IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-KA-00532-COA

STANLEY DEWAYNE COLE — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

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# BRIEF ON THE MERITS BY THE APPELLANT

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**Oral Argument will be requested.**


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*Stanley Dewayne Cole v. State of Mississippi*

**Cause No. 2010-KA-00532-COA**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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So certified, this the 13rd day of August, 2011.

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* The Hon. Swan Yerger has of course retired as of Dec. 31, 2010; Mr. Eichelberger is now in private practice.

*Stanley Dewayne Cole v. State of Mississippi*

**2010-KA-00532-COA**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Constitutions, Statutes and other authorities**

## STATEMENT OF THE ISSUES

**I. The trial court erred when it used the wrong legal standard to deny a jury instruction on manslaughter, thus denying Mr. Cole the right to have the jury instructed as his theory of defense;**

**II. The court erred when it denied Motion For Change Of Venue filed by Mr. Cole as it denied to him the fundamental right to trial by an impartial jury, guaranteed by both state and federal constitutions;**

**III. The court abused its discretion by refusing to strike or quash the venire even when three separate instances of misconduct arose during jury selection including:**

**A. Testimony by John [Jon] David Cole, who reported overhearing several veniremen discussing the facts, including two who stated they thought Mr. Cole had already pleaded guilty;**

**B. Reports from George Moore, who overheard Mario Johnson and Zabrina Fuller discuss that the trial was a waste of time since "we all know" Mr. Cole is guilty;**

**C. Juror Angela Ashley reported that one venireman turned to a large group of the panel and whispered loudly, "I don't know why we're all here. We all know he's f------ guilty!"**

**All of which denied Mr. Cole his fundamental right to an impartial jury under both state and Federal constitutions;**

**IV. The court erred in failing to denying the challenge for cause by Mr. Cole on jurors James Craig Anderson, Ivory Britton, Debra Coleman, Charlotte Smith Hart, John M. Lassetter Jr., George Moore, Barbara S. Plunkett, Ella Paulette Stamps, Gina Toney Wallace, and all challenges for cause against veniremen who had been exposed to the overwhelming media coverage of this matter;**

**V. The court erred when it denied the Motion To Suppress Statements And Physical Evidence filed by Mr. Cole, in violation of his fundamental rights, including the right to remain silent;**

**VI. The court erred when it denied the request of the defense for an independent forensic examination of the remains of Latasha Norman, which denied to Mr. Cole due process of law under both state and Federal constitutions;**

**VII. The trial court abused his discretion by granting in part the *Motion In Limine To Prevent The Defense From Mentioning Any Potential Testimony Of Marie Danforth During Opening Statement And During The Trial And To Prevent Her Testimony* by the prosecution;**

**VIII. The court abused its discretion in denial of the *Motion in Limine (*Pearl Arrest) in violation of Mississippi Rules of Evidence 403 and 404, thus denying to Mr. Cole a fair trial;**

**IX. The court abused his discretion when it barred testimony about prior acts of Latasha Norman against Mr. Cole and other persons, as this was critical to his theory of defense;**

**X. The court abused its discretion in the admission of evidence, including noxious-smelling cardboard found covering the body of Latasha Norman and the femur from the body of Latasha Norman, as the evidence lacked virtually any probative value and the prosecution sought only to inflame and arouse the passion of the jury against Mr. Cole by admission of such evidence;**

**XI. The trial court abused its discretion when it denied the *Motion In Limine To Preclude Admission Of Gruesome And Highly Prejudicial Color Photographs Of The Decedent* by Mr. Cole. The sole purpose of admission of the photographs was to inflame and prejudice the jury against Mr. Cole;**

**XII. The trial court denied Mr. Cole his fundamental right to a fair trial due to the cumulative effect of the errors discussed herein.**

## STATEMENT OF THE CASE

### A. Disposition of the Proceedings Below

Stanley Dewayne Cole was arrested on November 29, 2007 and indicted for deliberate design murder in violation of MISS. CODE ANN. § 97-3-19(1)(a) (1972) stemming from the November 13, 2007 death of his longtime girlfriend, Latasha Norman. CP 13. The arrest of Mr. Cole capped an intensive, nationally publicized two-week manhunt for Ms. Norman, a Jackson State University student. CP 259; 271-279; 280-287; 592-738; 820-1501.

Mr. Cole came on for trial beginning February 9, 2010 with summons of a special venire drawn from the 1st Judicial District of Hinds County, due to massive national and local publicity surrounding the disappearance of Ms. Norman and the subsequent arrest of Mr. Cole. CP 428; 433; T. 548.

On February 22, 2010, the jury convicted Mr. Cole of the murder of Ms. Norman, who had been his high-school sweetheart. T. 2412; CP 560; 564; RE 19. Immediately following conviction, the trial court sentenced Mr. Cole to life imprisonment in the custody of the Mississippi Department of Corrections. CP 561; RE 20. Following prosecution of post-trial motions, all of which were denied, Mr. Cole appealed his conviction and sentence, now before this honorable Court. CP 571-591; 739; 741; RE 21.

## STATEMENT OF THE FACTS

This is the story of how the relationship of high-school sweethearts deteriorated into an explosive outburst with ultimately fatal consequences for Latasha Norman and a lifetime in prison for Stanley Cole. The fact that this is an oft-told tale of love, possessiveness and anger makes it no less tragic.

Stanley Cole and Latasha Norman met and became sweethearts while both were in high school in Greenville, Mississippi. T. 1899. They were working teenagers, both at Bing's Country

Market and Latasha, for one, had practical dreams of opening her own accounting business in Greenville. T. 1899.

After graduation, both enrolled at Jackson State University, Latasha in accounting and Mr. Cole in criminal justice. T. 1898; 2113. But their relationship was a jealous one. Mr. Cole had children by another woman in Greenville and while dating Latasha, he also began seeing JSU student Samone Harris, also of Greenville. T. 2066. Once in Greenville, Norman, while in her car, tried to charge Mr. Cole and Samone with her car. T. 2085.

By the fall of 2007, all three were Jackson State University students. Mr. Cole was seeing Samone Harris "on and off," while still seeing Latasha Norman, who also became involved with another man, Marquis Smith. T. 2067. On October 9, 2007, Mr. Cole, Ms. Norman and fellow students Donte Stroud and Jaquesha Rule went to Ruby Tuesday restaurant in Jackson to pick up the paycheck of Mr. Cole. T. 2010; 2034. The group rode in the car belonging to Norman, when Norman received a call on her cellular telephone. Whoever the caller, Mr. Cole became quite upset, according to both Stroud and Rule. T. 2011; 2030; 2034. Mr. Cole knocked the telephone from the hand of Norman, then lunged toward the floorboard, Stroud testified. In what appeared to be an almost reflexive movement, Norman jumped back up into her seat and in so doing, knocked out one of Mr. Cole's front teeth. T. 2012. In response, Stroud testified, Mr. Cole shot up his left hand and struck Norman, leaving her lip cracked and bleeding. T. 2012; 2022; 2035. At that point, Rule testified she pulled Norman from the car and Stroud pulled Stanley from the car. T. 2034. The couples returned to the JSU campus and never ate that evening. T.2021. Norman, with a cracked lip, went to the campus Department of Public Safety to file a complaint against Mr. Cole over the incident. T.2050; 2056. Told that campus police had no jurisdiction since the incident occurred in Pearl, Norman later filed an affidavit against Mr. Cole alleging

domestic violence. T.2062. And, at least for the time being, the relationship between Mr. Cole and Norman ceased. T. 1999.

What Norman did not know was that by then, Samone Harris was pregnant by Mr. Cole. T. 2003. Mr. Cole became disillusioned with school and his responsibilities and told Harris of his plan to move and live with an aunt, make a fresh start. T.1990; 2069. He moved into the apartment of Harris in early November, intending to stay only a few weeks until Nov. 9, 2007, the date on his purchased bus ticket to Grand Junction, Kansas. T.2129; *Exh.* 17.

Mr. Cole never used the bus ticket, however, and on November 13, he went to Jackson State to formally withdraw. T. 1990. Latonya Robinson, a university counselor, assisted him with the process. T. 1990. Robinson testified that she saw Norman waiting outside her office and assumed she accompanied Mr. Cole, for Robinson knew the pair dated. T. 1990-1991.

Shortly thereafter, Sade Aultman, roommate of Norman, said she heard Norman come in and gather books for classes. T. 1997. Norman left and Aultman did not worry until she failed to hear from Norman, for she normally called between classes. T.1997. The next morning, the parents of Norman called, concerned because they had been unable to reach Norman; the parents normally spoke with their daughter everyday. T. 1895; 1997-98. Alarmed by Aultman's inability to contact Norman, the Boldens drove to Jackson. T. 1902.

Meanwhile, Marquis Smith, current boyfriend to Norman, reported her missing to the JSU Department of Public Safety. T. 1907.A cursory investigation quickly ruled out Smith as a suspect and campus police then turned their attention to Mr. Cole and Harris. T. 1909.On Nov. 15, JSU police interviewed both Mr. Cole and Harris; both said they did not know the whereabouts of Norman. T. 1937; 2079; Exh. 10. As Norman continued missing, events took on greater urgency and the campus police force requested assistance from the Jackson Police Department and the Federal Bureau of Investigation. T. 1976; 2155. On about Nov. 20, 2007,

Det. Juan Cloy, JPD liaison with and member of an area FBI Violent Crimes taskforce, became involved. T. 2155. As part of that investigation, law enforcement sought the consent of Harris to search the Dodge Neon she had purchased just weeks earlier and which Mr. Cole habitually drove. T. 2110. The FBI processed the car in their Jackson facility. T. 2134. The FBI search turned up spots of what was found to be human blood in areas around the trunk gasket; the carpeting normally found lining the trunk was missing. T. 2116; 2140; 2141; 2306. Samples were taken for DNA analysis and matched the DNA profile of Norman developed from personal items recovered from her dormitory room. T. 1956; 2313.

