7-S and S-2-S are a correct statement of law.[83] See AB 208. Mr. Gillett cited authority denouncing contradictory instructions in non-death cases. See AB 208. Mr. Gillett then argued that any of four refused instructions he tendered could have "alleviated the disastrous inconsistency caused by S-2-S and S-7-S." See AB 208. Finally, Mr. Gillett cited the federal constitutional authority for his demand that each of his jurors be instructed to individually consider mitigation. See AB 209.

The Attorney General responds with one citation: Berry v. State, 703 So. 2d 269, 288-89 (Miss. 1997). The State is correct that Berry, supra stands for the proposition that no capital defendant in Mississippi is entitled to a jury instruction that informs each juror to consider mitigation.[84]

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[83] Neither the trial court nor the Attorney General offers an explanation as to how an amalgam of inconsistent instructions produce a correct statement of law.

[84] As the United States Supreme Court is the final arbiter of federal constitutional law, Dixon v. Duffy, 344 U.S. 143, 145-46 (1952); Jaffree v. Wallace, 705 F.2d 1526, 1536-37 (11th Cir. 1983) cert. denied 466 U.S. 926 (1984),

Is Mr. Gillett constitutionally entitled to non-contradictory jury instructions? Mr. Gillett claims he is. See AB 208. The Attorney General offers no answer to this question. Mr. Gillett's jury was told that each juror consider and weigh mitigation and was also told that the jury shall "determine which mitigating circumstances exist." Contradiction in the jury charge is constitutionally intolerable. See AB 208-09. The relief sought at Claim 24 must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 27

The penalty-phase jury charge is found at CP. 915-941.

At no point in this charge does the trial court advise Mr. Gillett's jury that the failure to unanimously agree on a sentence requires the trial court to sentence Mr. Gillett to life without parole.

In Claim 27, Mr. Gillett claims it was error to refuse to advise the jury that the inability to unanimously agree on a sentence within a reasonable time shall constitute a final verdict – that is, the trial court shall sentence the defendant to life without parole. See AB 217; Miss. Code Ann. 99-19-103. "The failure to be unanimous is specifically permitted by law and specifically remedied by operation of law." See AB 217. Jury Instructions DA-66 and DA-67 correctly and completely instructed the jury that deadlock is legally acceptable and that, in the event of deadlock, Mr. Gillett shall be sentenced to life without parole. See AB 216-18.

Citing Edwards v. State, 737 So. 2d 275, 316-17 (Miss. 1999), the Attorney General responds that Mr. Gillett was not entitled to have his jury advised that the failure to unanimously agree on a sentence means that Mr. Gillett shall be sentenced to life without the possibility of parole. The Attorney's General reliance on Edwards, supra is well taken. The difficulty with Edwards, supra is that it does not address juror concern, or perhaps even juror presumption, that

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Mr. Gillett's demand that each juror individually consider mitigation at AB 209 remains a correct statement of constitutional law.

a failure to unanimously agree on sentence means the defendant will suffer some fate other than a sentence of life imprisonment without parole. People v. McIntosh, 178 Misc.2d 427, 429-30, 682 N.Y.S.2d 791, 793-94 (Dutchess Co. Ct. 1998) (relying on State v. Hunt, 558 A.2d 1259, 1285 (N.J. 1989); State v. Ramseur, 524 A.2d 188, 284 (N.J. 1987)); People v. Mateo, 175 Misc. 2d 192, 223-24, 664 N.Y.S.2d 981, 1003 (Monroe Co. Ct. 1997). In light of this discussion, and the discussion at AB 218, Mr. Gillett respectfully requests this Court revisit Edwards, supra and grant the relief sought in Claim 27.

REPLY TO STATE'S RESPONSE TO CLAIM 30

Mr. Gillett filed a pre-trial notice of specific instances of forensic misconduct that occurred during the capital trial of Mr. Gillett's co-defendant. See AB 222. At Mr. Gillett's trial, and "[n]otwithstanding more than two months notice of specific acts of forensic misconduct, the State repeated seven of the specific violations announced in Mr. Gillett's notice." See AB 223. The seven specific instances were inventoried by Mr. Gillett. See AB 223-24.

