IN THE SUPREME COURT OF MISSISSIPPI

JUSTIN BARRETT BLAKENEY, *Appellant*

versus **No. 2015–DP–00058–SCT**

STATE OF MISSISSIPPI, *Appellee*

APPELLEE'S BRIEF

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INTRODUCTION

In this direct appeal, Appellant attacks the decision to deny one of his many motions for a continuance, the form of the sentencing verdict, the prosecution's conduct, the jury selection process and the objectivity of an juror, several evidentiary rulings, and the decision to give or refuse more than twenty jury instructions. He also claims Double Jeopardy barred his retrial, the death penalty is an unconstitutional form of punishment, Mississippi's capital punishment scheme is unconstitutional, and the effect of cumulative error violated his right to a fair trial.

Appellant is entitled to no relief. Every claim raised in this appeal, including the litany of issues and sub-issues raised in support of them, should be denied. Many are procedurally barred. All are without merit. Error, if any, is harmless beyond a reasonable doubt. Appellant's conviction and sentence should stand.

STATEMENT OF THE ISSUES

I. The trial court did not err in denying Appellant a seventh continuance.

II. The form of the sentencing verdict satisfies the statutory and constitutional requirements for imposing the death penalty.

III. The trial court did not err in admitting any of the evidence obtained from or through Hobo Hancock or Satan Smith.

IV. The prosecution did not engage in misconduct; and the trial court did not err in refusing to prohibit the district attorney's office from representing the State in a post-trial motions hearing.

V. Double Jeopardy did not bar Appellant's retrial.

VI. The jury was comprised of twelve impartial individuals.

VII. Appellant's conviction was not the product of evidentiary error.

VIII. The trial court properly instructed the jury during the guilt phase of trial.

IX. The trial court properly instructed the jury during the penalty phase of trial.

X. Appellant's sentence is constitutional.

XI. Appellant's sentence is neither disproportionate nor excessive.

XII. No error exits, cumulative or otherwise.

STATEMENT OF THE CASE

This case arises from the murder of two-year-old V.V.[1] in Jones County, Mississippi. On December 16, 2010, the Grand Jury returned an indictment, charging Appellant Justin Barrett Blakeney for the capital murder of V.V. with the underlying felony of felonious abuse of a child.

[1] Appellant refers to the two-year-old victim by her initials, V.V. (Appellant's Br. at 1 n. 1). To avoid unnecessary confusion, the State will follow suit and do the same.

(C.P. 9, 904; Tr. 249 .).[2] Appellant was formally arraigned on December 22, 2010. Appellant entered a plea of "NOT GUILTY" to one count of capital murder. (C.P. 14; Tr. 7.). On July 9, 2014, through July 11, 2014, Appellant was tried in the Circuit Court of Jones County, Mississippi, before a Greene County jury, (Honorable Billy Joe Landrum, presiding). The jury returned a verdict finding Appellant guilty of capital murder on July 11, 2014. (C.P. 1131.). A separate sentencing hearing was held, after which, the jury found

> We the Jury unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. The capital offense was committed while the defendant was engaged in the commission of felonious abuse of a child, [V.V.], age two (2).
> 2. The capital offense was especially heinous, atrocious or cruel.
>
> We the jury unanimously find that the aggravating circumstances are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances and we unanimously find the Defendant should suffer death.
>
> [s/] Rodney J. Courtney
> Foreman of the Jury

(C.P. 1132.).

Thereafter, Appellant's Motion for JNOV and/or for a New Trial, and/or to Vacate Judgment Insofar as It Sets an Execution Date, and/or Other Relief and Amended and Supplemental Motion for JNOV and/or for a New Trial, and/or to Vacate Judgment Insofar as It Sets an Execution Date, and/or Other Relief were denied. (C.P. 1187.). Appellant then perfected this appeal in which he raises twelve issues for this Court's consideration.

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[2] On February 3, 2014, the trial court granted the State's unopposed Motion to Amend the Indictment after the defense stated that it had no objection and noted that "the body of the indictment tracks the statute in F." (Tr. 249; C.P. 904.). The indictment was amended to correct a scrivener's error. The indictment's reference to Miss. Code Ann. § 97-3-19(2)(e) was changed to Miss. 97-3-19(2)(f). (C.P. 902.).

STATEMENT OF FACTS

Approximately 10:30 a.m. on August 10, 2010, Emergency 9-1-1 dispatch received a telephone call from Appellant, who reported his live-in girlfriend, s two-year-old daughter, V.V., had fallen, hit her head, lost consciousness, and was not breathing. (Tr. 1400-01). Minutes later, Medical first responder, Lee Garrick, arrived at the residence that Appellant shared with V.V. and her mother, Lilly Viner. (Tr. 1300, 1302.). As Garrick approached the residence, he saw Appellant talking on the telephone and V.V. lying on a couch nearby. (Tr. 1303, 1304.). Garrick introduced himself to Appellant as a first responder to an emergency call who was there to assist until paramedics arrived. (Tr 1304.). Appellant stated he did not know what happened to V.V. because he had been in another room. When he found her, she was lying in the hallway, unconscious with her jaw clenched shut. (Tr. 1304, 1306.). Emergency medical technicians arrived shortly after. V.V. and Appellant were taken by ambulance to the emergency room at nearby South Central Regional Medical Center (SCRMC). (Tr. 1306, 1310.).

There, Dr. Michael LaRochelle examined her immediately. Based on his initial examination, Dr. LaRochelle was concerned that V.V. was experience an "infection process or a traumatic injury." (Tr. 1314, 1318.). A CAT scan was taken of V.V. heads and the results revealed diffuse injury throughout her brain caused by some form of trauma, indicative of a repeated episode or at least one severe shaken type scenario. (Tr. 1314-15.). Because her brain was swelling and her injuries could not be adequately treated at SRCMC, the decision was made to have V.V. flown to the University of Mississippi's Medical Center (UMMC) in Jackson. (Tr. 1314-16, 1317-18.).

When V.V. arrived at UMMC, Dr. Scott Benton was asked to assist in treating her as a consulting physician. Dr. Benton, Chief of the Division of Forensics and Medical Director of the

Children's Justice Center, was double-board certified in general pediatrics and child abuse pediatrics. (Tr. 1368, 1381.). When she arrived at UMMC, V.V. was showing signs of brain death. (Tr. 1390.). Additional CAT scans taken of her head revealed brain swelling so extensive that it was pushing through holes in her skull. (Tr. 1390.). So V.V. was placed on life support in order to give her Intensivist the time needed to consult with other physicians. (Tr. 1393-95; State's Exhibit 13.). Based on his initial examination of V.V., Dr. Benton suspected that an acceleration / deceleration injury, similar to whiplash was what V.V. was experiencing. (Tr. 1397-98.).

On August 11, 2010, Dr. Benton met with Appellant and interviewed him as to the events of the previous day. (Tr. 1400-1401.). Based on that interview, Dr. Benton learned that Appellant and V.V. were home, alone from approximately 9:45 to 10:30 a.m. on August 10. (Tr. 1400.). Lilly Viner was working. (Tr. 1400.). Around 10:15, Appellant peaked his head into V.V.'s room to check on her without waking her. (Tr. 1400.). When he did, he found that she was awake and wanting milk. (Tr. 1400.). So, Appellant removed her from her crib, placed her on the floor, and began making his way to the kitchen. (Tr. 1400.). V.V. followed behind him. (Tr. 1400.). As the two were making their way towards the kitchen, Appellant heard a "thud" sound behind him. (Tr. 1400.). When her turned to look, he saw V.V. face down on the floor. (Tr. 1401.). He turned her onto her back to pick her up. (Tr. 1401.). When he did, he noticed she was unresponsive and limp, but soon tensed and began clenching both fists to her chest. (Tr. 1401.). At that point, Appellant called 9-1-1 and attempted to phone Lilly Viner. She returned his call and he told her about V.V.'s fall and that she was not breathing. (Tr. 1401.). By August 12, 2010, it was apparent that V.V. would be not treatable. So the decision was made to remove her from life support. (Tr. 1362, 1363.). She passed away shortly thereafter. (Tr. 1363.). Also on August 12, 2010, law enforcement

interviewed Appellant after V.V.'s death. (Tr. 1357, 1358-60; St.'s Ex. 11; 12.).

An autopsy of V.V. was performed as part of an on-going investigation into her death. (Tr. 1324.). The results of V.V.'s autospy revealed the cause of her fatal injuries was blunt force trauma to the head. (Tr. 1324.). Her injuries included a small subdural hematoma on the right side of her brain, symmetrical brain swelling, and a two inch subgaleal hematoma at the vertex of her scalp. (Tr. 1324-26.). V.V. also suffered from "acute pneumonia" that was likely related to being admitted to the hospital . (Tr. 1330.). But the pneumonia was not the cause of V.V.'s death. (Tr. 1330.). A blow to V.V.'s head could have produced her injuries. (Tr. 1326.). Based on her autopsy results, the manner of V.V.'s death was homicide. (Tr. 1326.). Additional facts will be provided below.

SUMMARY OF THE ARGUMENT

Appellant raises twelve claims for relief over the span of one hundred seventy-seven pages. The State has responded to all twelve claims for relief as well as the litany of issues and sub-issues, which he claims entitle him to relief. Due to the length of the Appellee's Brief and the full explanation given in response to all of Appellant's claims, the State respectfully requests leave to dispense with a more detailed Summary of the Argument.[3]

ARGUMENT

As demonstrated below, Appellant is entitled to no relief for the claims presented in this direct appeal. The State would address a preliminary matter before moving on to Appellant's claims. That is, Appellant reserves the right to have this Court consider claims of error premised "on *per*

[3] The State has earnestly attempted to address each claim, whether expressed, implied, or otherwise intended to evoke the appearance of error. That said, the absence of a response to an issue or perceived issue should not be construed as a waiver and should not be deemed an admission.

arguendo assumptions". In his brief, he asks that:

> To the extent that some of these points are premised on *per arguendo* assumptions that are not consistent with claims made in others (for example, resting one claim of error on evidence of record or legal precedent that is elsewhere challenged) Blakeney presents those arguments in the alternative. He expressly reserves the right to have this Court determine each claim of error on its independent merits and ultimately to reverse Blakeney's conviction and sentence on any one or more of them.

(Appellant's Br. at 6). Factual and legal assumptions made for the sake of argument will not support a valid claim for relief. "The issues must be supported and proved by the record." *Byrom v. State*, 863 So.2d 836, 852 (Miss. 2003) (citing *Pulphus v. State*, 782 So.2d 1220, 1224 (Miss. 2001); *Robinson v. State*, 662 So.2d 1100, 1104 (Miss. 1995)). This Court is under no obligation to consider and should not review claims for relief that are admittedly assumptions offered for the sake of argument. This Court "does not act upon innuendo and unsupported representation of fact, *Gerrard v. State*, 619 So.2d 212, 219 (Miss. 1993), or upon assertions in briefs, but is bound by the matters contained in the official record." *King v. State*, 857 So.2d 702, 718 (Miss. 2003) (citing *Saucier v. State*, 328 So.2d 355, 357 (Miss. 1976)).

I
The trial court did not err in denying Appellant a seventh continuance.

In his first issue, Appellant argues that the trial court abused its discretion and violated the rule established in *Box v. State*, 437 So.2d 19 (Miss. 1983) when it denied his request for a seventh continuance. (Appellant's Brief at 7-29). He claims that, by refusing to postpone trial, the trial court denied him the time he needed to prepare a defense and allowed the State to ambush him with new evidence, even though it was disclosed to his attorneys two weeks prior to trial. The State disagrees entirely.