Armed with this information, Cloy and FBI agents Robert Bohls and Jason Pack followed Mr. Cole and Harris to Greenville, Mississippi on Monday, November 26. T. 1961; 2160. After a series of telephone calls, Det. Cloy had Harris meet him at the Greenville Police Department; during their interview, Cloy told Harris human blood was found in the trunk of her car. T. 2157. In response to questioning by task force members, Harris claimed she never looked in the trunk during purchase to see if contained a fabric lining. T. 2080. The seller, however, testified at trial that the trunk contained interior lining when purchased. T.2146.

Mr. Cole had accompanied Harris to the police department; noticing his presence, Cloy asked to speak with him after he talked to Harris. T. 2160. The interview room was small, Cloy testified, and so he asked FBI Special Agents Robert Bohls and Jason Pack to leave. T.2161. Cloy testified that Mr. Cole asked if told police where Norman was, could he speak with his mother. T. 277; 2176. Mrs. Cole came in, Cloy left and after several minutes, Mr. Cole left with his mother after he assured he was not under arrest. T. 277; 2176.

On Nov. 29, a large group of law enforcement officers from the FBI, the Jackson Police Department and Jackson State University Department of Public Safety left for Greenville to arrest Mr. Cole in connection with the death of Norman. T. 297; 1957. Upon arrival, however,

they discovered Mr. Cole was in Pearl Municipal Court for a hearing on the complaint filed against him in October by Norman. T. 296. Police arrested Mr. Cole in Pearl without incident and took him to the Jackson Police Department third floor interrogation room. T. 299; 301.

About 11:35 A.M., Det. Cloy and Agent Bohls informed Mr. Cole of his *Miranda* rights, and then asked if he wished to talk. T.2182. Mr. Cole refused. T. 2182; Exh. 31; 32. In keeping with a pre-arranged ploy, Det. Cloy immediately recruited Det. Crystal Tillman to talk with Mr. Cole. T. 53; 281; 298. Within less than forty-five minutes after his initial refusal to talk with Cloy and Bohls, Tillman reinitiated the interrogation. T. 381. About thirty minutes to an hour later and after speaking with his mother, Mr. Cole told police the body of Norman was about 20 to 30 feet off the roadway of Brown Street near Tougaloo College. T. 55; 305.

Waiting law enforcement officers immediately converged on the area and quickly located the body of Norman with a piece of cardboard covering her upper torso. T. 1925; 1960; 2188. Her body, in a state of advanced decomposition, was immediately taken to Dr. Stephen Hayne for autopsy. T. 2283. Despite partially skeletonized remains, Hayne insisted there was a "slit-like" wound" immediately above the left nipple "consistent" with death by a stab wound. T. 2283. Hayne made this determination, despite his testimony that the edge of the alleged wound was "somewhat distorted" due to the state of decomposition and that the wound itself was "difficult to identify." *Exh.* 37; 38; 39; 40; T. 2283; 2284. Hayne apparently was so uncertain about his initial findings that he sent her jaw to a forensic odontologist and remaining body parts to a forensic anthropologist, who also later received the jaws. T. 2291. Hayne, however, insisted he relied not on the findings by the forensic anthropologist or odontologist, but his own examination to testify that Norman died by stabbing; he discounted death due to a blow to the head, despite the fact that forensic anthropologist Marie Danforth found a reddened area on the left side of the skull. T. 2297-2299; 1829. *Exh.* 37; 38; 39; 40.

A request by counsel for Mr. Cole for independent examination of the remains before release to her family for burial was denied. T. 18; RE 22. Hayne, however, summoned anthropologist Danforth to the morgue to examine the skeletal remains, which still had tissue attached. T. 1825. Danforth testified that she "extricated" remaining tissue by sliding off tissue from the bones with her hands - and thus destroying any opportunity for another pathologist to follow and analyze the findings of Hayne. T. 1825. Despite Hayne's pronouncement that Norman died as a result of a stab wound, Danforth only found slight scratches, so slight "they were most likely caused by our processing." T. 1828. In a hearing on the state's *Motion in Limine* to bar the testimony of Danforth, she testified that it "was not very likely" the scratches could have been caused by anything *but* tissue removal. T. 1828.

No knife or other alleged weapon was ever recovered.

to hire an independent pathologist to examine the decomposed remains of Ms. Norman before they were released to her family. Dr. Stephen Hayne, who has since been removed from the list of forensic pathologists approved to perform autopsies, testified he found a slit-like wound above the left breast. But an examination by Dr. Marie Danforth, a forensic anthropologist, said her examination of the skeletal remains – at the request of Dr. Hayne – showed only a slight scratch attributable to processing and no sign of a stab wound on rib bones. As Mr. Cole challenged the court's grant of expert status upon Dr. Hayne and he was the only forensic pathologist to review the remains, which were then essentially destroyed during Danforth's review, the denial of an independent forensic pathologist denied Mr. Cole due process of law in challenging the cause of death, as he alleged he hit her in the head – not stabbed her.

In regard to the testimony of Dr. Danforth, it was error of constitutional proportions to keep from the jury the fact that she found no evidence of stab wounds on the ribs. This would have gone to corroboration of Mr. Cole's version of events, that he hit her, not stabbed her. Coupled with the refusal of the trial court to bring out testimony showing their physically violent relationship, these errors by the trial court denied Mr. Cole the ability to mount a meaningful defense, a fundamental right guaranteed him under both state and federal constitutions.

The trial court erred in denial of the *Motion in Limine* regarding his arrest in Pearl; this was a separate crime not at issue in the trial. This probative value of this evidence regarding an argument Oct. 9 was substantially outweighed by the possibility of prejudice to Mr. Cole and was admitted in violation of the Mississippi Rules of Evidence.

Finally, it was error to admit gruesome photographs of the decomposed body of Norman, and to admit the odoriferous cardboard which covered her body and the femur from which DNA material for comparison was drawn. This was ghoulish and unnecessary with only one purpose – to inflame the jury against Mr. Cole. Finally, Mr. Cole alleges all errors taken in total

demonstrate the cumulative effect was to deny him the fundamental right to a fair and impartial trial, through continuing prosecutorial misconduct, prejudicial statements by law enforcement officers in violation of the Uniform Rules of Circuit and County Court Practice and all other assigned errors.

## ARGUMENT

### I. The trial court erred when it used the wrong legal standard to deny a jury instruction on manslaughter, thus denying Mr. Cole the right to have the jury instructed as his theory of defense;

The trial court may not have believed manslaughter was an issue in this case, but the jury most certainly did.

> BY THE COURT: Be seated. The jury, a little while ago, sent to inquiries to the Court. One of them was the jurors want to know the definition of manslaughter. The Court met with counsel from both sides in chambers a little while ago, and after discussion by both sides, both the State and the Defense, with the Court, the Court made a decision about what to respond to that particular inquiry by the jury.
>
> The State was in agreement with the response of the Court. The defense was not in agreement with response of the. The response of the Court, as stated, was "The Court instructs you that manslaughter is not an issue in this case. Please continue your deliberations."
>
> Just a moment ago, the Court received a response to the Court's response to the jury concerning manslaughter, the one just mentioned. And the response from the jury is "Thank you. We are, Deedra Watts."
>
> We'll have made of record the original of the question and also the response and the response of the jury. The next inquiry by

the jury was, again, a little while earlier, and the Court discussed this one with the State and defense counsel. In both sides were in agreement that this should be – – would be an appropriate response by the Court. The response is related to the inquiry, "Defined evincing,"E-V-I-N-C-I-N-G.

And a response by the Court agreed to by the State and defendant is as follow; [sic] "The Court is not permitted to provide a definition of the word in an instruction. Please continue your deliberations." So that one was transmitted to the jury.

Also, just moments ago, there was a response by the jury to the Courts response to that one, which was defined evincing. And that was response was, "Thank you. We are, Deedra Watts." So that original will be made an exhibit to this hearing as well. T. 2405 – 2406. See *Exhibits 43 and 44 for Identification*; CP 1512.

Literally minutes later, the court announced the jury had reached a verdict.

BY THE COURT: All right. The Court has just been advised by the bailiff that the jury has reached a verdict; however, before bringing the jury in with a verdict, the Court is going to permit the defense an opportunity to make a record as to this instruction to the jury, that is, a response to the inquiry relating to the definition of manslaughter. You may do so at this time.

BY MR. EICHELBERGER: Thank you, Your Honor. In chambers earlier, approximately ten minutes ago, we had a

discussion back and forth with respect to the Court's response to the juror question, "Jurors want to know the definition of manslaughter."

I felt that it was improper for the Court to respond as it did saying that manslaughter is not an issue in this case. I believe that now is not the time to be adding additional instructions for the jury.

In addition, I believe that it also would make the jurors or give the jurors the impression that the Court's perhaps partial one way or another considering the mention of manslaughter in opening statement. To say that it's not an issue in this case, I think, would be an improper comment on the statement and arguments of counsel. And that was my objection to that.