In response, the Attorney General advises this Court that "[i]t is inconceivable that Gillett maintains he sat idle as the State allegedly, repeatedly committed reversible error." See SB 93. The cogency of the Attorney's General suspicion concerning Mr. Gillett's motives is inversely proportionate to the credibility of Mr. Gillett's assertion that "[t]here are instances where the failure to contemporaneously object to a prosecutorial violation during forensic argument shall only focus further attention on the violation and, therefore, does not foreclose appellate review of the violation." See AB 222.

The Attorney General argues that Claim 30 is procedurally barred. See SB 93. Should this Court agree that Mr. Gillett's pre-trial notice concerning specific instances of forensic

misconduct in the trial of the co-defendant that were deliberately repeated in the instant trial does not preserve the issue as urged by Mr. Gillett at AB 222-23, then the Attorney's General argument for procedural bar is well taken.

On the other hand, should this Court determine Claim 30 is preserved for review and that capital prosecutors may not deliberately repeat noticed instances of forensic misconduct, then Mr. Gillett must prevail. Mr. Gillett inventoried the seven specific instances of forensic misconduct, including the case authority originally cited to the trial court in Mr. Gillett's pre-trial notice of prior misconduct. See AB 223-24.[85] The Attorney's General response to the merits of Claim 30 – that "[a]t no time did the prosecution engage in misconduct of any degree and certainly not to any degree warranting reversal" – is purely conclusory. If Mr. Gillett is not procedurally barred, then Claim 30 stands unchallenged and the relief sought must be granted.

REPLY TO STATE'S RESPONSE TO CLAIM 31

As stated at AB 226: "Notwithstanding the State's observation that it would not show photos during its first-phase summation 'to try to fire you up,' it is readily apparent from the above record extractions that this apprehension dissipated at the penalty phase." Mr. Gillett argued pre-trial and again prior to introduction at trial that photos violated Miss. R. Evid. 403 and Mr. Gillett's constitutional rights and proposed remedies – e.g., stipulation of facts or introduction of non-polychromatic images. CP. 53-59; R. 250-51; R. 1345-46. Mr. Gillett's efforts failed and the State introduced gruesome color photos, including color photos taken during autopsy. Mr. Gillett objected to introduction of any autopsy photos and cited Hurns v. State, 616 So. 2d 313, 319 (Miss. 1993), and other authority. See AB 228-29. As related at Footnote 168 of AB: "Regardless of probative value, where unduly prejudicial evidence is

[85] The local prosecution was noticed of the error it previously committed and would commit anew in the instant trial.

admitted, a juror 'may be satisfied with a somewhat less compelling demonstration of guilt than should be required.'" McCormick on Evidence, Section 185, pg. 645 (5th ed. 1999); see Comment to Miss. R. Evid. 403 (citing United States v. Renfro, 620 F.2d 497 (5th Cir. 1980) cert. denied 449 U.S. 921 (1980); Hannah v. State, 336 So. 2d 1317 (Miss. 1976) cert. denied 429 U.S. 1101 (1977); Coleman v. State, 198 Miss. 519, 23 So. 2d 404 (1945)).

The Attorney General merely contradicts Mr. Gillett in its response to Claim 31.

The Attorney General responds that the trial court did not err because "[t]he 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[.]" See SB 96.

Mr. Gillett concedes that the local prosecution contended that autopsy photos it introduced through the State's pathologist "would assist [the pathologist] in explaining the injuries that you saw to the jury." See SB 97. As argued in Claim 31, the mere fact an autopsy photo is helpful does not render it admissible – particularly in light of (i) the gruesome content of the photo, (ii) Mr. Gillett's objection to its introduction, and (iii) the remedies offered by Mr. Gillett to eliminate erroneous admission of the photos. The State has not addressed the error briefed in Claim 31 and appellate relief is necessary.