This Court reviews a trial court's discovery rulings for abuse of discretion. *Pitchford v. State*,

45 So.3d 216, 231 (Miss. 2010); *Payton v. State*, 897 So.2d 921, 942 (Miss. 2003) (citing *Gray v. State*, 799 So.2d 53, 60 (Miss. 2001)); *Simmons v. State*, 805 So.2d 452, 484 (Miss. 2001); *Walker v. State*, 671 So.2d 581, 592 (Miss. 1995). "We will reverse a trial court's decision only where manifest injustice would result." *Pitchford*, 45 So.3d at 231 (citing *Simmons*, 805 So.2d at 484); *accord Payton*, 897 So.2d at 942; *Walker*, 671 So.2d at 592 (citations omitted). "A violation of Rule 9.04 of the *Uniform Circuit and County Court* may be considered harmless error unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice." *Payton*, 897 So.2d at 942 (citing *Buckhalter v. State*, 480 So.2d 1128, 1128-29 (Miss. 1985);[4] *Prewitt v. State*, 755 So.2d 537, 540-41 (Miss. Ct. App. 1999)).

A. There was no discovery violation.

On appeal, Appellant argues the trial court denied his request for a continuance "[w]ithout following any of the procedures outlined by this Court in *Box*, or making the due process type of analysis required by *Fulks*, 18 So.3d at 807...." (Appellant's Br. at 15). He contends that, under *Box v. State*, 437 So.2d 19 (Miss. 1983) and its progeny, the trial court was obligated to grant his Motion for Continuance so that the defense could prepare to meet the information the State disclosed on June 24, 2014, as supplemental discovery. (Appellant's Br. at 7). He is mistaken.

Appellant's trial was set for July 7, 2014. On June 24, 2014, the State provided the defense with supplemental discovery, which included a written list that named Randall Smith, Randy Johnson of the Jones County Sheriff's Office, Rigo Vargas of the Mississippi State Crime Lab,

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[4] In *Buckhalter*, this Court briefly noted Its rationale for adopting the harmless error doctrine and abandoning the "Exchequer Rule", "which produced illogical and absurd results[]" by making certain errors, such as an erroneous evidentiary ruling, *per se* reversible error. 480 So.2d at 1128-29; *see id.* at 1128 n. 1 (citing cases from other jurisdictions, applying harmless error doctrine).

forensic computer expert Tom Thomas, and local music retailer employee Scott Black, as possible State's witnesses and provided an outline of their testimony. (C.P.1104-05; Tr. 749.).[5] The same day, the State provided the defense with:

1. Copy of letter signed by [Appellant] and Randall Smith dated June 19, 2014
2. Copy of letter written by Randall Smith beginning "Hello my Brother", not dated
3. Copy of body mic recording dated 6/20/14
4. Copy of two letters written by [Appellant] to Major Johnson
5. Copy of letter from Justin [Appellant] to Amber Johnson
6. Copies of three (3) Rights forms signed by [Appellant]
7. Copy of page from [Appellant]'s Bible
8. Numerous commissary/canteen receipts signed by [Appellant]
9. Letter naming potential additional witnesses, substance of testimony, and test now ongoing

(C.P.1103; see Tr. 749.).

On July 1, 2014, Appellant filed a Motion for Continuance, seeking the trial court to postpone the July 7, 2014 trial date and to issue a scheduling order that would allow the defense time to prepare for trial. (C.P.1096-1101.). In his Motion for Continuance, Appellant informed the trial court that the State, "on June 24, 2014, produced discovery of recently developed information that

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[5] Appellant gives several dates as the date when he received supplemental discovery. Those dates directly contradict the June 24, 2014 date in his Motion for Continuance, attached Exhibits A and B, and in the Brief before this Court. For example, in his Motion for JNOV and/or for a New Trial, and/or to Vacate Judgment Insofar as It Sets an Execution Date, and/or Other Relief (Motion for JNOV), he stated that "[t]he identify of these witnesses [(Smith and Vargas)] and a general description of their expected testimony, and the associated documentary evidence was produced on and after July 1, 2014...." (C.P.1141.). In the brief before this Court, he states that, prior to June 26, 2014, Greg Hancock was the only State's witness disclosed to him, who could provide direct evidence. (Appellant's Br. at 11, 12). Yet, in the same brief and when speculating that Hancock recanted his testimony in a letter, Appellant states, "on June 23, the day before the prosecutor finally disclosed SATAN and Vargas as witnesses." (Appellant's Br. at 21-22 n. 11). He also speculates that the State knew about Smith's letter as early as June 17 or 18 and waited nine days, June 25 or 26 to disclose it. (Appellant's Br. at 22). The assertions in his post-trial papers and Brief of Appellant may make it unclear as to the date of disclosure, but the record does not. The record clearly shows the State provided this information as supplemental discovery on June 24, 2014. See, e.g., Motion for Continuance (confirming "[t]he State of Mississippi, on June 24, 2014, produced discovery of recently developed information it intends to present in evidence...."). (C.P.1096.).

it intends to present in evidence against [Appellant]...." (C.P.1096; Tr. 749.). He attached the State's Supplemental Discovery Receipt (Exhibit A) and a letter from the State (Exhibit B) to his Motion for Continuance. (C.P.1103; 1104-05.). The trial court heard Appellant's Motion for Continuance the same day. (Tr. 749-95.). The defense contended that it needed additional time in order to prepare to confront the State's evidence. (Tr. 756.). And, it heard the State confirm that the defense:

> was furnished discovery on 6/24, I gave them everything that I sent to Mr. Vargas, copies of it for him to examine to determine if this was Blakeney's signature on this letter. I gave them a copy of a body mic recording, a copy of all the writings of Randall Smith, including the one signed by Justin Blakeney. I had a copy of a letter that Blakeney had sent to a girl, and I included that in there. I included his rights forms. I included a copy of a page where the Aryan Nation man had written a recommendation in Mr. Blakeney's Bible. I included that. All the commissary receipts. I gave him everything that I was sending off tested.
>
> In short, Your Honor, as soon, whether I've got an oral confirmation or a written confirmation -- just like I handed to him this morning, he says he knows nothing about Randall Smith, it's got Randall Smith. It's got his date of birth. It's got his race and, yes, it's even got his sex. If I find out more I'll tell him. And also I included what he's charged with in Jones County and what the State intended to do with Mr. Smith. I told him about Mr. Vargas and I also informed him that Mr. Thorton of the Leader-Call, who his client voluntarily gave an interview to, would probably be a witness in the trial too. So in short, Your Honor, all of these things that they're arguing about the motion for continuance, they have come up before the Court due to the actions of the defendant in this case. Your Honor, for instance, if we suppose that this gentleman that's being tried for this crime were to be so foolish as to make some statement the day before trial, does that entitle him to put it off? I mean, if he's going to keep saying things to people, well then, you know, I have an obligation to try to follow through and see where they lead. Substantiate them or not substantiate them. That's what I've tried to do in all of this. You know, I can't be responsible for the timing of the information that he gives to other people, whether it be Randall Smith or a newspaper interview to Mr. Thorton.
>
> And I have given them -- if I get any further information, when I get the written report from Mr. Vargas, I will get it to them. I simply informed them orally what I have been told over the phone. That's all I can do.... But again, this is something, the reason it's so close to trial that was initiated by the defendant.
>
> Also as far as these video things, I don't know. Tom Thomas, I'll be happy to give

> them an address and all. And I don't know that anything will come of that. If it does I'll let them know. They're looking. But again, this is something, the reason it's so close to trial that was initiated by the defendant.
>
> Also as far as the audio, I gave them what I had. If I have somebody who can get out the background noise and make it better, they're trying. I don't have it yet. I've told them I'm trying. If I get it, it won't change what's on it. It will just make it easier for them to hear their client and Mr. Smith speaking.
>
> So in short, Your Honor, I've given the Court a timeline. And we have worked diligently to get the discovery. On Monday after we completed gathering whatever information we got from Mr. Smith, on that next Monday I gave Mr. Piazza his discovery. Mr. LaBarre was I think ill at the time. He picked his up a few days later. I think Mr. Piazza started faxing him the information that I gave him.
>
> So once we completed the investigation to this new information, as soon as we did, on that Friday we gathered all this stuff up. By Monday I was giving it to them. I think that's a pretty good response. And I don't know how that I could have responded any quicker. And that's what we've done. We'll continue to supplement that as we go along, Your Honor. And as I get hard copies or anything else I give it to them. I've even gone to the extent of telling them what people have told me over the phone so that they will have advance notice. That's all I know to do.

(Tr. at 762-65.). The State also informed the trial court that, on July 1, 2014, prior to the motions hearing, it had provided the defense with Mr. Vargas's *Curriculum Vitae* and Mr. Vargas's oral report that, in his opinion, the signature on Randall Smith's recommendation letter (State's Exhibit S-19) was Appellant's. (Tr. 761-62.).

Trial counsel offered two unsupported assertions to rebut the State's time line of events. He stated that, due to the timing of the State's disclosure, the defense did not "have the ability to investigate [the witnesses and evidence] at all." (Tr. 768.). Trial counsel claimed the State would not "suffer any prejudice by delaying this case." (Tr. 786-69.). His reasoning was that "[t]his evidence will not change." (Tr. 768-69.). Trial counsel then contradicted himself, noting that the evidence "could change for the better. There could be exculpatory things that are in this information that they've given us." (Tr. 768-69.).

Appellant's first claim, that the trial court denied his request for a continuance "[w]ithout following any of the procedures outlined by this Court in *Box* ...", is without merit. (Appellant's Br. at 15). Rule 9.04(I)(1)-(3) is a codification of the guidelines first announced by this Court in *Box v. State*, 437 So.2d 19, 22-26 (Miss. 1983) (Robertson, J., specially concurring); *McGowen v. State*, 859 So.2d 320, 337 n. 5 (Miss. 2003)." *Ben v. State*, 95 So.3d 1236, 1249 (Miss. 2012). Rule 9.04(I) of the *Uniform Rules of Circuit and Chancery Court* states that:

> I. If at any time prior to trial it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.
>
> If during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these rules, and the defense objects to the introduction for that reason, the court shall act as follows:
>
> 1. Grant the defense a reasonable opportunity to interview the newly discovered witness, to examine the newly produced documents, photographs or other evidence; and
> 2. If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, in the interest of justice and absent unusual circumstances, exclude the evidence or grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence or grant a mistrial.
> 3. The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence.
>
> The court shall follow the same procedure for violation of discovery by the defense.
>
> Discovery material shall not be filed with the clerk unless authorized by the court. Willful violation by an attorney of an applicable discovery rule or an order issued pursuant thereto may subject the attorney to appropriate sanctions by the court.

URCCC 9.04(I) (emphasis added).

And, URCCC 9.04(E) clearly states that:

> Both the state and the defendant have a duty to timely supplement discovery. If, subsequent to compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

URCCC 9.04(E).

"*Box* is inapplicable to [Appellant's] case since there is no assertion that the State withheld ... discovery materials." *Walker*, 671 So.2d at 592. In his Brief, Appellant readily admits:

> That letter disclosed for the first time that that the State would be offering testimony from self-described jailhouse "snitch," T. 1489, Randall "SATAN" Smith, T. 1493, as well as from up to three newly identified expert witnesses, one of whom would be corroborating SATAN's testimony. C.P. 1103-06.
>
> ....
>
> The State also produced a document prepared in June 2014 by SAT AN at the behest of the State concerning Blakeney's desire for membership in the prison organization Aryan Brotherhood that SATAN claimed, and one of the expert witnesses would allegedly corroborate, had been signed by Blakeney. Trial Ex. S-19B, T. 1472, 1499.