I think that it would have been more appropriate for the court to say that the Court instructs you that you have all of the instructions. Please continue your deliberations. And I *believe that that impact on the jury is events – – speaking of evincing – – is evinced by the fact that less than 10 min. after submitting that response, we have a verdict.* So that was my response, Your Honor. T. 2407 – 2408. [emphasis added].

"[E]very accused has a fundamental right to have her theory of the case presented to a jury, even if the evidence is minimal," the Mississippi Supreme Court wrote in *Chinn v. State*, 958 So.2d 1223, 1225 (¶13) (Miss. 2007), citing *O'Bryant v. State*, 530 So.2d 129, 133 (Miss.

1988). "We have held that "[i]t is, of course, an absolute right of an accused to have every lawful defense he asserts, even though based upon meager evidence and highly unlikely, to be submitted as a factual issue to be determined by the jury under proper instruction of the court." *Id.* "This Court *will never permit an accused to be denied this fundamental right." O'Bryant v. State,* 530 So.2d at 133 [internal citations omitted; emphasis added].

This entitlement, however, was denied to Mr. Cole, as he sought to place before the jury his theory of the case, which was the lesser offense of manslaughter or culpable negligence manslaughter. Denial of the numerous instructions on heat of passion manslaughter and culpable negligence manslaughter submitted by the defense was an abuse of discretion fatally prejudicial to Mr. Cole. T.2235; 2340; 2353; 2358; 2360; 2372; RE 71-76; This prejudice is demonstrated by the fact the jury sent out a note requesting a definition of manslaughter, which the judge refused to provide. Less than ten minutes after the trial court sent back a response stating "Manslaughter is not an issue in this case," the jury returned with a verdict of guilty on the charge of murder. T. 2412; CP 560.

Upon appellate review of disputed jury instructions, "[W]e are required to read and consider the jury instructions as a whole in order to determine if error was committed," *Brown v. State*, 39 So.3d 890 (Miss. 2010) [internal citations omitted] Deference is given the trial court's exercise of discretion in the grant or denial of an instruction. *Flowers v. State*, 51 So.3d 911 (Miss. 2010). The judge is to give the jury "appropriate instructions which fairly announce the law applicable to the case so as not to "create an injustice against the defendant."" *Id.* The trial court should grant jury instructions that are "correct statements of law, are supported by the evidence, and are not repetitious." *Id.*

Clearly, the trial judge failed to employ the proper standard this Court requires judges to use in evaluation of the request of a party for a jury instruction.

"Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. *Hester v. State*, 602 So.2d 869, 872-873 (Miss. 1992). "Where the defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error." *Id.*

Further, as defendants are all put on notice that manslaughter is by statute a lesser included offense of murder under MISS. CODE ANN. § 97-3-19 (3) (1972), binding Mississippi precedent requires the judge to view the evidence in the light most favorable to the accused, considering in favor of the accused all favorable inferences flowing therefrom; and also considering that the jury may not be required to believe *any* of the State's evidence. *Fairchild v. State*, 459 So.2d 793, 801 (Miss. 1984) citing *Ruffin v. State*, 444 So.2d 839, 840 (Miss. 1984). If any doubt exists about the giving of the instruction, the judge must resolve such doubts in favor of the accused. *Wadford v. State*, 385 So.2d 951 (Miss. 1980). "In deciding whether lesser included instructions are to be given, trial courts must be mindful of the disparity in maximum punishments," the Court wrote in *Boyd v. State*, 557 So.2d 1178, 1181 (Miss. 1990). "Generally, where the disparity is great this Court has required lesser included instructions to be given." *Id.*

A lesser related offense instruction should be granted unless the trial judge can say, *taking the evidence in the light most favorably to the accused that no reasonable jury could find the defendant guilty of the lesser related offense. Mease v. State*, 539 So.2d 1324, 1330 (Miss. 1989). This is so "if any evidence in the record can reasonably be inferred to support a lesser offense." Id., 539 So.2d 1324, 1329-34.

The trial court refused the following instructions proffered by Mr. Cole: (RE 75;76)

> Manslaughter is defined as the killing of a human being, without malice, in the heat of passion, but in a cruel or unusual manner, or

by the use of the dangerous weapon, without authority of law, and not the necessary self-defense. D-9 – CP 552.

The Court instructs the jury that if you find from the evidence and testimony that the prosecution failed to prove a credible evidence beyond a reasonable doubt any of the elements of deliberate design murder, then you will find Stanley Cole "not guilty" of murder and continue your deliberations to determine if Stanley Cole is guilty or not guilty of the offense of manslaughter. D-10 CP 554

The Court further instructs the Jury that if you find the Defendant guilty of murder, the form of your verdict shall be as follows; "We, the Jury, find the Defendant guilty of murder."

The Court further instructs the Jury that if you find Defendant guilty of manslaughter, the form of your verdict shall be as follows; "We, the Jury, find the Defendant guilty of manslaughter."

The Court instructs the Jury that if you find the Defendant not guilty, the form of your verdict shall be as follows; "We, the Jury, find the Defendant not guilty."

You should write your verdict on a separate sheet of paper. D – 14 CP 557

In the case at bar, Mr. Cole essentially asserted a defense of heat of passion manslaughter, a lesser included offense, as well as culpable negligence manslaughter. T.2372; RE 76. His Nov. 29 statement relates the events of that fateful day. *Exh. 35*

Cole: When uh we was in Pearl ... And all the way back to Jackson, we got to arguing and fighting in the car and

Det. Tillman: You hadn't parked,you were just riding.

Cole: Yeah, we were just riding ... and uh and uh I realized I hit her too hard and she wasn't breathing ... That's when I just stopped and started panicking man...

Det. Tillman: You remember where you stopped at?

Cole: No maam.

Det. Neal: When you were driving ... that's when you hit her?

Cole: Yeah, we was arguing and fighting while I was driving...

Det. Neal: Okay... Was she struggling back or...

Cole: No we you know ... No

Det. Neal: Let me ask you this Stanley.. did you hit her with an open fist or mean open hand or closed fist and where was the area that you hit her at? Do you know?

Cole: Across the face, in the head

Det. Neal: Okay, when you're saying across the face ... Here or...

Cole: Jus

Det. Neal: All over,

Cole: Yeah, we was just fighting all over... I can't even really recall, *she was fighting back, I was fighting back*.... at a time it could've been open fist... slap.... It was just. We was just going crazy...[emphasis added]

This evidence was presented to the jury through presentation of both audio and video recordings taken about 4:35 PM on November 29, the day police arrested Mr. Cole. T. 2215; *Exh. 35*. The manner in which these statements were exacted from Mr. Cole is discussed elsewhere in this brief as a separate assignment of error.

The reliance by the trial court upon *Mackbee v. State*, 575 So.2d 16 (Miss. 1990) and *Alford v. State*, 5 So.3d 1138, 1143 (Miss.App. 2008) in finding the evidence failed to support the giving of a manslaughter instruction as a lesser included offense of murder is badly misplaced. Factually, *Mackbee* and *Alford* are both far afield from the facts of the case at bar. In *Mackbee*, the accused had a long record of robbery and burglary in the neighborhood in which he lived. Cicero Montgomery lived in the neighborhood; law enforcement theorized that Montgomery walked in on Mackbee robbing his home. A search of Montgomery's showed that a violent physical struggle had taken place throughout most of the house and demonstrated the requisite malice to negate any inference of manslaughter. But perhaps the telling point was that after bludgeoning him, Mackbee loaded the unconscious but still living Montgomery into his trunk and after *several hours* of deliberation, poured gasoline all over him and burned him alive. *Id.*, 575 So.2d at 23. *Alford v. State*, 5 So.3d 1138, 1143 (¶16) (Miss.App. 2008), too, was a convicted felon when he shot Demarcus Johnson in the face after a verbal tirade directed against Johnson and after Alford followed Johnson from one hang-out spot to another. There is no indication of physical contact between the two and the opinion finds words alone are insufficient

provocation to reduce murder to manslaughter, as required by *Phillips v. State*, 794 So.2d 1034 (Miss. 2001). *Phillips* defines "heat of passion" as "a state of violent and uncontrollable rage engendered by a blow or certain other provocation given ... Passion or anger suddenly aroused at the time by some immediate and reasonable provocation, by words or acts of one at the time. The term includes an emotional state of mind characterized by anger, rage, hatred, furious resentment terror" and "would produce in the minds of ordinary men 'the highest degree of exasperation.'" *Phillips*, 794 So.2d at 1037 (¶¶ 9-10)(Miss. 2001).