REPLY TO STATE'S RESPONSE TO CLAIM 33

The Attorney General contends that this Court's statutory duty under Miss. Code Ann. 99-19-105(3)(a) "is nothing more than a cumulative error argument." See SB 98-99.

The Attorney General is incorrect.

Miss. Code Ann. 99-19-105(3)(a) is "nothing more than" a codification of Mr. Gillett's Eighth Amendment right to remain free from cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153, 193-95 (1976) (jurisdictions imposing death provide "the further safeguard of

meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner"); see Zant v. Stephens, 462 U.S. 862, 876 (1983); Profitt v. Florida, 428 U.S. 242, 253 (1976). The cumulative-error claims in Mr. Gillett's Original Brief, see Claim 35 and 36, are clearly nominated as such. Claim 33 is a constitutional claim founded in the legislative mandate for this Court to fulfill its obligation under Gregg, supra.

REPLY TO THE STATE'S RESPONSE TO CLAIM 37

At Footnote 7 of SB, the Attorney General submits the following: "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."

This statement is nonsensical.

First, it is impossible for Mr. Gillett to ignore case authority at the same time that he cites the very same case authority. Mr. Gillett cited Justices Stevens' concurring opinion in Baze v. Rees, ___ U.S. ___, 128 S.Ct. 1520, 1551 (2008) (Stevens, J, concurring). See AB 235-36. Turning to this pinpoint citation provided by Mr. Gillett, Justice Stevens writes in his concurring opinion:

> [J]ust as Justice White ultimately based his conclusion in Furman [v. Georgia, 408 U.S. 238 (1972)] on his extensive exposure to countless cases for which death is the authorized penalty, *I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.* A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment." Furman, 408 U.S. at 312 (White, J., concurring). (emphasis added)

Second, the manner in which the State endeavors to kill Mr. Gillett is not before this Court.[86] In Claim 37, Mr. Gillett seeks an Order from this Court barring his execution because any execution by any method is unconstitutional. The Attorney's General use of the word "protocol" is spurious.

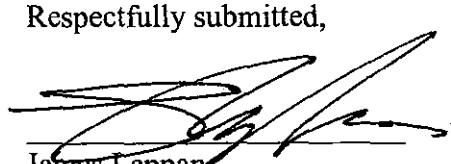
CONCLUSION

Mr. Gillett respectfully submits that this Court must review all claims raised herein under heightened scrutiny. Bishop v. State, 812 So. 2d 934, 938 (Miss. 2002) (citing cases); Randall v. State, 806 So. 2d 185, 200 (Miss. 2000); see Woodson v. North Carolina, 428 U.S. 290, 305 (1976); see also Caldwell v. Mississippi, 472 U.S. 320, 329-30 (1985); Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

For the foregoing reasons, as well as such other reasons as may appear to the Court on a full review of the record and its statutorily mandated review, Roger Gillett respectfully requests the relief sought in Appellant's Original Brief.

DATED: Tuesday, 3 November 2009

Respectfully submitted,



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[86] Mr. Gillett was remanded to the custody of the Mississippi Department of Corrections for execution of a death sentence. R. 1773-74. That sentence is the issue before this Court in Claim 37. The mechanism and genus of poisoning to be used at any execution is *de hors* record and, obviously, not before this Court.

CERTIFICATE OF SERVICE

I, James Lappan, attorney for Roger Gillett, hereby certify that I mailed, postage pre-paid, by United States Mail, a true and correct copy of the above Reply Brief of Appellant to the following three individuals:

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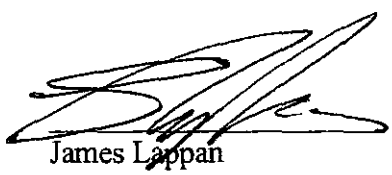
SO CERTIFIED, this the Third Day of November, 2009.



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