(Appellant's Br. at 12-13).[6] During the July 1, 2014 motions hearing, the trial court found "the rule requires [the State] to supplement discovery [the State] receive[s] it. And as far as the Court sees it at this time [the State] [has] done that...." (Tr. 771.). Appellant cites no instance where the State

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[6] Appellant also states that "on June 26, 2014, barely two weeks before the July 7 trial date, ... the prosecutor served the local public defender and second chair counsel [(Mr. Piazza)] ... with a letter dated two days earlier...." (Appellant's Br. at 12). This assertion conflicts with his earlier statements. In his Motion for Continuance, he stated: "The State of Mississippi, on June 24, 2014, produced discovery of recently developed information it intends to present in evidence...."). (C.P. 1096.). He also implies the State's disclosure was deceptive. But the record explains why Mr. Piazza was personally served. Mr. Piazza was local counsel. (Tr. 3; 291.). Mr. LaBarre was not. (See, e.g., Tr. 28, 237, 291.). During the July 1, 2014 motions hearing, the State explained:

> after we completed gathering whatever information we got from Mr. Smith, on that next Monday I gave Mr. Piazza his discovery. Mr. LaBarre was I think ill at the time. He picked his up a few days later. I think Mr. Piazza started faxing him [(Mr. LaBarre)] the information that I gave him [(Mr. Piazza)].

(Tr. 765.).

failed to disclose evidence. Further, he cites no instance or specific ruling from the trial court, which denied him disclosure of requested evidence in the State's possession. "Mere assertions that a discovery violation occurred, without proof, or any meaningful argument whatsoever as to what particular evidence was not disclosed, is insufficient to warrant reversal." *King v. State*, 857 So.2d 702, 714 (Miss. 2003). "[A]ppellant must present to us a record sufficient to show the occurrence of the error he asserts and also that the matter was properly presented to the trial court and timely preserved." *King*, 857 So.2d at 714 (citations and internal quotation marks omitted). There simply was no discovery violation in this case. And because there was no discovery violation, *Box* has no present application. *King*, 857 So.2d at 714; *Cox v. State*, 849 so.2d 1257, 1267-68 (Miss. 2003); *Walker*, 671 So.2d at 592.

Appellant relies heavily on *Fulks v. State*, 18 So.3d 803 (Miss. 2009), but this case is easily distinguishable from *Fulks*. The defendant in *Fulks* was convicted of armed robbery and aggravated assault. *Fulks*, 18 So.3d at 804. The State's case against Fulks included the testimony of an eye witness, Joshua Glenn. *Id.* Glenn originally told law enforcement that he and Fulks were not participants in the robbery, but were passengers in a car with others who had committed the crime. *Id.* But on the day before trial was set to begin, the State informed the defense that Glenn would take the stand and testify that he saw Fulks "kick in the back door of the home, lead the robbery party inside, and then quickly escape the house, followed by the other participants and in possession of some sort of electronic device from the residence." *Id.*

This Court reversed Fulks's conviction and sentence, because It found the State violated URCCC 9.04 and the underlying policy of *Box* by revealing "evidence on the eve of trial that should have been disclosed earlier, and when that evidence completely undercuts the defense's theory of

the case and renders most of its trial preparations worthless...." *Id.* at 805.

That is not the case here. Appellant claims the State knowingly withheld evidence related to Satan Smith in violation *Brady v. Maryland*, and its progeny. That claim is contrary to the record, and based on conjecture and speculation. Here, the State obtained evidence by and through Randall "Satan" Smith on June 19, 2014. And on June 20, 2014, the State sent Smith's letter of recommendation with Appellant's signature along with many commissary receipts Appellant signed over the past years to Rico Vargas, of the Mississippi Crime Lab. (Tr. 768.). Vargas made an oral representation that he would testify that the signature was Blakeney's. The State *provided*, that evidence on June 24, 2014, literally five days later after a weekend. And all of this information was disclosed in to trial counsel in letter written by the State on July 1, 2014.

In *Box*, Justice Robertson noted that:

> When police officers have been in possession of discoverable information for nine months, the State is entitled to no consideration because the District Attorney or his assistant did not look at the file until the night before trial. The State, in the present context, is a team consisting of the attorney, the law enforcement officers of the jurisdiction in which the case is brought, all other cooperating law enforcement officials—municipal, county, state or federal, the prosecution witnesses, and any other persons cooperating in the investigation and prosecution of the case. What is known or available to any one or more is deemed known by or available to the State. All are collectively "the State" for present purposes. *See United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973). When responding to requested or ordered discovery under Rule 4.06, the State, as here collectively defined, should disclose all information it has plus all information it could obtain with due diligence or upon reasonable inquiry. And, discovery responses should be supplemented when, as trial approaches, (a) the information previously furnished appears incomplete, misleading or downright incorrect or (b) the State comes into possession of new information within the scope of the discovery request as allowed. *Gallion v. State*, 396 So.2d 621, 622, 624 (Miss. 1981).

Box, 437 So.2d at 25 n. 4 (Roberston, J., specially concurring).

The record shows the State disclosed and personally delivered information and copies of

evidence that did not exist before June 19, 2014, to trial counsel on June 24, 2014. The State's production of discoverable information, including the June 24, 2014 disclosure, is consistent with *Box*. There was no discovery violation.

B. The trial court did not err in denying the motion for a continuance.

In addition to there being no discovery violation, Appellant fails to show the trial court erred in denying his July 7, 2014 motion for a continuance. "The question of whether defendant had a reasonable opportunity to prepare to confront the [State's] evidence at trial depends upon the particular facts and circumstances of each case." *Traylor v. State*, 582 So.2d 1003, 1006 (Miss. 1991). Appellant, as the moving party, "has the burden of showing that the trial court abused its discretion in denying his motion for a continuance." *Morris v. State*, 595 So.2d 840, 844 (Miss. 1991). "The right to a continuance cannot be established by conclusory arguments alone. The need for additional time is a matter that is the subject of proof." *Atterberry v. State*, 667 So.2d 622, 631 (Miss. 1995). "This Court is limited on appeal to reversing a trial court's decision regarding discovery violations only upon finding an abuse of discretion." *Gray v. State*, 799 So.2d 53, 60 (Miss. 2001) (citing *Conley v. State*, 790 So.2d 773, 782 (Miss. 2001)). Only when manifest injustice appears to have resulted from the decision to deny the continuance will this Court reverse. *Johnson v. State*, 631 So.2d 185, 189 (Miss. 1994).

The trial court denied Appellant's request for a continuance based on what the parties presented. After noting that URCCC 9.04 required the State to supplement discovery upon receiving it, the trial court stated that:

> the rule requires you to supplement discovery as you receive it. And as far as the Court sees it at this time you've [(the State)] done that....
>
> But I understand too that Mr. LaBarre, he's very zealous about defending his client.

> So just so long as the State supplements the discovery it has and the Court does not have to make a ruling that it's not timely, then we're all right.
>
> Of course, *at this time based on what's been presented*, the Court would deny any continuance in this case. And I would advise everybody to just go ahead continuance in this case.

(Tr. 771-72.) (emphasis added).

Again, URCCC 9.04 reads:

> I. If at *any time prior to trial* it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court *may* order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.
>
> Mississippi statutory law states that in seeking a continuance, a party must make a factual showing of what he expects to prove by the absent witness or document *and must also prove due diligence in seeking to procure the witness or document*. Miss. Code Ann. § 99-15-29 (Rev. 1994).

Appellant argues that he may have uncovered an injustice had he been permitted additional time to review the State's witnesses and evidence. But, that is not standard. *Jackson v. State*, 423 So.2d 129, 132 (Miss. 1982); *King v. State*, 251 Miss. 168 So.2d 637, 641 (1964) (quoting *Lamar v. State*, 63 Miss. 265, 271 (1885)). This Court has articulated standard as follows:

> If the court declines to grant the continuance[,] [the defendant] should sue out the proper process for [the witnesses he seeks], and when the case is called for trial should renew his application, make such changes in his affidavit as the conditions then existing require. If the continuance is still refused, he should with unremitting diligence seek to secure their attendance pending the trial by the continued use of the process of the court; if tried and convicted he should still persist in his efforts to enforce their attendance before the expiration of the term, and on his motion for a new trial present them to the court for examination; if, with all of his efforts, he is unable to have the witnesses personally present, he should, if practicable, secure their ex parte affidavits, which should be presented for the consideration of the court, which, on the motion for a new trial, will review the whole case and correct any error prejudicial to the defendant which may appear in any part of the proceeding.

King v. State, 251 Miss. 168 So.2d 637, 641 (1964) (quoting *Lamar v. State*, 63 Miss. 265, 271

(1885)). Very recently, this Court held:

> While we find no discovery violation occurred, this Court considers discovery violations to be harmless "unless it affirmatively appears from the entire record that the violation caused a miscarriage of justice." *Payton v. State*, 897 So.2d 921, 942 (Miss. 2003). During cross-examination, it also was revealed that defense counsel and Mr. W. had spoken previously. Mr. W. did not offer testimony that inculpated Graves in the crimes charged. Moreover, Mr. W. testified that he did not speak with G.W. regarding the specifics of her allegations against Graves. As such, this issue is without merit.

Graves v. State, ___ So.3d ___, 2016 WL 1459092, *6 (Miss. Apr. 14, 2016).

Appellant must raise the trial court's denial of a continuance as an issue on appeal, which he does. He is expected to continue the evidence or testimony, so he can show the court what he lost by having to go to trial without the continuance. He must also show the trial court's decision *resulted* in a manifest injustice. *Payton*, 897 So.2d at 942 (emphasis added) (citing *Hatcher*, 617 So.2d at 639); *Walker*, 671 So.2d at 592. Appellant has done none of this, and his claim falls well-below the standard. It is interesting to note that, in addition to making no attempt to obtain a handwriting expert, trial counsel chose not to seek out or obtain any expert to rebut the State's two medical expert witnesses.

Appellant fails to show the trial court's denial of a continuance was prejudicial. He argues the defense needed the continuance to thoroughly review and adequately prepare a response to the information the State disclosed on June 24, 2014. But at no time before, or after, the trial court denied his request, did Appellant so much as even attempt to obtain a handwriting expert. Now, he argues that he was prejudiced. How? It is insufficient to suggest additional time for review and investigation *could* have given him evidence.

With respect to expert witnesses, this Court has flatly rejected claims similar to Appellant's. In *Lewis v. State*, 725 So.2d 183 (Miss. 1998), the Court said:

> Furthermore, it seems disingenuous for Lewis to claim prejudice or ambush by the actual visual comparisons themselves, when he was clearly aware that Andrews would testify about such comparisons. *See Brown v. State*, 690 So.2d 276, 289 (Miss. 1996) (no discovery violation where appellant knew that shoe print expert would make general comparison and expert testified regarding specific characteristics of toe of shoe, because it was "obvious from looking at the evidence of the bloody shoe prints with a naked layman's eye that attention would focus on the toe area of [appellant's] shoe"). Therefore, Lewis' argument on this point is also without merit.

725 So.2d at 187.

Even if Appellant had obtained a handwriting expert whose opinion was that Appellant had not signed Satan Smith's letter of recommendation, it would not result in a manifest injustice. Rico Vargas opined that the signature appearing on Smith's letter of recommendation was Appellant's. But Randall Smith testified that he observed Appellant sign the letter of recommendation inside the Jones County jail on June 19, 2014. (Tr. 1484-85, 1486-87.). The following day, Smith made a written notation in Appellant's Bible, which corroborated his testimony that he witnessed Appellant sign the letter of recommendation. (Tr. 1493.). And, the record also reflects that Appellant had spoken with Randall Smith at some point before trial, though Smith was uncooperative. (Tr. 1490-91.). *See Graves*, 2016 WL 1459092, at *6.