Mr. Cole has no such violent history as did Mackbee and Alford. He was not a convicted felon before these events, nor did he go in search of confrontation and violence. Considering the statement of Mr. Cole in the light most favorable to him and drawing all reasonable and favorable inferences from the evidence, the jury could reasonably have found that Mr. Cole told Norman of Samone's pregnancy and that verbal violence, spurred by anger and jealousy, escalated into physical violence between the pair, just as Mr. Cole stated. The jury could easily have found that Norman may have been enraged by the fact of Samone's pregnancy or even that Mr. Cole was now seeing Samone and that Norman may have viewed this as a betrayal. The jury could easily and reasonably infer how Norman may have reacted with understandable physical violence and words of provocation that produced "the highest degree of exasperation" in Mr. Cole. Finally, the trial failed to examine the disparity in punishment. Mr. Cole was sentenced to the maximum penalty for murder, life in prison, whereas the maximum penalty for manslaughter is twenty years. [dbl check that] In commenting on the continuing failure of trial courts to use the proper standard regarding jury instructions, "the State has charged a defendant with a serious felony, and in response, the defendant has come forward with evidence rendering him far less culpable thereby requiring lesser punishment," the Mississippi Supreme Court wrote in *Boyd v. State*, 557 So.2d 1178, 1181 (Miss. 1989) [internal citations omitted]. Denial of jury instructions

requiring lesser punishment "in essence allows the jury to hear the defendant's side of the story; however, it also bars that same jury from using that evidence during its deliberations," the Court wrote. "This forces the jury, when it has the choice between finding the defendant guilty of something or allowing him to go free, to convict a defendant of a greater offense when he could possibly only be guilty of a lesser crime." *Id.* Once acknowledged, Mr. Cole never backed away from his responsibility in the death of Norman, to whom he wrote love poems, who was the sweetheart of his teen years in Greenville. T. 1963-1964. His statement shows this was a crime fueled by furious passion on sides, evidence the jury obviously sought to use in its deliberations until completely stonewalled by the trial court. *See Boyd v. State*, 557 So.2d at 1181.

Both this Court and the Mississippi Supreme Court have in recent years reversed several criminal convictions due to denial of lesser included offense instructions and lesser offense instructions. *Lewis v. State*, 50 So.3d 1004 (Miss. Ct.App. 2010) (This Court reversed the murder conviction of Lewis for failure to give a manslaughter instruction upon evidence that the alleged victim was beating her as she was trapped in a car on the roadside); *Brown v. State*, 39 So.3d 890 (Miss. 2010) (Reversal of murder conviction for failure to give accidental shooting instruction, based on Brown's version of events); *Williams v. State*, 53 So.3d 734 (Miss. 2010) (Reversal of murder conviction for failure to give an assisted suicide instruction based on a lesser offense) and *Ford v. State*, 52 So.3d 1245 (Miss.Ct.App. 2011) (Reversal of conviction for failure to give justifiable homicide instruction).

The failure of the trial judge to give *any* manslaughter instructions was an abuse of discretion clearly prejudicial to Mr. Cole. Actions by the jury pointedly buttress that fact, for it was the *jury* who sought a legal definition of manslaughter. Only after being bluntly informed by the trial court that manslaughter was not an issue did the jury – moments later - notify the judge

it had reached a verdict. Respectfully, manslaughter was *the* issue in this case and it was reversible error to deny Mr. Cole these instructions.

### II. The trial court erred when it denied the *Motion for Change of Venue* filed by Mr. Cole, as it denied to him the fundamental right to trial by an impartial jury as guaranteed by both state and federal constitutions;

In 1961, Wilbert Rideau was arrested for the robbery of a Calcasieu Parish, Louisiana local bank, kidnapping three employees and the murder of one of the three. The day after his arrest, a Lake Charles, Louisiana television station aired a jailhouse "interview" of Rideau, by the sheriff, who led him through a recitation of his culpability for the crime. The interview was broadcast three times over the next few days so that an estimated 97,000 Calcasieu Parish citizens saw it. Quite naturally, Rideau's two appointed lawyers sought a change of venue – which was promptly denied. Rideau wound up with a jury with three who had admitted to hearing his "interview" and two deputy sheriffs from the parish – because by then his lawyers had run out of peremptory challenges and the trial court refused the challenge for cause to two active deputy sheriffs serving on the jury. Rideau was convicted, sentenced to death and the Louisiana Supreme Court affirmed.

The United States Supreme Court did not look kindly on the actions of the Calcasieu judiciary nor the Louisiana Supreme Court's rather perfunctory affirmance; the Court held it was a denial of due process to deny the change of venue. "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality," the Court wrote. "But we do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" *Rideau v. Louisiana*, 373 U.S. 723, 726-727 (1963).

*Rideau* was handed down some five years before the Supreme Court held in *Duncan v. Louisiana* that the Sixth Amendment right to trial by jury in criminal proceedings applied to the states through Due Process Clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968). Reading these and other cases together, the accused in a criminal case has a fundamental right to a fair trial by an *impartial* jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (Accused has a right to be tried by "a panel of impartial, 'indifferent' jurors.").

By virtue of ART. 3, § 14, MISS. CONST. "an accused has a due process right to a fair trial." *Fisher v. State,* 481 So.2d 203, 216, citing *Collins*, 408 So.2d 1376, 1380 (Miss. 1982). And long before *Rideau* and *Duncan*, Mississippi put the guarantee to an impartial jury in ART. 3, § 26, MISS. CONST. "[I]n all criminal prosecutions the accused shall have a right to ... trial by an impartial jury ..." *Adams v. State*, 220 Miss. 812, 72 So.2d 211 (1954); *Seals v. State*, 208 Miss. 236, 44 So.2d 61 (1950).

This fundamental right of a fair trial by an impartial jury was denied Stanley Cole by denial of his *Motion for Change of Venue* and renewed motions throughout the jury selection process. T. 654; 708; 759; 1102-1103; RE 23; 32 – 35; CP 290.

The record shows individual *voir dire* on media exposure was conducted on eighty-four potential jurors, of whom twenty-four said outright they could not set aside pre-formed opinions due to media exposure or familiarity with Norman or her family and were excused. T. 665-1764. And several who said they could be impartial were found to have been disingenuous at best, errors which are discussed in greater detail below. The defense challenged forty-two more for cause due to responses during individual *voir dire* or the jury questionnaire regarding media exposure, which were denied. T. 1730; RE 51. Mr. Cole contends this was an abuse of discretion which denied to him his fundamental right to fair trial with an impartial jury.

"If an unbiased jury is not impaneled, it does not matter how fair the remainder of the proceedings may be," the Mississippi Supreme Court wrote in *Fisher*, 481 So.2d at 216. In that case, the capital murder and death sentence of Larry Fisher for the rape and murder of Melinda Gail Weathers was reversed due to the abuse of discretion by the trial judge in denial of a request for venue change by Fisher, who was also charged for the separate crime of killing Carol Formby. *Id.* In reversing the conviction, the Court relied upon long-standing Mississippi case law interpreting the state constitutional guarantee to an impartial jury that "saturation" media coverage could render impossible a fair trial by a cross-section of the community who stood 'indifferent' to the cause.

Counsel for Mr. Cole repeatedly and doggedly sought change of venue throughout the proceedings as individual jury selection disclosed the pervasiveness with which the overwhelming pre-trial publicity had not only inundated the Jackson metropolitan area, but resulted in already-formed opinions as to the guilt of Mr. Cole, to his fatal prejudice. T. 654; 708; 759; 1102-1103; RE 23; 32 – 35; CP 290; 820-1501.

Mr. Cole met the requirements of MISS. CODE ANN. 99-15-35 et seq. (1972) by attaching affidavits from attorneys Sanford Knott and James Craig, experienced counsel who said that in their professional opinion, Mr. Cole could not obtain a fair trial on the charge. CP 820-1501 (Exhibits 7; 8 to the *Motion for Change of Venue*). Mr. Craig testified as to the intense interest the Jackson State University held in the matter and noted the extensive concentration of JSU students or those with close ties to the University in the Hinds County area and "because it tugs at the heartstrings." T. 229. T. Kathryn Nester, now Federal Public Defender for the State of Utah, testified to much the same based on her experience as private counsel in the Freddie Southwell case, which was moved from Hinds County to the Gulf Coast due to massive pretrial publicity. Finally, Frankie Pellerin, associate director of the Latasha Norman Counseling Center,

testified to her recollection of the prayer vigil held at JSU once her body was found as well as the memorial service at McCoy Auditorium in early December 2007. The auditorium seats 1,500 and there were people standing outside for the service; Pellerin also recalls that classes were cancelled in honor of Norman. T. 181. And although Dr. Mason, who received daily briefings from his campus police about the case, said he did not believe the media exposure would deny Mr. Cole a fair trial. T. 155; 159. But it was Mason who decided to name – and ultimately dedicate in memory of Latasha Norman – the student counseling center. T. 163; 182. Upon prompting by counsel for Mr. Cole, Mason acknowledged an annual 5K run held in Norman's memory – every Nov. 13. T. 164.

A review of the newspaper, television and internet coverage is breathtaking in its breadth, some 400 newspaper stories alone – and absolutely scorching toward Mr. Cole. CP 820-1501. In the age of cyberspace, however, it is much, much easier for the public at large to indicate the effect the exposure has upon them and the case of Ms. Norman and Mr. Cole was a lit match to an open gas tank in that respect. A sampling of some of the opinions is contained in Exhibits 5 and 6 to the *Motion for Change of Venue*, including several that call for the death of Mr. Cole in most graphic terms. CP 824-825.

In *Johnson v. State*, 476 So.2d 1195, 1214-1215 (1985), the Mississippi Supreme Court strongly urged in a thorough review of Mississippi case law that judges, mindful of a media age, "must be prepared to readily grant a change of venue." *Id.*, 476 So.2d at 1215. Among the factors enumerated are of course the saturation of media coverage, the presence of threatened violence tantamount to a mob, cases of serious crimes against members of prominent families, or public officials or when there are multiple crimes involved, such as serial killings and finally when the accused is a person of color and the victim is white. Media saturation was proved most conclusively in filings with the *Motion*, (820-1519) and Mr. Cole submits the threatened violence

was demonstrated just as conclusively by the comments posted throughout the Internet. Ms. Norman was not in life a member of a prominent or influential family; this was not a crime of race. Nevertheless, like ripples in a pool, the events of Nov. 13, 2007 connected in a visceral and deeply personal way with many people in this community, as evidenced by the twenty-four who said they could not put aside their opinions as to his guilt and others Mr. Cole challenged, but which were denied. Therefore, Mr. Cole submits the trial court abused its discretion in denying to him a change in venue for trial of this cause.

**III. The court abused its discretion by refusing to strike or quash the venire even when three separate instances of misconduct arose during jury selection including:**

**A. Testimony by John [Jon] David Cole, who overheard several veniremen discussing the case, including two who thought Mr. Cole had already pleaded guilty;**

**B. Reports from George Moore, who overheard Mario Johnson and Zabrina Fuller discuss that the trial was a waste of time since "we all know" Mr. Cole is guilty;**

**C. Juror Angela Ashley reported to the court that one venireman turned to a large group of the panels and whispered loudly, "I don't know why we're all here. We all know he's f------ guilty!"**

**All of which operated to deny Mr. Cole his fundamental right to an impartial jury guaranteed under both state and Federal constitution;**

**IV. The court erred in failing to denying the challenge for cause by Mr. Cole on jurors James Craig Anderson, Ivory Britton, Debra Coleman, Charlotte Smith Hart, John M. Lassetter Jr., George Moore, Barbara S. Plunkett, Ella Paulette Stamps, Gina Toney Wallace, and all challenges for cause against veniremen who had been exposed to the overwhelming media coverage of this matter;**

Much of the authority recited in Issue No. II is pertinent to these assignments of error, for the tainted venire deprived Mr. Cole of his right under both state and federal constitutions to a fair trial of impartial jurors. Despite continual instruction by the jury to avoid discussion of the case among themselves, three separate instances of misconduct were reported to and ignored by

the trial court. Further, challenges for cause for media exposure, anticipated extraneous pressure from family and friends if selected to serve and equivocal answers regarding impartiality were denied. RE 36-39; 42-59; T. 1292; 1326; 1451; 1580; 1696; 1699; 1707; 1708; 1713; 1714; 1715; 1716; 1721; 1730; 1764; 1769; 1771; 1772; 1776; 1780; 1782; 1788.

In the case of *Collins v. State*, 99 Miss. 47, 54 So. 665 (1911), defense counsel objected to the trial court's examination of Thelma Collins as to her request for a continuance to secure a witness before the jury. Whereupon the court asked the jury "if anything came out in the examination of the appellant which would affect them in making up their verdict in the case, to which "some of the jury answered by saying, 'No,' and others by shaking their heads," etc." The Supreme Court held the guaranty of a fair trial by an impartial jury was that the right by the judge questioning her before the jury, and "by the character of questions put to her, bringing her cause into contempt." The Court reversed the conviction for extraneous influence upon the jury by the judge. *Id.* 54 So. at 666. In *Fuselier v. State*, 468 So.2d 45 (Miss. 1985), the Supreme Court reversed the capital murder conviction and death sentence of Eric Fuselier due to the presence of the dead woman's daughter within the bar, which was held to be a prejudicial and extraneous influence, as well as the erroneous grant of challenges for cause by the prosecution, including some who said nothing but merely stood in response to a prosecutor's initial question. 468 So.2d at 53-55. "A clear showing that a juror's views would prevent or significantly impair the performance of his or her duties requires more than a single response to an initial inquiry," the Court wrote. And, in *James v. State*, 912 So.2d 940 (Miss. 2005) the Mississippi Supreme Court held that information about murder of a second child and discussion of that fact among jurors before trial was extraneous influence sufficient to reverse for a new trial. *Id.*, 912 at 952-53 (¶¶22-23; 27). "Although the exact source of the communication will never be known, the fact that the "skunk" was thrown into the jury room mandates a new trial." *Id.*, citing *Hickson v.*

*State*, 707 So.2d 536, 544 (Miss. 1997) (citing *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962). Further, Mr. Cole objected as required before the jury was impaneled, thus preserving his objection to the composition. *Myers v. State*, 565 So.2d 554, 557 (Miss. 1990).

Not once, not twice but at least three times the trial was informed of the "skunk" in the jury room and failed to follow the procedure laid by *James* and the cases cited therein. *McGilberry v. State*, 741 So.2d 894, 915 (Miss. 1999) states, that one response to the taint of publicity from law enforcement about evidence in the case, a defendant's prior criminal history or the existence or contents of a confession is to change venue.*Id.*, 741 So.2d at 915 (¶¶ 71; 72).

During individual *voir dire*, Jon Cole told the judge and all counsel that he had heard other potential jurors talking about case facts that were new to him, but "overall, I could be impartial." T. 1281. The previous day, Cole [no relation to the defendant] overheard a fellow venireman in the hallway say that Mr. Cole had already pleaded guilty. T. 1285. Cole also said the heard up to ten other jurors talking about the case "because it's been publicized so heavily." The defense request for a mistrial due to the taint was denied. T. 1292. RE 36. Shortly thereafter, George Moore in individual *voir dire* informed the court that he had heard three or four people talking about the case. Moore identified two as Mario Johnson and a woman later identified as Zabrina Fuller; saying rather loudly "I don't know why we are all here or why we have so many people because they know he did it. And so I don't know why we all are still here." T. 1304. Johnson denied having made such statements and protested his impartiality; Johnson said his comments were limited to discussion of news coverage of events and nothing more. T. 1320. Again Mr. Cole moved for a mistrial, arguing that clearly, the venire was having difficulty following the court instructions to refrain from discussions of the case. T. 1325-1326. The again denied the motion to strike the venire as tainted on the basis that it was just "some broad commentary" by two or three jurors. T. 1326; RE 37. Johnson and Fuller are both excused.

Johnson, however, apparently did not receive the news for the following Monday, he asks if he is excused. T. 1444. Counsel for Mr. Cole again renews his motion to strike the venire as tainted due to continued presence of Johnson, which is again denied. T. 1451; RE 38.

Finally, venireman Angela Ashley notifies a baliff of her need to speak with the court. While sitting with a large group of venireman during a bench conference, a woman later identified as Debra McChristian Willis turned her head, and audibly whispered "We all know this is a joke, We all know he's f------ guilty." T. 1749; 1752. Ashley was aware Willis had been excused. Counsel for Mr. Cole notes that McChristian Willis underwent individual *voir dire* and promised impartiality and to set aside her previous media exposure. Once again, in the face of deliberate misconduct infusing the potential jurors, the trial court denied the motion of Mr. Cole to strike the venire as tainted. T. 1764; RE 52.

Mr. Cole alleges it was error to deny the challenges for cause, many of which had to do with media exposure and the responses given during individual *voir dire* and on the questionnaires, including Diane Crawley (who said Ms. Norman was struck in the head, T. 1567) T. 1580; RE 39; Kendria Holt (who had both media exposure and medical training which might impact her view of medical testimony) RE 42; T. 1696; Judy Clayborn (due to media exposure and the fact that child had a drug conviction) RE 43; T. 1699; Tommy Butler (due to considerable media exposure) RE 44; T. 1707; Lekeyla Norris (JSU student familiar with Ms. Norman and the events of November 2007) RE 45; T. 1708; William Auwarter (due to media exposure, hearing and vision problems as well as back problems) RE 46; T. 1713; Lawrence Manley (media exposure); RE 47; T. 1714; June Woodbridge (who asked on questionnaire to be dismissed and had remembered media exposure) RE 48; T. 1715; Julia Lindsey (knew a potential witness and son had felony conviction) RE 49; T. 1716; Elizabeth Horsley (equivocal responses about ability to set aside media exposure) RE 50; T. 1721; Lee Taylor (numerous law

enforcement family members and grimace at mention of gruesome pictures) RE 53; T. 1769; Keshia Hudson (who said she would feel sympathy for family with loss of another member) RE 54; T. 1771; James McCoy (who works with a potential witness) RE 55; T. 1772; Patsy Holbrook Martin (who indicated close friend murdered, with close JSU ties and knew about the case) RE 56; T. 1776; Ella Paulette Stamps (who said if she were on trial, she would want to testify; inability to set aside defendant's decision not to testify) RE 57; T. 1780; John M. Lassetter (wrote on questionnaire that he was close to a murder victim, but failed to respond during general *voir dire*) RE 58; T. 1782 and Diane Crawley (who knew potential witness and had heard extraneous information through juror discussion) RE 59; T. 1788 and finally, a 'blanket' motion listing panel members that the defense felt had already knowledge about the case due to media exposure that they simply would be unable to set aside. RE 51; T. 1730.

### V. The court erred when it denied the Motion To Suppress Statements And Physical Evidence filed by Mr. Cole, in violation of his fundamental rights, including the right to remain silent;

At the pretrial hearing on the *Motion to Suppress Statements and Physical Evidence* filed by Mr. Cole, Det. Juan Cloy detailed for the trial court his ploy to circumvent the Fifth Amendment to the United States Constitution, which states in part, "No person … shall be compelled in any criminal case to be a witness against himself ..."

After testimony that he gave Mr. Cole the warnings required under *Miranda v. Arizona,* 384 U.S. 436 (1966) about 11 AM, November 29, 2007, Cloy also testified to the following:

A. After that – after I read him his rights and asked him if he wanted to talk to me, and he said he did not wish to speak to me.

Q. He said he didn't wish to speak to you?

A. Right

Q. What did you do then?

The transcript of the initial Nov. 29, 2007 interrogation of Mr. Cole by Cloy and Agent Bohls shows Cloy gave him the required *Miranda* warnings. After Mr. Cole said he understood and recited his name, the following occurred:

Cloy: Okay. Ah, at this point in time, do you wish to … to talk to me and we can conversate and see if we need to …

Cole: No sir.