The Court should deny Appellant's first claim. There was no violation of *Box* or URCCC 9.04. The State disclosed evidence it obtained on June 19, 2014 and June 20, 2014 to trial counsel five and four days later, on June 24, 2014. Further, Vargas (Tr. 1533-47) and Smith (Tr. 1467-1525) did not testify on July 7, 2014, the day trial started. They testified on July 10, 2014, some sixteen days after the State supplemented its discovery on June 24, 2014. Further, Appellant fails to show the trial court abused its discretion or that there was a manifest injustice for not allowing him more time. For the reasons above, the State respectfully requests the Court deny Appellant's first claim. Appellant is entitled to no relief for his first claim as it is without merit.

II
The form of the sentencing verdict satisfies the statutory and constitutional requirements for imposing the death penalty.

Next, Appellant claims the Court should reverse his sentence, because the jury returned a sentencing verdict that did not meet the statutory and constitutional requirements to impose the death penalty. (Appellant's Br. at 30-40). He argues the reformed sentencing verdict in this case lacks the written finding that Miss. Code Ann. § 99-19-101(7) and *Pinkton v. State*, 481 So.2d 306 (Miss. 1985) require. The State disagrees.

A. Statutory framework

State statutory law provides the framework for review of the sentencing verdict in this case, beginning with Mississippi Code Section 99-19-101. Section 99-19-101 provides the procedure for imposing the death penalty in this State. Part of Section 99-19-101's procedure requires the sentencer, be it judge or jury, to make certain findings relating to a defendant's conduct and character render in determining whether or not to impose the death penalty. And, Section 99-19-101's procedure requires the sentencer to record these findings by writing them in its sentencing verdict. Specifically, Section 99-19-101(3) requires the sentencer to return a sentencing verdict that contains the following three, unanimous written findings in order to impose a valid sentence of death:

> (a) That sufficient factors exist as enumerated in subsection (7) of this section;
>
> (b) That sufficient aggravating circumstances exist as enumerated in subsection (5) of this section; and
>
> (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances.

Miss. Code Ann. § 99-19-101(3)(a)-(c). And if the sentencer decides to impose the death penalty, Miss. Code Ann. § 99-19-101(3) requires its decision be:

> supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) of this section and upon the records of the trial and the sentencing proceedings....

In order to comply with Section 99-19-101(3), the sentencer must find at least one of the four factors listed under part (7) of Section 99-19-101. Miss. Code Ann. § 99-19-101(3). Those facts are:

> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.

Miss. Code Ann. § 99-19-101(7); *See Jackson v. State*, 860 So.2d 653, 665 (Miss. 2003) (ruling a finding of only one *Enmund* factor is sufficient to meet the requirements of *Enmund* and Miss. Code Ann. § 99-19-101(7)) (citing *Jordan*, 786 So.2d at 1026, 1030; *Smith v. State*, 724 So.2d 280, 297 (Miss. 1998); *Holland v. State*, 705 So.2d 307, 327 (Miss. 1997)).

Section 99-19-105 provides appellate review of cases where the death penalty is imposed. In a case where the death penalty is imposed, Section 99-19-105 requires this Court to review the record once judgment is final in the trial court. Miss. Code Ann. § 99-19-105(1). Section 99-19-105 also states that:

> (3) With regard to the sentence, the court shall determine:
>
> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101;
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and
>
> (d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.
>
> ....

(5) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(a) Affirm the sentence of death;

(b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, and (I) affirm the sentence of death or (ii) hold the error in the sentence phase harmless and affirm the sentence of death or (iii) remand the case for a new sentencing hearing; or

(c) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

(6) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Miss. Code Ann. § 99-19-105(3), (5)-(6).

B. Factual Background

The Grand Jury charged Appellant with one count of capital murder. The indictment read, in pertinent part, as follows:

> [Appellant] in said District, County and State on or about the 10th day of August, 2010, did then and there willfully, unlawfully, feloniously, without authority of law, with or without the design to effect death, did kill and murder [V.V.], Age 2, a human being, said killing occurring at a time when [Appellant] was engaged in the commission of the crime of felonious abuse or battery of a child, namely, [V.V.], Age 2, as set for and described by Section 97-5-39(2)(a) of the Mississippi Code of 1972, annotated, as amended, in that ... [Appellant], on the date complained, did intentionally strike or otherwise abuse the said [V.V.], Age 2, a human being, the exact manner to the Grand Jurors unknown, in such a manner as to cause serious bodily harm, all of said act complained of resulting in the actual death of the said [V.V.] on the 12th day of August, 2010....

(C.P. 9; 904.).

After the jury found Appellant guilty as charged and at the conclusion of the penalty phase of his capital murder trial, the trial court instructed the jury according to the State's proffered

Sentencing Instruction S-5. Section "A" of Sentencing Instruction S-5instructed the jury that:

> To return the death penalty in this case you must first unanimously find from the evidence beyond a reasonable doubt that one or more of the following facts existed:
>
> 1. That the Defendant actually killed [V.V.];
> 2. That the Defendant killed [V.V.] while engaged in the crime of intentional felonious child abuse;
>
> ....

(C.P. 845.).

After deliberating and reforming its initial sentencing verdict, the jury returned a handwritten sentencing verdict that read as follows:

> We the Jury unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder:
>
> 1. The capital offense was committed while the defendant was engaged in the commission of felonious abuse of a child, [V.V.], age two (2).
> 2. The capital offense was especially heinous, atrocious or cruel.
>
> We the jury unanimously find that the aggravating circumstances are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances and we unanimously find the Defendant should suffer death.
>
> [s/] Rodney J. Courtney
> Foreman of the Jury

(C.P. 1132.).[7] Before the verdict was read aloud and accepted, the trial court called a bench conference in order to afford the parties an opportunity to review the reformed sentencing verdict and to voice any objections. (Tr. 1816.). The record reflects that:

> (THE COURT READ THE VERDICT. THE LAWYERS APPROACHED THE BENCH AND READ THE VERDICT)
>
> THE COURT: I believe that's appropriate.

[7] The sentencing verdict also appears on the second page of the trial court's Jury Verdict and Sentencing Order. (C.P. 1134.).

MR. PARRISH: That's exactly the correct form.

THE COURT: All right. Let him re-read it?

MR. PARRISH: I would. I guess I would let the man read it.

THE COURT: Pass it back to [the foreman,] Mr. Courtney.

MR. LABABRE: I said it's incomplete.

MR. PARRISH: He said it's incomplete. I don't know. I think it's complete.

MR. LABARRE: It's incomplete.

(BENCH CONFERENCE CONCLUDED)

(Tr. 1816.).

Following the bench conference, the jury's foreman read the reformed sentencing verdict aloud. (Tr. 1817.). The trial court subsequently polled the jury a second time, noted that all twelve jurors were unanimous in their sentencing decision, accepted the sentencing verdict, and set the date for Appellant's execution. (Tr. 1817-20.).

C. Analysis

Appellant's second claim entitles him to no relief. The reformed sentencing verdict meets the requirements of Miss. Code Ann. § 99-19-101. And, Appellant's reliance on *Pinkton v. State* is misplaced. The State respectfully requests the Court deny Appellant's second claim for the following reasons:

1. *Review is barred.*

Review of Appellant's second claim is procedurally barred. The record reflects that Appellant did not object to the form of the jury's reformed sentencing verdict when it was returned. "[O]bjections to the form of a verdict will be barred unless the objection is made when the verdict is returned." *Jordan v. State*, 786 So.2d 987, 1003 (Miss. 2001) (citing *Edwards v. State*, 737 So.2d 275, 306-07 (Miss. 1999); *Smith v. State*, 729 So.2d 1191, 1216-17 (Miss. 1998)); *Thorson v. State*,

895 So.2d 85, 100, 103 (Miss. 2004); *Conner v. State*, 632 So.2d 1239, 1277 (Miss. 1993). Appellant argues against applying the procedural bar, insisting that trial counsel "*did everything in his power to prevent the court from* ..." accepting the reformed sentencing verdict. (Appellant's Br. at 35) (emphasis in the original). His argument is not supported by the record.

In his brief, Appellant insists he objected to the form of the reformed sentencing verdict during the bench conference that took place after the jury returned that verdict. He argues that "when the trial court failed to heed that caution, [Appellant] actually renewed his objection, expressly citing to the statutory provision violated, *before* the jury was discharged." (Appellant's Br. at 35). The record shows the following exchange occurred immediately after the conclusion of the bench conference above:

> THE COURT: In accordance with the jury's finding that the gentleman, [Appellant], should be put to death, the Court hereby sentences him in that regard and sets his execution date for the 19th day of November, 2014.
>
> Sufficient? Let that be put in the record as the verdict of the jury.
>
> Do you want him to stand and me do it?
>
> MR. LABARRE: I just have a simple motion concerning the form of the verdict.
>
> THE COURT: Is that the same one you've already had? You want to make another one?
>
> MR. LABARRE: When we came to the bench on this form of the verdict.
>
> THE COURT: Okay. Go ahead and make it.
>
> MR. LABARRE: Your Honor, the form of the verdict fails to comply with the instruction as set forth and it fails to comply with the statute on which that verdict is set forth. And we would ask the court to release the jury. They've already been polled. The Court has imposed sentence and the sentence is improper and because the form of the verdict is incomplete in spite of the jury's attempt to make it that way. It fails to set forth the accurate facts as set forth in paragraph A of that sentencing instruction. And now that the Court imposed sentence, *it's improper to send the jury back to*

> *correct any form of the verdict and he should now be sentenced by the Court.*

(Tr. 1820-21.) (emphasis added).

It is true that trial counsel stated that the verdict was incomplete two times during the bench conference. But the record reveals trial counsel made no objection to the form of the reformed verdict. What the record reflects is that trial counsel opted to wait until the trial court accepted the sentencing verdict before moving the trial court to release the jury and impose a sentence of life imprisonment without the possibility of parole. (Tr. 1821.). Precedent is clear: "[O]bjections to the form of a verdict will be barred unless the objection is made when the verdict is returned." *Jordan*, 786 So.2d at 1003 (citing *Edwards*, 737 So.2d at 306-07; *Smith*, 729 So.2d at 1216-17); *Thorson*, 895 So.2d at 100, 103; *Conner*, 632 So.2d at 1277. Because trial counsel did not object to the form of the reformed sentencing verdict when the jury returned it, review of Appellant's second claim for relief is barred. The Court should deny Appellant's second claim for this reason.

2. *The sentencing verdict satisfies the State's statutory requirements.*

Additionally and without waiving the procedural bar above, the reformed sentencing verdict's written finding, that Appellant committed the capital offense while engaged in the felonious abuse of V.V., satisfies the statutory requirements for imposing the death penalty. But first, the State would call attention to the definition of capital murder as it applies in this case. The Legislature defines capital murder, in part, as:

> The killing of a human being without the authority of law by any means or in any manner shall be capital murder ... [w]hen done with or without design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of section 97-5-39...

Jackson v. State, 684 So.2d 1213, 1227 (Miss. 1996) (citations omitted). And this Court recognizes

that the Legislature enacted Miss. Code Ann. § 97-3-19(2)(f) with the intent " 'that serious child abusers would be guilty of capital murder if the child died.' " *Jackson*, 684 So.2d at 1227 (internal brackets omitted) (quoting *Faraga v. State*, 514 So.2d 295, 302 (Miss. 1987)); *Brawner v. State*, 947 So.2d 254, 267-68 (Miss. 2006); *Bennett v. State*, 933 So.2d 930, 950-51 (Miss. 2006); *Brawner v. State*, 872 So.2d 1, 16 (Miss. 2004); *Stevens v. State*, 806 So.2d 1031, 1044 (Miss. 2001). To be convicted of capital murder while engaged in the commission of felonious abuse of a child in violation of Miss. Code Ann. 97-3-19(2)(f), the jury had to find Appellant actually killed V.V. This is reflected in indictment, which charges Appellant with "intentionally strik[ing] or otherwise abus[ing] the said [V.V.], Age 2, a human being, the exact manner to the Grand Jurors unknown, in such a manner as to cause serious bodily harm, all of said act complained of resulting *in the actual death* of the said [V.V.] on the 12th day of August, 2010...." (C.P. 9; 904) (emphasis added).

With that in mind, the State submits the sentencing verdict satisfies Miss. Code Ann. § 99-19-101(7). This is because the two factors listed under Section "A" of Sentencing Instruction S-5 are, in effect, the same. The record shows Sentencing Instruction S-5 informed the jury that it had to find at least one of two listed factors. The two factors listed under Section "A" of Sentencing Instruction S-5 are (1) that Appellant actually killed; and (2) that Appellant killed V.V. while engaged in the crime of intentional felonious child abuse. (C.P. 845.). The verdict contains the jury's written finding that "[t]he capital offense was committed while the defendant was engaged in the commission of felonious abuse of a child, [V.V.], age two (2)." (C.P. 1132; 1134.). So by making the written finding that Appellant committed capital murder while engaged in felonious child abuse, the jury necessarily found that Appellant actually killed V.V. The sentencing verdict contains one of the factors listed under Miss. Code Ann. § 99-19-101(7)—that Appellant actually killed. The

jury's written finding, that Appellant killed V.V. while engaged in the crime of intentional felonious child abuse, satisfies Miss. Code Ann. § 99-19-101(7).

The sentencing verdict also satisfies all three of Miss. Code Ann. § 99-19-101(3)'s requirements. As explained above, the jury unanimously found from the evidence proved Appellant committed capital murder by killing V.V. while engaged in the felonious abuse. That finding satisfies Miss. Code Ann. § 99-19-101(3)(a)'s requirement. The sentencing verdict also contains the written finding, that "the aggravating circumstances are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances[,]" which in turn, satisfies Miss. Code Ann. § 99-19-101(3)(b) and (c)s' requirements. (C.P. 1132.). Finally, the sentencing verdict comports with Miss. Code Ann. § 99-19-101(3)'s requirement that the jury be unanimous in its findings. (C.P. 1132.). The State submits the sentencing verdict contains the requisite *Enmund* finding and satisfies Miss. Code Ann. § 99-19-101's requirements to impose the death penalty.

Appellant claims this Court has no choice but to reverse his sentence. He argues Section 99-19-101(7)'s finding is absent from the sentencing verdict in this case. He relies on *Pinkton* as authority that holds the factors listed under Section 99-19-101(7) "cannot be supplied or inferred from other findings made by the jury or any other circumstances of the case. *Pinkton*, 481 So.2d at 310". (Appellant's Br. at 33). He even quotes the *Pinkton* Opinion where the Court said: "If the legislature thought it proper for us to imply a § 99-19-101(7) finding from other findings or from circumstances in the case, it is hard to explain why they required the jury to make a separate finding at all, let alone a *written* finding." (Appellant's Br. at 33). But his reliance on *Pinkton* is misplaced.

As the Court knows, Pinkton pled guilty to one count of capital murder for killing the owner

of a pawnshop during an attempted armed robbery. *Pinkton*, 481 at 307-08. A jury was impaneled for the sole purpose of deciding Pinkton's sentence. *Id.* at 308. After hearing the State's case in aggravation, which consisted of evidence offered to prove four aggravators, and Pinkton's case in mitigation, the jury returned a sentencing verdict. The sentencing verdict stated the jury had:

> found the following aggravating circumstances beyond a reasonable doubt:
>
> 1. The capital murder was committed while the defendant was engaged in an attempt to commit the crime of armed robbery.
> 2. The capital offense was committed by a person under sentence of imprisonment.
> 3. The capital offense was committed for pecuniary gain.
> 4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.
>
> The jury further found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances (which were not enumerated) and that Adam Pinkton must therefore suffer death for his crime.

Id.

Pinkton directly appealed his sentence to this Court, claiming that his sentence should be reversed. He argued the jury sentenced him to death without returning a verdict that contained any written *Enmund* findings. And he asked the Court to decide "whether the law requires a specific written finding by the jury relating to the defendant's actions and intent." *Id.* at 307. The Court looked to the record and found the jury had "embarked directly upon the framing of findings relating to the aggravating circumstances[]" without making the *Enmund* finding required by Miss. Code Ann. § 99-19-101(7). *Id*. at 309. It also found Miss. Code Ann. § 99-19-101(7) was clear in that "the jury *'must'* make a written finding that one or more of these circumstances existed before imposing the death sentence." *Id.* (emphasis in the original) (quoting Miss. Code Ann. § 99-19-101(7)). The Court reversed Pinkton's death sentence and remanded the case for further sentencing

proceedings. In doing so, the Court held Miss. Code Ann. § 99-19-101(7)'s requirement, that the jury make a written *Enmund* finding, was "indispensable to the valid imposition of the death penalty." *Pinkton*, 481 So.2d at 310.

Pinkton is factually distinguishable from this case. Appellant was charged with felony capital murder with the underlying felony of felonious abuse of a child. (C.P. 9; 904.). Appellant did not enter a guilty plea. (Tr. 7.). A jury found him guilty of capital murder. (C.P. 1132; 1134.). The jury had to find Appellant actually killed V.V to do so. (C.P. 9; 904.). And the jury considered the evidence supporting its guilty verdict as evidence aggravating in favor of imposing the death penalty. (C.P. 845.). The jury in this case found the evidence presented at trial proved Appellant's guilt and warranted imposing the death penalty. Importantly, the sentencing verdict returned in this case contained a written finding that Appellant actually killed V.V in accordance with Section 99-19-101(7). (C.P. 1132; 1134.). This fact is bolstered by the sentencing verdict's form, which mirrors section "C" of Sentencing Instruction S-5. The jury's sentencing verdict begins by stating: "We the Jury unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder[.]" (C.P. 1132.). Section "C" of Sentencing Instruction S-5, begins by stating:

> Your verdict should be written in one of the following forms:
>
> We, the Jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of the capital murder[:]
>
> (List or itemize all facts found, if any, from the list under Section A of all this instruction which you unanimously agree exist in this case beyond a reasonable doubt.)
>
> ....

(C.P. 847.). The sentencing verdict in this case is clearly distinguishable from the one returned in *Pinkton*. That verdict stated the jury had:

found the following aggravating circumstances beyond a reasonable doubt:

1. The capital murder was committed while the defendant was engaged in an attempt to commit the crime of armed robbery.
2. The capital offense was committed by a person under sentence of imprisonment.
3. The capital offense was committed for pecuniary gain.
4. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest.

The jury further found beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances (which were not enumerated) and that Adam Pinkton must therefore suffer death for his crime.

Pinkton, 481 So.2d at 308.

Pinkton is also legally distinguishable from this case. Specifically, the elements of the capital offense charged in this case distinguishes it from *Pinkton*. The State realizes the issue here is a sentencing issue. But the capital offense Appellant was found guilty of committing is relevant to his sentence and the jury's findings that support it. This case involves a felony capital murder conviction where the underlying felony was felonious abuse of a child, not armed robbery as in *Pinkton*. Even though it is discussed above, one point bears repeating. That is, a defendant can only be convicted of capital felony murder with the underlying felony of felonious child abuse if his " 'conduct fits the description of felonious child abuse, *and the child subsequently dies*....' " *Brawner*, 872 So.2d at 16 (emphasis added) (quoting *Faraga*, 514 So.2d at 302). " 'Any person who shall intentionally[,] ... except in self-defense or in order to prevent bodily harm to a third party, whip, strike or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse ... of a child....' " *Id.* at 15-16 (quoting Miss. Code Ann. § 97-5-39(2)(a)); *see e.g., Byers v. State*, 157 So.3d 98, 103 (Miss. 2014) (applying Miss. Code Ann. § 97-5-39(2) "as it existed when the offense occurred"). Serious bodily harm is " 'bodily injury that creates

a substantial risk of death, or permanent or temporary disfigurement, or impairment of any bodily organ or function.' " *Easely v. State*, 158 So.3d 283, 292 (Miss. 2015) (quoting *Buffington v. State*, 824 So.2d 576, 579 (Miss. 2002)). So the jury's finding that "the capital offense was committed while [Appellant] was engaged in the commission of felonious abuse of a child, [V.V.], age two (2)[,]" is, according to precedent, a finding that Appellant actually killed V.V. (C.P. 1132; 1134.).

Additionally, the State disagrees with Appellant's contention that *Pinkton* requires the Court to strictly construe Section 99-19-101 in his favor. In the three decades since *Pinkton* was handed down, this Court has chosen not to strictly construe criminal procedural statutes like Section 99-19-101. The State would briefly discuss two cases that illustrate this point, beginning with the most recent case of *Gillett v. State*, 148 So.3d 260 (Miss. 2014).

In that case, Gillett argued, among other things, that one of the several aggravators supporting his death sentences was invalid because "inadmissible evidence was put before his sentencing jury in support of the invalid aggravating factor...." *Gillett*, 148 So.3d at 264. The Court agreed with Gillett in this respect, vacated both of his death sentences, and remanded his case for a new sentencing hearing. *Id.* at 269.

But it is what the Court did not do in *Gillett* that makes that case relevant to this appeal. The Court expressly declined "to determine whether the remaining aggravators [we]re outweighed by the mitigating circumstances...." *Id.* at 267. In doing so, the Court recognized the U.S. Supreme Court's holding in *Clemons v. Mississippi*, 494 U.S. 738 (1990), "that 'the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review[.]' " *Id.* at 267-68 n. 34 (quoting *Clemons*, 494 U.S. at 741).

And the Court acknowledged the fact that the Legislature gave It the "authority to determine whether the remaining aggravators are outweighed by the mitigating circumstances ..." when it amended Section 99-19-105 in 1994. *Id.* at 268. The *Gillett* Court expressly observed the fact that,

> [i]n 1994, the Mississippi Legislature amended Section 99-19-105 to provide:
>
> > Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

Id. at 265 (footnote omitted) (quoting Miss. Code Ann. § 99-19-105 (Rev. 2007)). The Court did not expressly do the same with respect to part five of Section 99-19-105 in the *Gillett* Opinion. But It did exercise the authority that Section 99-19-105(5) grants the Court when remanding Gillett's case to the trial court.

Briefly, part five of Section 99-19-105states, in part, that the Court:

> In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
>
> (a) Affirm the sentence of death;
>
> (b) Reweigh the remaining aggravating circumstances against the mitigating circumstances should one or more of the aggravating circumstances be found to be invalid, *and*
>
> (I) affirm the sentence of death *or*
> (ii) hold the error in the sentence phase harmless error and affirm the sentence of death *or*
> (iii) remand the case for a new sentencing hearing; *or*
>
> (c) Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

Miss. Code Ann. § 99-19-105(5) (emphasis added).

Part five of Section 99-19-105 broadens the Court's appellate authority with respect to sentencing in three ways. The Court may affirm a death sentence outright. Miss. Code Ann. § 99-

19-105(a). It may set a death sentence aside and remand with instruction to modify a defendant's sentence to one less than death. Miss. Code Ann. § 99-19-105(c). Or, the Court may perform a re-weighing analysis and do one of three things: (1) affirm, (2) find any error harmless and affirm, or (3) remand for a new sentencing hearing. Miss. Code Ann. § 99-19-105(b).