Cloy: **You do not wish to talk**?

Cole: **No.**

Cloy: Okay. Let the record state at this point in time that Mr. Cole **advises that he does not wish to speak with detectives, with Special Agent Bohls**, and at this time we'll terminate this interview." *Exh. ?* [emphasis added].

The right to be free from compelled self-incrimination is fundamental and applicable to the states through the Fourteenth Amendment Due Process clause. *Malloy v. Hogan*, 378 U.S. 1 (1964). "Once warnings have been given, the subsequent procedure is clear. If the individual *indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease*," the United States Supreme Court decreed in *Miranda v. Arizona,* 384 U.S. at 473-474. [emphasis added] "At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise," the Court wrote. "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

Subsequent cases demonstrate that interrogation may be re-initiated, either by the accused or the police, but law enforcement re-initiation of questioning and admission of statements so

obtained is restricted, with the respect for the underlying principles of the Fifth Amendment. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored." *Michigan v. Mosley*, 423 U.S. 96, 104 (1975). In that case, the U.S. Supreme Court held that re-initiation of interrogation after a break of more than two hours about a different crime by a different officer who began the interrogation with a reading of *Miranda* rights was sufficient to satisfy the procedural safeguards *Miranda* required. In reaching its decision, the Court looked to the *Miranda* opinion and noted that "[i]t does not state under what circumstances, if any, a resumption of questioning is permissible." *Id.*, at 101. "The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Mosley*, 423 U.S. at 103, *citing Miranda*, 384 U.S. at 474. In analyzing the actions of the two Michigan detectives, the Supreme Court noted, "the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."

In contrast, Mr. Cole clearly indicated he wished to cut off questioning. As shown above, Mr. Cole did not say he didn't want to talk to Cloy; he said he did not want to talk. Period. *Exh.*

During the testimony on the *Motion to Suppress*, Cloy first estimated it was no more than thirty minutes before Det. Tillman resumed interrogation to forty minutes (T. 55 (June 6, 2008 hearing) T. 282 (30 to 40 minutes) T. 324 (30 to 40 minutes) (Feb. 24, 2009 hearing on the accused's *Motion to Suppress* ) to Agent Bohls' estimate of a half hour (354) to an hour. T. 368. As the second interrogation by Detectives Tillman and Wells was not recorded either by audio or video, we have only the testimony of the officers that *Miranda* warnings were re-administered.

T. 381. Finally, the interrogation concerned questions about the same events, namely the disappearance of Ms. Norman.

Whether police "scrupulously honored" the cut off in questioning by Mr. Cole, as *Miranda* permits, is the heart of the issue regarding suppression of the subsequent – and unrecorded – statement given to Det. Tillman and Det. Stephen Wells and later, Det. Sammie Neal, for it is during this period that Mr. Cole tells of his role in Norman's death and the location of her body. T. 2212 Not until some four hours later is his confession again given for videotape and audio recording. T.2215 *Exh. 33; 34; 35.*

In its Order denying the *Motion to Suppress*, the Court stretches the time frame to "as much as an hour" and states that even forty-five minutes was sufficient time to fulfill the "scrupulously honored" requirement of *Michigan v. Mosley*. The Court goes on to rely upon *Barnes v. State*, 854 So.2d 1 (Miss.Ct.App. 2003) and *Griffin v. State*, 504 So.2d 186, 195 (Miss. 1987). The reliance of the trial judge on cases factually distinct from the case at bar is seriously misplaced, however. In *Barnes*, *more* than an hour passed between interrogations and moreover, at the second interrogation, Barnes not only "expressed no desire to speak with an attorney," he "in fact said several times that he wished to speak." *Barnes*, 854 So.2d 1, 4 (¶5). In *Griffin*, the time period was also *more* than an hour. *Griffin*, 504 So.2d 186 at 195. Further, the Court found that the trial judge followed the process laid out in *Jones v. State*, 461 So.2d 686 (Miss. 1984), which *requires immediate cessation of all questioning* and no resumption *unless*: "1. There has been an adequate cooling off period; 2. There is a reasonable basis for inferring that the suspect has voluntarily changed his mind; 3. New and adequate *Miranda* warnings are given." *Id.*, 461 So.2d at 699-700. (Capital murder conviction overturned when Jones, in the midst of making inculpatory statements during interrogation invoked his right to remain silent by saying "I prefer

not to speak on that," an invocation not scrupulously honored by police who continued to question him) [emphasis added].

In *Christopher v. Florida*, the murder conviction and death sentence of William Christopher was overturned on a writ of habeas corpus due to the failure of law enforcement to "scrupulously honor" his request to terminate interrogation. Instead, police continued to question him on the crimes about which he refused to speak. 824 F.2d 836 (11th Cir., 1987). That Christopher continued to respond to officers and ultimately confess had nothing to do with the fact that police refused to cease questioning. "An accused's post-request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself," *Christopher*, at 841, citing *Smith v. Illinois*, 469 U.S. 91, 100 (1984) (Armed robbery conviction reversed for failure to cease questioning upon request for counsel; held, "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.") [emphasis in original]. *Christopher* also relied on the earlier binding precedent of *United States v. Hernandez*, 574 F2d 1362 (5th Cir., 1978), in which the United States Court of Appeals for the Fifth Circuit reversed the conviction of Hernandez for possession of some 23 tons of marijuana with intent to distribute and conspiracy to possess marijuana with the intent to distribute. According to Hernandez, he invoked both his right to remain silent and requested a lawyer, both of which were refused. After being held in a police wagon for more than five hours (where he first invoked his right to silence and asked for counsel), he was finally brought to the police station house where in the space of 45 minutes no less than two and possibly three or more efforts were made to interrogate him. *Id.* 574 F.2d at 1369. "The more times police inform a suspect of his rights in the face of his repeated invocation of one of those rights the right to remain silent the clearer it becomes that the police must not mean what they say," the Fifth Circuit wrote. "He was given his rights, he invoked his right to

remain silent through his refusals to cooperate, he was given his rights again, and so on until he incriminated himself." *Id.*, at 1368.

That is exactly the situation presented by these facts. In reversing the conviction of *Hernandez,* the Fifth Circuit looked to *Mosley* factors to determine if the request was "scrupulously honored," including immediate cessation of questioning, passage of a "significant period" of time, the giving of a "fresh set" of warnings and the restriction in the second interrogation to a completely different crime not covered in the earlier interrogation. *Id.*, at 1369. In the case at bar, the meticulously compiled timeline drawn from police reports filed during the investigation and attached as Exhibits to the *Motion to Suppress Statements and Physical Evidence* (CP 234-256) show beyond a shadow of doubt that the police plan was always to not take no for an answer from Mr. Cole – *precisely* what *Miranda v. Arizona, Michigan v. Mosley* and their progeny say police *may not* do. For example, Cloy testified on June 6, 2008 that he immediately went to Det. Tillman after Mr. Cole exercised his right to silence. "Previously, the day before in the briefing it was provided to my attention that he [Mr. Cole] had some what of affection for Miss Tillman, detective Tillman." Cloy testified that he wrote in his report of a deliberate plan to "immediately" have Det. Tillman interrogate Mr. Cole if he would not respond to his questions. T. 53. During the Feb. 24, 2009 hearing on the *Motion to Suppress* filed by Mr. Cole, Cloy initially testified that he had only spoken to Det. Tillman that morning that if Mr. Cole refused to talk to Cloy, "she [Det. Tillman] would be able to extract information probably better than I would." T. 281. Cloy's own written reports, however, show that testimony is false. Under cross-examination by the defense that he set up *in advance of Mr. Cole's arrest* a deliberate strategy to circumvent any cut-off in questioning. From the Dec. 2, 2007 Supplemental Narrative attached to the *Motion to Suppress*, Cloy wrote of a briefing on Nov. 28 around 4:30 to 5 PM that, "Tillman, the other investigators and I had discussed in the briefing the day before

Cole's arrest that I would attempt to speak with Cole first because I had developed some rapport with Cole in the interview with him at GPD, Greenville Police Department. ... It was determined that if Cole did not wish to speak with me, *or if it appeared as if my interview technique was not working, then Tillman would be brought in.*" T. 298, *Motion to Suppress Statements and Physical Evidence*, CP 234-256.

Mr. Cole, contrary to Cloy's initial testimony, never waived his rights until some six hours after his arrest in Pearl, when his statement was video and audio recorded. T. 280 (Mr. Cole waived his rights Nov. 29) *Exh.31; 32*; T. 300 (Cloy: [Mr. Cole] never waived his rights in my presence); CP 405 – 413. The facts are clear. In the first interrogation by Cloy, Mr. Cole unequivocally cut off questioning, as was his right under *Miranda v. Arizona* and waived no rights. *Exh.31; 32.* Cloy immediately went to Det. Tillman and had her follow literally on his heels to further interrogate Mr. Cole in a deliberate and impermissible ploy to circumvent his exercise of silence.

As a matter of judicial policy, to affirm this police action on appeal is only to invite greater and more such action. The right to cut off questioning, guaranteed under the 5th and 14th amendments, is like a solid piece of wood, a bulwark against police coercion and oppression, even torture. But whittled away, piece by piece, in court decisions that sanctify the principle of the ends justify the means, that bulwark dissolves into nothing but splintered chips.