Returning to the *Gillett* case, the Court did not strictly construe the statutory language of Section 99-19-105(5). It remanded Gillett's case to the trial court without re-weighing the remaining valid aggravating circumstances with the mitigating circumstances. *Gillett*, 148 So.3d at 269; *cf.*, Miss. Code Ann. § 99-19-105(b). In doing so, the Court explained that Its decision was based largely on U.S. Supreme Court precedent, including *Clemons*. *See id.* at 268 (recognizing the *Clemons* Court "was careful to emphasize its opinion should not be read to 'convey the impression that state appellate courts are required to or necessarily should engage in reweighing ... when errors have occurred in a capital sentencing proceeding[,]' " in part because the 'peculiarities in a case make an appellate re-weighing ... extremely speculative or impossible' ") (quoting *Clemons*, 494 U.S. at 741, 754).

The second case the State would call attention to is *Rowland v. State*, 42 So.3d 503 (Miss. 2010). As the Court knows, Rowland pleaded guilty to two counts of armed robbery and two counts of capital murder for two homicides that occurred during a poker game at the Leflore County Country Club in 1979 robbery. *Rowland*, 42 So.3d at 504. He received a life sentence for each capital murder charge and a twenty-four year sentence for each armed robbery charge that were to run consecutively. *Id.* at 505. In 2007, Rowland filed a petition for post-conviction relief in the Circuit Court of Washington County, claiming he had been convicted and sentenced twice for the crime of armed robbery in violation of the Double Jeopardy Clauses of the State and Federal

Constitutions. *Id.* Rowland recognized the fact that his petition was time-barred as it was filed a quarter of a century after the running of the Uniform Post-Conviction and Collateral Relief Act's (UPCCRA) three year statute of limitations. *Id.* Nevertheless, he argued his claim should be reviewed in spite of the UPCCRA's procedural bars, because it involved a fundamental constitutional right. *Id.* The trial court disagreed. It "dismissed Rowland's petition with prejudice, finding that it was time-barred by the UPCCRA's three-year statute of limitations." *Id.* (citation omitted).

Rowland appealed the trial court's decision. *Id.* And his case came before the Mississippi Court of Appeals. *Id.* That Court found Rowland's claims had been waived and were subject to the UPCCRA's time and successive-writ bars. *Id.* In doing so, the Court of Appeals acknowledged that this Court had held the right to be free from double jeopardy was a fundamental right, and errors affecting fundamental rights may be excepted from the UPCCRA's procedural bars. *Id.* at 505-06 (citations omitted). But ultimately, it declined "to exercise whatever discretionary authority it may have to consider otherwise time-barred issues pursuant to the "fundamental rights" exception[,]" and affirmed the trial court. *Id.* at 505-06 (citation and internal punctuation omitted). Rowland subsequently petitioned this Court for *certiorari* review.

On *certiorari* review, the Court held "errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA." *Id.* at 507. The Court's decision was based, in large part, on Its decision in *Smith v. State*, 477 So.2d 191 (Miss. 1985). The Court quoted the portion of the *Smith* Opinion where It previously acknowledged that: " 'Post-conviction proceedings are for the purpose of bringing to the trial court's attention facts not known at the time of judgment. Questions not alleged and raised at trial and/or on direct appeal are procedurally barred and may not

be litigated collaterally in a post-conviction environment.' " *Id.* at 506 (quoting *Smith*, 477 So.2d at 195). But, the Court noted that *Smith* and other cases had consistently held claims involving fundamental constitutional rights were not subject to the UPCCRA's procedural bars. *Id.* at 507-08. And because Its "jurisprudence in this area [wa]s less than consistent[,]" the Court took the opportunity to "hold, unequivocally, that errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA." *Id.* at 506.

Gillett and *Rowland* are two examples of cases where this Court decided not to strictly construe the language of an applicable criminal procedural statute. *Gillett* is relevant here, because the State statute in that case, Miss. Code Ann. § 99-19-105, was enacted in an effort to comply with U.S. Supreme Court precedents, *e.g.*, *Clemons*, that permitted appellate re-weighing. Like *Gillett*, this case involves a statute, Miss. Code Ann. § 99-19-101, that was enacted in an effort to comply the U.S. Supreme Court precedents, *e.g.*, *Enmund* and *Tison*. And *Rowland* is relevant, because its fundamental rights exception is one, which exemplifies the fact hat in certain instances, substance must trump form.

The State would make one final, significant point that concerns Appellant's reliance on *Pinkton*. That is, *Pinkton's* holding, that the Court must strictly construe criminal procedural rules without exception, is inconsistent with the holdings in both *Gillett* and *Rowland*. And those holdings cannot be reconciled. The Court has already found appellate re-weighing to be constitutionally sound. *Gillett*, 148 So.3d at 267-68 n. 34 (quoting *Clemons*, 494 U.S. at 741). And, there is no State or Federal constitutional right to post-conviction review or relief. And even then, the UPCCRA's procedural bars are necessary parts of this State's administration of justice. They are constitutionally permissible. *See Medina v. California*, 505 U.S. 437, 446 (1992) (recognizing that "it is normally

'within the power of the State to regulate procedures under which its laws are carried out ...' ") (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). The same is true of the UPCCRA's statute of limitations and other filing requirements. *See Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (acknowledging statute of limitations are filing conditions, "which go to the very initiation of a petitioner and a court's ability to consider that petition, are distinguishable from procedural bars, "which go to the ability to obtain relief") (citing *Artuz v. Bennett*, 531 U.S. 4, 10-11 (2000)). Because the statutes in *Gillett* and *Rowland* are constitutional, Appellant's contention—that *Pinkton* requires the strict construction of Section 99-19-101's language—leaves the Court with two options.

On one hand, the Court may side with the State and refuse to strictly construe Section 99-19-101, because it is clear here that the sentencing verdict complies with the State's statutory requirements and U.S. Supreme Court precedent. On the other hand, the Court may agree with Appellant and find that It must strictly construe Section 99-19-101. But the ramifications are significant, should the Court agree with Appellant. Doing so will abrogate the holdings of *Gillett* and *Rowland* to the extent the Court did not strictly construe the criminal procedural statutes in those cases. This is not true of the State's position.

Creating an exception for instances where, as here, it is clear the sentencing verdict satisfies Section 99-19-101's requirements and U.S. Supreme Court precedent is consistent with State law and this Court's precedent. The State realizes Section 99-19-9 is a general statute, rather than a specific one like Section 99-19-101. But it is worth considering Section 99-19-9's language, because it reflects the Legislature's intent. Section 99-19-9 states that:

> No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.

Miss. Code Ann. § 99-19-9. What can be gleaned from the language of Section 99-19-9 is that where it clear that a verdict meets the requirements of State law, form gives way to substance. This is consistent with precedent. "Where there has been substantial compliance with the law, a jury's verdict will not be reversed for mere want of form.... [I]f the jury's intent can be understood in a reasonably clear manner, there has been substantial compliance and there is no error." *Jordan v. State*, 912 So.2d 800, 814 (Miss. 2005) (citing Miss. Code Ann. § 99-19-9). " '[T]he basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court.' " *Jordan*, 912 So.2d at 814 (citations omitted).

The State urges the Court to adopt its position with respect to *Gillett*, *Rowland*, and *Pinkton.* The State's position is consistent with the legislative intent in construing statutory language and this Court's precedent. Based on the preceding, the State submits the sentencing verdict is sufficient as to form. Appellant's sentence should be affirmed.

4. ***The sentencing verdict satisfies the constitutional requirements.***

In addition, Appellant argues that the jury's sentencing verdict fails to satisfy the requirements of the Sixth and Eighth Amendments to the Constitution of the United States. (Appellant's Br. at 31). He is mistaken. The sentencing verdict passes constitutional muster.

The State submits the sentencing verdict meets the Eighth Amendment's requirements for imposing the death penalty. A "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983); citing *Gregg v. Georgia*,

428 U.S. 153 (1976)). In *Lowenfield v. Phelps*, 484 U.S. 231 (1988), the U.S. Supreme Court found "no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase." *Lowenfield*, 484 U.S. at 244-45 (citing *Jurek v. Texas*, 428 U.S. 262 (1976)). In *Wiley v. Epps*, 668 F. Supp.2d 848 (N.D.Miss. 2009). As "long as narrowing is performed at either the guilt or sentencing phases, the aggravating factor's duplication of an element of the crime does not offend the Constitution." *Wiley v. Epps*, 668 F. Supp.2d 848, 861 (N.D.Miss. 2009) (citations omitted).

As argued above, the sentencing verdict contains the jury's written finding that "[t]he capital offense was committed while the defendant was engaged in the commission of felonious abuse of a child, [V.V.], age two (2)." (C.P. 1132; 1134.). This finding is a finding that Appellant actually killed V.V., which satisfies the Eighth Amendments's requirements for imposing the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982). *Tison* and *Enmund* address the issue of proportionality in light of an offender's character, conduct, and culpability. *See Tison*, 481 U.S. 137 (1987) (upholding death sentence where defendants, who did not actually kill but substantially and recklessly participated in a series of events that culminated in multiple murders); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (recognizing robbery was a serious crime deserving serious punishment, but not death, because Enmund played a minor role in the commission of an armed robbery, and did not actually cause, or intend to cause the death of any individual during the commission of that crime). As stated above, the jury found Appellant actually killed V.V., twice. It only had to do so once in order to comply with *Enmund* and *Tison*.

Further, as "long as narrowing is performed at either the guilt or sentencing phases, the aggravating factor's duplication of an element of the crime does not offend the Constitution." *Wiley*,

668 F. Supp.2d at 861 (citations omitted); *see Lowenfield*, 484 U.S. at 246 (citing *Jurek v. Texas*, 428 U.S. 262, 269 (1976)). In *Holland v. State*, 705 So.2d 307 (Miss. 1997), this Court called attention to:

> the fact that the our statute restricts, limits and narrows the death penalty to certain classes of cases. One class consists of those cases in which two crimes have been committed, i.e., murder and another specified type felony. Another class concerns a murder for compensation, or "hire." *See* Miss. Code Ann. § 97-3-19(2)(a) and (d). Another class of crimes address specified classes of people considered particularly vulnerable, i.e., children, law enforcement personnel and public elected officials, etc. *See* Miss .Code Ann. § 97-3-19(2)(a), (e), (g).
>
> ....
>
> The constitutional challenge asserted here does not offend the Eighth Amendment of the United States Constitution, and this conclusion has been long ago held by the United States Court of Appeals for the Fifth Circuit in *Gray v. Lucas*, 677 F.2d 1086 (5th Cir. 1982), *reh'g denied*, 685 F.2d 139 (5th Cir. 1982), *cert. denied*, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815, *reh'g denied*, 462 U.S. 1124, 103 S.Ct. 3099, 77 L.Ed.2d 1357 (1983).

Holland, 705 So.2d at 320. The jury's guilty verdict is sufficient under the Eighth Amendment according to *Tison* and *Enmund* to impose the death penalty. The sentencing verdict in this case does not violate the Eighth Amendment to the Constitution of the United States.

Appellant also claims the sentencing verdict violates his Sixth Amendment right to a fair trial. He argues the Sixth Amendment requires a jury, ... rather than a judge, find each fact necessary to impose a sentence of death. (Appellant's Br. at 32-34). He relies on *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 619 (2016), *Ring v. Arizona*, 536 U.S. 584 (2002), and *King v. State*, 656 So.2d 1168, 1173 (1995). (Appellant's Br. at 32-33). The jury was the sentencer in this case, not the trial court. And the sentencing verdict clear stated that the jury was unanimous in finding Appellant should suffer death. (C.P. 1132; 1134.).

Appellant's reliance on *Hurst*, *Ring*, and *King* is misplaced. The jury found Appellant should

suffer death, not the trial court. For this reason, *Hurst*, *Ring*, and *King* do not apply in this case. Further, *Ring* " 'address[es] issues wholly distinct from our law....' " *Batiste v. State*, 121 So. 3d 808, 871 (Miss. 2013) (quoting *Brown v. State*, 921 So.2d 901, 918 (Miss. 2004) (citing *Stevens v. State*, 867 So.2d 219 (Miss. 2003))). The same is true of *Hurst*. The jury decides whether or not to impose the death penalty in this State. The jury's decision to impose the death penalty in this case does not violate Appellant's Sixth Amendment right to a fair trial.

5. *Double Jeopardy would not bar the State from seeking the death penalty on remand.*

Finally, Appellant claims his case must be remanded to the trial court for a sentencing hearing to impose a sentence less than death. (Appellant's Br. at 34-35). The State disagrees for the reasons above. There is no reason to remand this case. Nevertheless, the State will address this contention, because Appellant misstates U.S. Supreme Court precedent in an effort to mislead the Court. As he appreciates it, U.S. Supreme Court precedent holds the proposition that: "Under the double jeopardy clause of the United States Constitution any unanimous finding that results in a sentence other than death is preclusive of any subsequent retrial at which death is an option. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003) (citing *Bullington v. Missouri*, 451 U.S. 430, 446 (1981))." (Appellant's Br. at 34). He is incorrect for two reasons. For one, the jury imposed the death penalty. And two, his interpretation of *Sattazahan* is expressly contradicted by the Court's Opinion in that case. The U.S. Supreme Court could not have been clearer when It said that the:

> relevant inquiry for double-jeopardy purposes *was not whether the defendant received a life sentence the first time around*, but rather whether a first life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence-*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt.
>
> ....
>
> Under the *Bullington* line of cases just discussed, the touchstone for double-jeopardy

> protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital-sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result-or more appropriately, that non-result-cannot fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence." *Rumsey*, *supra*, at 211, 104 S.Ct. 2305.

Sattazahn, 537 U.S. at 108, 109.

Appellant's understanding of *Sattazahn* and *Bullington* is simply incorrect. More importantly, he does not even attempt to show the jury "acquitted" him. He cannot, particularly in light of the fact that the jury returned a sentencing verdict, which expressly stated "we unanimously find [Appellant] should suffer death." (C.P. 1132; 1134.). So even if the form of the sentencing verdict was deficient in some way—and it is not, Double Jeopardy would not bar the State from seeking the death penalty on remand for a new sentencing trial.

In sum, the Court should deny Appellant's second claim for relief. Review of his second claim is barred. The sentencing verdict satisfies the statutory and constitutional requirements for imposing the death penalty. Appellant's second claim is without merit. The State respectfully requests the Court deny Appellant's second claim .

III
The trial court did not err in admitting any of the evidence obtained by or through Greg Hancock or Randall Smith.

In his third claim, Appellant, challenges the trial court's evidentiary rules related to Greg "Hobo" Hancock and Randall "Satan" Smith. (Appellant's Br. at 40-89). This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Brown v. State*, 890 So.2d 901, 914 (Miss. 2004) (citing *Farris v. State*, 764 So.2d 411, 431 (Miss. 2000)). In order to

constitute grounds for reversal, an error in the admission or exclusion of evidence must affect a party's substantial right. *Brown*, 890 So.2d at 914 (citing *Farris*, 764 So.2d at 431); M.R.E. 103(a).

A. Deputy Madison's testimony

Appellant first takes issue with the trial court's decision to allow Jones County Sheriff's Deputy, Tonya Madison, to testify that she was able to secure a search warrant for Appellant's jail cell based on a statement that Hancock made to her. (Appellant's Br. at 45-61). According to him, "[t]he most egregious error regarding 'snitch' evidence was allowing Deputy Sheriff Tony Madison to inform the jury of what jailhouse snitch Gregory HOBO Hancock told Madison that [Appellant] had told HOBO." (Appellant's Br. at 45). He claims the trial court erred in allowing the State to elicit inadmissible hearsay without a limiting instruction and violated his right to confrontation. (Appellant's Br. at 45). The State disagrees.

Appellant's statement to Hancock does not constitute hearsay within hearsay. *See Brown v. State*, 969 So.2d 855, 860-62 (Miss. 2007). Hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing[,] and a party offers in evidence to prove ..." the matter asserted. M.R.E. 801(c). "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conform with an exception to the rule." M.R.E. 805. First, Appellant is the declarant. Appellant's statement to Hancock was a statement against party interest under M.R.E. 801(d)(2)(A). And, it was not offered for its truthfulness to prove Appellant murdered V.V.[8] Appellant's statement was offered to show a complaint was made and Deputy Madison responded. (C.P. 1082-83; Tr. 726-29.). The statement was also offered to show why Sheriff's

[8] "[A] person who makes a casual remark to an acquaintance" is not making a "testimonial" statement. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

Deputies recorded "the phone call between [Apellant] and his mother." (Tr. 728.). So by definition, Appellant's statement to Hancock was not hearsay.

Further, and as Appellant points out in his brief, the trial court permitted Deputy Madison to testify as follows:

> Q. (Mr. Parrish) Go ahead and tell us what was related to you by Greg Hancock that [Appellant] told him?
>
> A. [Ms. Madison] He told Mr. Hancock that he had -
>
> Q. When you say he?
>
> A. [Appellant] told Mr. Hancock that he had taken a phone book and placed it on top ofV.V.'s head and hit her with it.
>
> Q. And did what?
>
> A. Hit her in the head with it.
>
> Q. And as a result of that you secured a search warrant for his cell and went back, did you not?
>
> A. Yes, sir.

(Appellant's Br. at 45; Tr. 1424.).

The admission of out-of-court statements, which were made to the police during the course of their investigations, is permissible. "It is elemental that a police officer may show that he has received a complaint, and what he did about the complaint without going into details of it." *Swindle v. State*, 502 So.2d 652, 658 (Miss. 1987); *Rubenstein v. State*, 941 So.2d 735, 764 (Miss. 2006). The record reflects that is precisely what took place in this case. The trial court properly granted the State's motion to allow her testimony. (Tr. 747-48.). The State would also point out, with respect to the penalty phase and the admissibility of this evidence, that Mississippi Rule of Evidence 1101 states, in pertinent part, that:

> **(a) To Courts and Proceedings.** These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

> **(b) Exceptions.** These rules--except for those on privilege--do not apply to the following:
>
> **(4)** these miscellaneous proceedings:
>
> ....
>
> - sentencing....

M.R.E. 1101(a), (b)(4); *see Wilson v. State*, 21 So.3d 572, 587-88 (Miss. 2009) (" 'Rules 101 and 1101(b)(3) state that the Rules of Evidence do not apply to sentencing hearings.' ") (quoting *Randall v. State*, 806 So.2d 185, 231-32 (Miss. 2001)).

Appellant claims the trial court erred in denying him any opportunity to cross-examine Hancock during Deputy Madison's cross-examination "regarding the credibility of the source of the information she was sharing with the jury...." (Appellant's Br. at 60). It is Appellant's position that Hancock was the declarant of Appellant's admission. He is mistaken. As discussed above, Appellant's admission to Hancock was not hearsay. It was non-hearsay—an admission by a party-opponent. M.R.E. 801(d)(2)(A). And the only statement at issue is *Appellant's* statement. *He* was the declarant of his statement, not Hancock. There is no M.R.E. 806 issue.

Furthermore, there is no confrontation clause issue. There was absolutely nothing that prevented Appellant from calling Hancock to testify. The record reflects as follows:

> THE COURT: The reason I had Mr. Hancock to come up here today is because this gentleman advised me that Mr. Hancock would not talk to him. And I can't take a lawyer's word, even though he's an officer of the Court....
>
> MR. LABARRE: Your Honor, if I could? Just so that we can be clear, I did go to the jail yesterday when we concluded our hearing here. And I sat down with Mr. Hancock. I explained who I was, who I represented. And I explained that he had no obligation to speak to me. We did speak for approximately ten minutes --
>
> THE COURT: See, you hadn't advised the Court of that. You advised the Court that you tried to talk to him and he refused to talk to you. That's why I want everything on the record.

MR. LABARRE: And, Your Honor, if I -- just so you'll understand, he did not answer all of my questions --

THE COURT: That's beside the point.

....

THE COURT: Just let him come out here and let me ask him what his position is so I can get it on the record. I don't care what you people do. I'm tired of being the goat when it goes to the Supreme Court and the Supreme Court says the judge erred when it's the lawyers that forced the judge or put the judge in the position to make rulings that causes him to have an error. So I just want to get it right. I want to make sure that I get everything on the record and then the supreme court know what's going on. That's all. That's all I want to do.

Bring him out.

....

GREG HANCOCK WAS PLACED UNDER OATH BY THE CIRCUIT CLERK)

THE COURT: The only thing I want -- I don't want to ask you any questions about your testimony. I don't care what your testimony is. It's none of my business. The only thing I want to know for the record here today is did you have an opportunity to talk to this gentleman over here who is representing the defendant?

[HANCOCK]: Yes.

THE COURT: Did y'all have a discourse about what you were going to testify to? Did y'all talk about it?

[HANCOCK]: Not really because I'd rather not talk about the case to him or until trial date.

(Tr. 206-07; 208-09.).

Additionally, Appellant goes on to state that the trial court erred when he requested to have the jury " 'instructed on the limited purpose for which Hancock's statement was used by the State in this case' and tendered a form for the court to adapt to the particular facts of the instant matter...." (Appellant's Br. at 48). Even if this were applicable here, and it is not, the trial court did not err. The trial court gave the Appellant's proffered Instruction D-8, which read as follows:

> The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged informant, and requires the jury to weigh that testimony with great care and suspicion. You should weigh the testimony from an alleged informant, and passing on what weight, if any, you should give this testimony, you should weigh it with great care and caution and look upon it with distrust and suspicion.

(C.P. 819.). But, the trial court refused to give Appellant's proffered jury instruction form D-9:

> The court instructs the jury that evidence *[description of evidence]* may not be considered as evidence that the defendant committed the crime which the defendant is now charged. It may, however, be used for the limited and sole purpose of *[description of purpose]*.

(C.P. 825) (emphasis in the original).[9]

The trial court did not err in refusing jury instruction form D-9. First, the cases Appellant cites to and relies on, *Green v. State*, 89 So.3d 543, 552 (Miss. 2012) and *Brown v. State*, 890 So. 2d 901, 912 (Miss. 2004), concern limiting instructions in relation to M.R.E. 404B bad acts evidence. Appellant fails to cite any relevant authority to support the allegations in his second prosecutorial misconduct issue. His failure to do so "obviates [this Court]'s obligation to review [this] issue[.]" *Byrom v. State*, 863 So.2d 836, 866 (Miss. 2003).

Notwithstanding the bar, *Green v. State* holds trial courts should give " 'an *appropriately*-drafted limiting *or* cautionary instruction....' " *Green*, 89 So.3d at 552 (emphasis added) (quoting *Gore v. State*, 37 So.3d 1178, 1183 (Miss. 2010)). Trial counsel did not do this. He proffered a limiting instruction form and a cautionary instruction, Jury Instruction D-8. The trial court gave trial counsel's proffered Jury Instruction D-8. And the trial court properly denied Appellant's proffered jury instruction form. It was unnecessary, because Deputy Madison's testimony was not hearsay.

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[9] Trial counsel stated his belief that jury instruction form D-9 came "right out of the model jury instructions." (Tr. 1658.). A search of the Mississippi Model Jury Instructions (2012) available on this Court's website reveals no such instruction.

Furthermore, jury instruction form D-9 did not accurately state the law.