This cause should be reversed for failure of the Jackson Police Department to adhere to the laws they are sworn to uphold and remanded for a new trial with suppression of his confession and all evidence found as a result.

**VI. The court erred when it denied the request of the defense for an independent forensic examination of the remains of Latasha Norman, which denied to Mr. Cole due process of law under both state and Federal constitutions;**

Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), the United States Supreme Court held that due process requires access to experts for indigent defendants. That was not a carte blanche for indigents to seek expert assistance willy-nilly; the issue here was whether Ake was insane at the time of the crime, a determination only a psychiatrist could make. Therefore, Oklahoma was required to provide such access. *Id.*, 470 U.S. at 74. The Mississippi Supreme Court reached the same conclusion in *Harrison v. State*, 635 So.2d 894 (Miss. 1994), this Court held the state must pay for expert assistance for indigents "only where the accused demonstrates that the trial court's abuse of discretion is so egregious as to deny him due process and where his trial was thereby rendered fundamentally unfair." *Harrison*, 635 So.2d at 91, citing *Johnson v. State*, 529 So.2d 577, 590 (Miss. 1988). Case law requires that the accused "come forth with concrete reasons, not unsubstantiated assertions that assistance would be beneficial." *Id.* [internal citations omitted].

The "concrete reason" is that the only one to discern a "slit-like" wound "consistent" with a stab wound was Dr. Stephen Hayne, the professional credibility of whom has been called into question numerous times by numerous parties, including this Court. *Edmonds v. State*, 955 So.2d 787, 792(Miss. 2007) (Opinion regarding so-called "two-shooter" theory inadmissible as it was outside his realm of expertise). The body of Ms. Norman was badly decomposed; the head had already separated from the body. T. 2188. Mr. Cole asserted Ms. Norman died from a blow to the head, not a stab wound. *Exh.* 35. Given the state of the remains, the sad lack of professional credentials by Dr. Hayne and the understandable and heartrending need of Latasha Norman's family to reclaim her body for family burial, time was of the essence. Counsel for Mr. Cole

therefore quickly sought funds for independent pathological review of the remains, which were denied. T. 18; RE 22.

The testimony and findings of Dr. Marie Danforth demonstrate just how crucial an independent pathological review was. After all tissue was removed, Dr. Danforth found no evidence of a stab wound on the ribs. T. 1826-1828. Slight scratches were found on the right and left ribs, both in the breast area; the right rib scratches were "still in the breast area, fairly parallel to where the autopsy cut was." T. 1827. Danforth concluded that since the scratches were so slight, "they were most likely caused by our processing." T. 1828. She also said it was "not very likely" the scratches were caused by anything else but tissue removal.

Given this set of facts, Mr. Cole asserts he was denied due process of law by the refusal of the trial court to order an independent examination which could have corroborated his version of how Ms. Norman died.

### VIII. The trial court abused his discretion by granting in part *the Motion In Limine To Prevent The Defense From Mentioning Any Potential Testimony Of Marie Danforth During Opening Statement And During The Trial And To Prevent Her Testimony* by the prosecution;

Mr. Cole argues that the trial court's restriction of full disclosure to the jury of her findings essentially deprived him of the "meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683 (1986). While Mr. Cole acknowledges that as forensic anthropologist Danforth may not find cause of death, her physical findings go more toward corroboration of his version of events and less toward that of Hayne, who said Norman had a "slit-like" wound consistent with a stabbing. In *Terry v. State*, 718 So.2d 1115 (Miss. 1998), this Court reversed the conviction, finding that the judge denied Terry the right to present evidence showing others had access to the money she was accused of embezzling. "Due process requires a criminal defendant be allowed to defend himself." *Hentz v. State*, 542 So.2d 914, 917 (Miss.

1989) (Quashing of Hentz's three witness subpoenae constituted denial of any defense; reversed). Due process demands that jury hear all of Danforth's findings, placed in her professional context of findings, not cause of death.

### IX. The court abused its discretion in denial of the *Motion in Limine (Pearl Arrest)* in violation of Mississippi Rules of Evidence 403 and 404, thus denying to Mr. Cole a fair trial;

It was prejudicial error to deny the *Motion in Limine* of Mr. Cole to exclude evidence of his arrest by Pearl police in connection with the October 9 fight. CP 453-454; RE 40-41. This was evidence of other crimes under MISS.R.EVID. 404 and under MISS.R.EVID. 403, its probative value was substantially outweighed by prejudice. The definition of relevant evidence under MISS.R.EVID. 401 is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence."

The fact that Latasha Norman filed a domestic violence affidavit against Mr. Cole on Oct. 9 has nothing to do with whether or not he committed murder on Nov. 13, 2007. Mr. Cole has taken responsibility for his role in the death of Norman, which he contends is manslaughter. In *Flowers v. State*, 773 So.2d 309 (Miss. 2000), this Court reversed the conviction of Curtis Flowers in part for repeated references to the deaths of three other people while on trial for the murder of Bertha Tardy. *Id.*, 773 So.2d at 318-319. There was no necessity to admit evidence of this arrest in order to tell a rational and coherent story of what happened Nov. 13. *Id.;* it is not part of an interconnected series of events, nor is it integrally related in time, place, and fact of the crime for which Mr. Cole was being tried. *Id.*, [internal citations omitted]. In short, it was nothing more than another ploy designed to prejudice the jury against Mr. Cole.

**X. The court abused his discretion when it barred testimony about prior acts of Latasha Norman against Mr. Cole and other persons, as this was critical to his theory of defense;**

Mr. Cole submits it was prejudicial error to sustain the prosecution's objection to evidence that Ms. Norman once charged him in her car when he was with Samone Harris in Greenville. T. 2090, RE 83. This was not offered under MISS.R.EVID. 404 to demonstrate who may have been the initial aggressor in a claim of self-defense; instead, it was offered to show the jealous and sometimes physically heated nature of their relationship. Furthermore, Danny Bolden testified as the non-violent, peaceful nature of his daughter, thereby placing her character in issue. T. 1899. Under MISS.R.EVID. 405, [o]n cross-examination, inquiry is allowable into relevant, specific instances of conduct." Harris was on cross-examination when counsel for Mr. Cole attempted to question her about the incident. In *Heidel v. State*, 587 So.2d 835 (Miss. 1991), it was held reversible error to exclude evidence of an attack by Esther Heidel on her husband some two weeks before he shot her. *Id.,* 587 So.2d at 844. The Court held it was relevant to Heidel's state of mind the morning of the shooting and whether she had been the first aggressor in their final conflict. Finally, offering such evidence integral to demonstrating the past sometimes violent physical history of this couple and necessary to presenting a complete defense to the case against him. *Crane v. Kentucky,* 476 U.S. 683 (1986)

**XI. The court abused its discretion in the admission of evidence, including noxious-smelling cardboard found covering the body of Latasha Norman and the femur from the body of Latasha Norman, as the evidence lacked virtually any probative value and the prosecution sought only to inflame and arouse the passion of the jury against Mr. Cole by admission of such evidence;**

Admission of the cardboard Mr. Cole placed over the body of Ms. Norman, which had blood and body fluids on it from the decomposing remains of Mrs. Norman was an abuse of discretion, as was admission of a femur allegedly from the body of Ms. Norman, for while

relevant, neither her death nor the method of concealment of the remains was in dispute. T. 2242; 2290 RE 67; 69.The stench from the cardboard, unsealed and admitted into evidence during the testimony of Crime Scene Investigator Charles Taylor, was so severe it sickened the court reporter during proceedings, prompting the trial judge to order it moved – but not to any place close to the bench. T. 2249.

Under MISS.R.EVID. 403, evidence which is otherwise relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As with the issue of admission of gruesome photographs, the issue is whether placing these items into evidence is merely a ploy to arouse and inflame the passions and prejudice of the jury against Mr. Cole. Mr. Cole submits that was the sole aim of prosecutors, who fought to introduce both items; even the trial court questioned on numerous occasions whether it was necessary. T.2238.

In *Walker v. State*, 878 So.2d 913 (Miss. 2004), the risk of unfair prejudice in untested evidence led the reversal of the statutory rape conviction of Freddie Walker. In that case, introduction into evidence of a towel with which the prosecutrix allegedly wiped herself after engaging in sexual intercourse with Walker was held reversible error. The problem? No scientific testing of the towel to determine (a) if semen was present and (b) if semen *was* present, whether it belonged to Walker. *Id.*, at 915-916 (¶¶ 15-16). "With no direct link to the accused, a soiled towel would tend to mislead, confuse and incite prejudice in the jury, especially in a capital rape trial involving a 13-year-old victim," the Court wrote in reversing the conviction.

Mr. Cole does not dispute responsibility for the death of Ms. Norman; he does dispute any premeditated intent to do so. He also does not dispute that he covered with her body with cardboard. *Exh. 33; 34; 35.* The state claimed admission was necessary because it

"corroborated" the statement of Mr. Cole. Such corroboration was unnecessary; even the trial court admitted as much yet still admitted the cardboard and the femur. T. 2248; 2313.

Citing MISS.R.EVID. 403, the Mississippi Supreme Court reversed the conspiracy conviction of former Hattiesburg police officer Scott Morgan due to admission at trial of evidence that co-conspirator Chancellor William Robert Taylor committed suicide. The Court held that the "probative evidence that Judge Taylor died by suicide is negligible at best." *Morgan v. State*, 741 So.2d 246, 258, 259 (¶ 43) (Miss. 1999). In holding that introduction of such testimony was reversible error, the Court said, "[i]ts probative value was clearly outweighed by the prejudicial effect of hearing that one of the co-conspirators had killed himself." *Id.*

There was no dispute as the circumstances surrounding the cardboard, nor was there any dispute as to the identity of Ms. Norman or that she was found covered by cardboard off Brown Street. Admission of this evidence was so unfairly prejudicial as to affect the fundamental right of Mr. Cole to a fair trial and therefore, requires reversal and remand.

**XI. The trial court abused its discretion when it denied the *Motion In Limine To Preclude Admission Of Gruesome And Highly Prejudicial Color Photographs Of The Decedent* by Mr. Cole. The sole purpose of admission of the photographs was to inflame and prejudice the jury against Mr. Cole;**

Ms. Norman died some two weeks before her body was found on Nov. 29, 2007; when found on Brown Street, the record documents her remains were so badly decomposed to the point that cause of death could at best only be described as "consistent" with a stab wound." T.2283; *Exh. 37; 38.*. Photographs were taken both at the scene documenting how and where her body was found and the subsequent autopsy. T. 2283. In anticipation of the state's use of these gruesome and lurid photographs of a decomposing corpse, counsel for Mr. Cole filed before trial a *Motion in Limine* to prevent admission of the photographs into evidence. CP 447-449; 460-463. This was denied. RE 31; T. 611.

To deny the *Motion in Limine* regarding the photographs and admit them into evidence is, Mr. Cole submits, an abuse of discretion amounting to reversible error, for their use was more prejudicial than probative, as the trial court found in excluding several of them from evidence. MISS.R.EVID. 103(a); 403; T. 2285; 2287. Nevertheless it was also error to permit the prosecution to use a greatly enlarged color photograph of an autopsy picture for the prime purpose behind its use was solely to fan the flames of prejudice against Mr. Cole. T. 2285; 2287 RE 31; T. 611. The record reveals there can be little doubt this was part and parcel of the prosecution plan, particularly when considered in context with the egregious actions of prosecutors referring to "critters" and "maggots" infesting the body and gratuitously asking objectionable questions, covered in greater detail below in the final assignment of error.

A review of Mississippi case law reveals that the admission of photographs into evidence is within the discretion of the trial judge, and admission will be upheld on appeal absent a showing of an abuse of that discretion. Mr. Cole submits the trial judge here demonstrated an abuse of discretion in admitting the photographs.

"[P]hotographs of the victim should not ordinarily be admitted into evidence where the killing is not contradicted or denied, and the *corpus delicti* and the identity of the deceased have been established. *Sudduth v. State*, 562 so.2d 67, 69 (Miss. 1990), citing *Davis v. State*, 551 So.2d 165, 173 (Miss. 1989); *Shearer v. State*, 423 So.l2d 824, 827 (Miss. 1982). Photographs of bodies may nevertheless be admitted into evidence in criminal cases where they have probative value and where they are not so gruesome or *used in such a way as to be overly prejudicial or inflammatory. Davis*, 551 so.2d at 173; *Griffin v. State*, 504 So.2d 186, 191 (Miss. 1987), overruled on other grounds, *West v. State*, 553 So.2d 8 (1989). [emphasis added].

The identity of Latasha Norman had already been established during testimony by her father, Danny Bolden. T. 1900; *Exhibits 7; 8*. Mr. Cole had admitted he hit her during a fight and

that she stopped breathing, so his role in connection with her death was essentially admitted. Finally, Dr. Hayne could have easily used anatomical drawings to demonstrate his conclusion that her death was allegedly "consistent" with a stab wound. T. 2283.

The case of *McNeal v. State*, 551 So.2d 151 (Miss. 1989) is almost exactly on point with the facts presented by this record. The conviction of former Biloxi police officer Don McNeal was reversed due to the admission of full color photographs of the partially decomposed body of his wife, Darlene, which was found some three days after she was last seen alive. In reversing the case, the Court wrote the pictures "are so graphic as to arouse the passion of the jury." *Id.*, 551 So.2d at 159. "[We] believe that the state could have shown the angle and entry of the bullet wound without the full-color, close-up view of the decomposed, maggot infested skull." *Id.* In response to the prosecution argument that the photographs were necessary to prove *corpus delicti*, the Court held bluntly "the probative value of the photographs is outweighed by their tendency to inflame and prejudice the jury." *Id.* When presented with such photographs, the Court said trial judges "must consider: (1) whether the proof is absolute or in doubt as to the identity of the guilty party, as well as (2) whether the photographs are necessary evidence or *simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury." Id.* [emphasis added]

Mr. Cole submits that is precisely what occurred here and it was an error requiring reversible of this case and remand for a new trial.

### XII. The trial court denied Mr. Cole his fundamental right to a fair trial due to the cumulative effect of the errors discussed herein.

When considered as a whole, Mr. Cole respectfully argues that the cumulative effect of the errors described herein show he was denied his constitutional right to fair and impartial trial with Due Process of law. Considered together, they cannot be considered harmless; the denial of

a manslaughter instruction for which a clear evidentiary basis existed and which was not covered elsewhere; the refusal to grant a change in venue, despite overwhelming evidence of the inability to obtain a fair and impartial trial in Hinds County, the denial of the Motion to Suppress Statements and Physical Evidence regarding the violation of Mr. Cole's Fifth Amendment right against self-incrimination and other errors claimed elsewhere.

The day after jury selection began – and before sequestration of the jurors – a television story appeared alleging that Mr. Cole turned down a plea offer that would have sent him to prison for thirty years and avoid a life sentence. T. 930-931. Under the authority of Uniform County and Circuit Court Rule 9.01 on Pretrial Publicity, counsel for Mr. Cole sought a mistrial and again renewed his motion for change of venue. T. 932. The trial judge denied it. T. 1102-1103; RE 34-35. The Rule states in part,

> Prior to the conclusion of the trial, no defense attorney, prosecuting attorney, clerk, deputy clerk, law enforcement official or other officer of the court, may release or authorize release of any statement for dissemination by any means of public communication on any matter concerning:
>
> 1. The prior criminal record of the defendant or the defendant's character or reputation;
>
> 2. The existence or contents of any confession, admission or statement given by the defendant; or the refusal or failure of the defendant to make any statement;
>
> 3. The defendant's performance on any examinations or tests, or the defendant's refusal or failure to submit to an examination or test;
>
> 4. The identity, testimony, or credibility of prospective witnesses;
>
> 5. *The possibility of a plea of guilty to the offense changed*, or a lesser offense; and
>
> 6. The defendant's guilt or innocence, or other matters relating to the merits of the case, or the evidence in the case. [emphasis added].

In *McGilberry v. State*, 741 So.2d 894 (Miss. 1999), prejudicial statements in violation of U.R.C.C.C. 9.01 appeared in Gulf Coast newspapers regarding McGilberry's prior criminal

history, existence or contents of a confession or evidence in the case. *Id.*, 741 So.2d at 915. "Such action by an agent of the State is one of the most certain ways to secure reversal in a criminal case," the Court wrote, citing *Hannah v. State*, 336 So.2d 1317, 1323 (Miss. 1976). Publication of the statements gained McGilberry a change in venue to Rankin County, to cure the taint arising from the prejudicial news coverage. While the prejudicial coverage issue in *McGilberry* was found without merit, it was also found that any error was waived by his request to move the trial back to Jackson County.

Mr. Cole did not have the luxury of a change in venue; further, the story appeared on the airwaves and on the Internet the day jury selection started and the day after. T. 9301-931.

Mr. Cole also alleges significant prosecutorial misconduct that considered together with the errors assigned here. During questioning of Donte Stroud and JaQuesha Rule, the prosecutor ended examination regarding November 13 with questions regarding the presence of Ms. Norman's body in the trunk, over the objection of the defense and heated response from the court. T. 2030; 2039. Despite firm commands to refrain from repeating such questions, the prosecutor persisted, prompting motions for a mistrial based on the prosecutor's deliberate misconduct. T. 2040; 2046; 2205; RE 62; 65. There was no way Stroud or Rule could know the body of Norman was in the trunk of the car. T. 2044. The trial court finally restricts the state from asking any more questions about bodies in trunk.

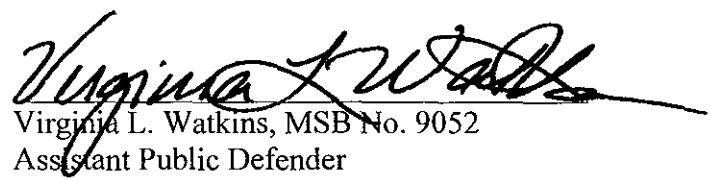
These errors, perhaps not reversible in themselves, combine with other errors assigned here to deprive Mr. Cole of his fundamental right to a fair and impartial trial. *Randall v. State*, 806 So.2d 185, 234, 235 (Miss. 2002).

## CONCLUSION

Mr. Cole was denied virtually all the true attributes of a fair and impartial trial, from denial of jury instructions for which he presented a clear case to denial of his request for a change in venue to rejection of his efforts to suppress statements and physical evidence taken in derogation of Fifth Amendment guarantees against compelled self-incrimination to the remainder of the errors detailed here.

For all of the foregoing reasons and supporting authority recited here, Mr. Cole respectfully requests this Court reverse his convictions and remand this cause for a new trial, with directions for a change in venue and the giving of appropriate jury instructions which present his theory of the case.

Respectfully submitted,



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## Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered via hand delivery a true and correct copy of the foregoing *Brief on the Merits by Appellant*, to the following:

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