Regardless, Appellant continues by turning his attention to the necessity of the Madison's testimony regarding Hancock's statement. (Appellant's Br. at 51-57). Appellant argues the Court must consider the evidence against the record as a whole, even though he does not. (Appellant's Br. at 51). His entire argument is focused solely on downplaying the necessity of Deputy Madison's testimony and overstating its prejudicial effect. But he ignores a basic, "elemental" point. "It is *elemental* that a police officer may show that he has received *a complaint*, and *what he did about the complaint* without going into details of it." *Swindle*, 502 So.2d at 658; *Rubenstein*, 941 So.2d at 764. "[T]he state has a legitimate interest in telling a rational and coherent story of what happened." *Shaw v. State*, 513 So.2d 916, 919 (Miss. 1987) (citing *Giles v. State*, 501 So.2d 406 (Miss.1 987); *Brown v. State*, 483 So.2d 328 (Miss. 1986); *Turner v. State*, 478 So.2d 300 (Miss. 1985); *Neal v. State*, 451 So.2d 743 (Miss. 1984)).

Deputy Madison stated she received a complaint: "[Appellant] told Mr. Hancock that he had taken a phone book and placed it on top of V.V.'s head and hit her with it." (Tr. 1424.). She was asked: "And as a result of that you secured a search warrant for his cell and went back, did you not?" (Tr. 1424.). Her response was, "Yes, sir." (Tr. 1424.). Her testimony allowed the jury to hear how evidence proving Appellant's guilt was lawfully obtained in a logical sequence of events, making it necessary to the State's case. This is why Appellant goes to great lengths to convince this Court it was error when it simply is not. Deputy Madison's testimony was not merely bolstering the State's evidence. Her testimony was an evidentiary linchpin, tying the State's case together.

The State would also briefly address a few of Appellant's bald allegations. First, his allegation that Deputy Madison's testimony was insignificant given the fact that the State's case was

"so complete that the prosecutor was announcing himself ready and issue trial subpoenas long before July 2, 2013...." (Appellant's Br. at 53). Appellant moved for every continuance in this case. He was granted six. Years passed. And in that time a complaint was made that leads to additional and highly inculpatory evidence. Now he faults the State for offering it. This assertion is not a proper argument on appeal. This implication, that had he gone to trial sooner he would not have been convicted or that Deputy Madison's testimony was unnecessary, is pure speculation. This Court considers what happened, not what could have happened. It is irrelevant to whether Deputy Madison's statement was admissible.

And his allegation that the jury was "called upon to determine or question the legitimacy of the search warrant that produced the evidence presented to it. *Johnson*, 155 So.3d at 738." (Appellant's Br. at 53). Appellant is confused. Deputy Madison's testimony concerned a complaint and her response—obtaining a search warrant. Her testimony had nothing to do with the legitimacy of the search warrant.

Appellant also claims the trial court erred for failing to perform a M.R.E. 403 balancing test. (Appellant's Br. at 56, 64). There was no contemporaneous objection at trial. "It is incumbent on the party asserting error to make a contemporaneous objection and obtain a ruling in order to preserve the objection." *Brown v. State*, 965 So.2d 1023, 1029 (Miss. 2007) (citing *Billiot v. State*, 454 So.2d 445, 456 (Miss. 1984)). There was no error, much less plain error. And even then, Appellant has not demonstrated a violation of a constitutional right.

The Court should deny this issue, because it has no merit. The trial court did not err in allowing Deputy Madison's testimony concerning Hancock's statement. It is not hearsay. There is no confrontation clause issue, because Appellant could have called Hancock. And, Appellant did

not contemporaneously request the trial court perform a M.R.E. 403 balancing test. The State submits this issue should be denied.

B. Gang affiliation evidence

Next Appellant takes issue with evidence related to his gang affiliation that was offered and accepted at trial. (Appellant's Br. at 61-69). Here, he argues that evidence associating him with the Aryan Brotherhood was inadmissible under M.R.E. 404(b) and M.R.E. 403. He also contends that this evidence was non-probative under M.R.E. 401 and 402. The State disagrees.

Mississippi Rule of Evidence 404(b), which states,

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"It is clear that many jurisdictions across the country find gang involvement to be quite probative on the question of motive as suggested by the State. Therefore, this Court should reject Hoops's contention that his alleged involvement in a gang is not subject to the "Other Crimes, Wrongs, or Acts" exception found in Miss. R. Evid. 404(b)." *Hoops v. State*, 681 So.2d 521, 530 (Miss. 1996). As the State argued at trial, this evidence was relevant to show motive. He admitted to killing of V.V. as a means of gaining acceptance into the Aryan Brotherhood. It was relevant in this respect and admissible under the rules. M.R.E. 401 and 402.

With respect to M.R.E. 403, Appellant did not contemporaneously object and request the trial court perform a M.R.E. 403 balancing test when this evidence was offered. Again, "[i]t is incumbent on the party asserting error to make a contemporaneous objection and obtain a ruling in order to

preserve the objection." *Brown*, 965 So.2d at 1029 (citing *Billiot*, 454 So.2d at 456). This is not plain error. Appellant has not demonstrated a violation of a constitutional right. The State submits this issue is, in part, procedurally barred and without merit and should be denied.

C. Evidence obtained by and through Smith and Hancock

The State would address Appellant's final three issues, concerning the admissibility of evidence obtained by and through Randall Smith and Greg Hancock, together. (Appellant's Br. at 69-76; 76-79; 80-89). He argues all the evidence law enforcement obtained by and through Randall Smith and Greg Hancock should have been excluded pursuant to the mandates of *Maine v. Moulton*, 474 U.S. 159 (1985), *Massiah v. U.S.*, 377 U.S. 201 (1964) and *Page v. State*, 495 So.2d 436 (Miss. 1986). He is mistaken.

First and with respect to Hancock, the State informed trial counsel and the trial court prior to trial that there were no promises of rewards, or offers of leniency of any kind made to Hancock in exchange for his testimony. (Tr. 133.). The State also stated that

> no other law enforcement agency of the State of Mississippi has the right to make such a proposition. If they have and I find out about it, I will tell the defense. But to my knowledge as of today, they have not made *any promises*. They do not have the authority to do that. And I emphasize that, but I will tell them if I find out one has done that. And that's what they're entitled o know about all this stuff.

(Tr. 134) (emphasis added). This is further bolstered by the fact that Hancock was in jail at the time of trial and refused to testify, even seeking out a protection order from the trial court so that he would not be required to testify. There is no evidence in the record shows Hancock was ever offered any leniency or benefit. And the State submits that he, like the informant in *Brown*, 682 So.2d at 352, obtained the recorded statement while acting on his own initiative.

The recorded conversation between Appellant, his mother, Marsha, and Hancock also

indicates that Appellant expected Hancock the day of visitation. The recorded conversation was transcribed, in part, as follows:

> [Appellant]: was talking to his mother Marsha when he told her at 0:00:52 to *tell HOBO to come here*.
>
> Marsha: *do you want to talk with him*
>
> [Appellant]: *yeah*
>
> Hobo: what's up buddy?
>
> [Appellant]: what you doing son?
>
> Hobo: nothing
>
> [Appellant]: you come over here to visit us huh?
>
> Hobo: yeah
>
> Hobo: you alright?
>
> [Appellant]: yeah
>
> Hobo: that's good
>
> Hobo: *I told yall I was gonna come up here*
>
> [Appellant]: hey, Ah, I'm glad you come, Seth told me that Big Dave sent word up the road to get me smashed when I got up there, what is that all about?

(St.'s Ex. S-15) (emphasis added).

The record reflects that Randall Smith, after returning to the Jones County Jail, reached out to authorities in March of 2014. (Tr. 1480.). In his letter, Smith stated that he wanted to speak with the Sheriff about what he had learned from talking to Appellant while in the Jones County jail in the Fall of 2013. (Tr. 1480.). He was offered leniency to several pending charges, if he would testify truthfully for the State. (Tr. 1481.). But, there was no offer of leniency for obtaining the statements from Appellant. (Tr. 1482.). So, Smith was returned with a promise he would be released from custody if he testify truthfully for the State. (Tr. 1482.). He was returned to the Jones County jail and placed in the medical cell where Appellant was being housed. (Tr. 1482.). There, Appellant

approached him about joining the Aryan Brotherhood. (Tr. 1483.). Subsequently, Smith wrote a letter of recommendation to another AB member in imprisoned in Parchman. (Tr. 1483-84; St.'s Ex. 19-B.). Smith then mailed the letter of recommendation, signed by Appellant, to law enforcement. (Tr. 1488-89.).

In *Brown v. State*, 682 So.2d 340 (Miss. 1996), the Court refused to extend *Messiah's* rule to those instances where an individual acted on his own in obtaining incriminating information. There, the Court said:

> "The United States Supreme Court, in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), provided guidance on the use of government agents. Where a co-defendant specifically agrees to work as an agent of the government, statements made to the co-defendant by the defendant were inadmissible...."
>
> ....
>
> It is established in the case law that in order for there to be a Massiah-type violation of a defendant's sixth amendment right to counsel, the person eliciting the incriminating information must be acting as a government agent.
>
> ....
>
> We join the circuits that have expressly "refuse[d] to extend the rule in Massiah and Henry to situations where an individual, acting on his own initiative, deliberately elicits incriminating information."

Brown, 682 So.2d at 351-52 (quoting *U.S. v. Watson*, 894 F.2d 1345, 1347 (D.C. Cir. 1990)).

The State submits that neither Hancock nor Smith were State agents, but were individuals acting on their own initiative when they obtained statements from Appellant.

But Even assuming that Hancock and Smith were State actors, there was no constitutional violation. And the evidence that was obtained and admitted by and through their efforts admissible. "[A] volunteered statement, voiced without prompting or interrogation, is admissible in evidence if made prior to the warning and of course if it were voluntarily and spontaneously made subsequent

thereto, it would remain admissible in evidence." *Burge v. State*, 282 So.2d 223, 226 (Miss. 1973 (citing *Fabian v. State*, 267 So.2d 294 (Miss. 1972); *Boyles v. State*, 223 So.2d 651 (Miss. 1969); *Spurlin v. State*, 218 So.2d 876 (Miss. 1969); *Nevels v. State,* 216 So.2d 529 (Miss. 1968)). As demonstrated above, Appellant volunteered his statements without prompting or interrogation. This issue has no merit. The evidence obtained and admitted by and through Smith and Hancocks' efforts was admissible. Finally and as addressed in the following response, the State did actions did not amount to prosecutorial misconduct in obtaining evidence used to convict Appellant. There is no merit to Appellant's third claim. The State respectfully requests that it be denied.

IV

The prosecution did not engage in misconduct and the trial court did not err in refusing to recuse the district attorney's office from participating in the post-trial motions hearing.

In his fourth claim, Appellant argues the prosecution engaged in misconduct by sandbagging trial counsel, concealing inculpatory and exculpatory information, and making misrepresentations to the trial court and the defense. (Appellant's Br. at 90-103). According to him, this misconduct when considered in conjunction with other instances of misconduct referenced throughout his brief establish a "cumulative pattern of overkill" which warrants reversal of his conviction and sentence. (Appellant's Br. at 90). He also argues the trial court committed reversible error when it refused to recuse the district attorney's office from representing the State during a post-trial motions hearing. (Appellant's Br. at 103-06). The State addresses the allegations supporting Appellant's fourth claim herein:

A. Access to evidence

First, Appellant claims that it was the prosecution's policy to dispose of potentially

exculpatory evidence as a means of preventing its disclosure to the defense. He argues that the prosecution's efforts, in this respect, amount to a due process violation under *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *Freeman v. State*, 121 So.3d 888 (Miss. 2013). (Appellant's Br. at 91-95). To support his claim, he misrepresents the record as follows:

> While testifying on *direct examination*, the lead Sheriff's Department investigator testified that computers and cell phones from [Appellant]'s residence belonging to both him and V.V.'s mother had been collected and sent to the ATF for *expert forensic analysis* of their electronic contents. However, according to the officer, the ATF analysis produced "nothing useful for *us*" or inculpatory of [Appellant]. T. 1282 (emphasis supplied). The disks containing the ATF reports were nonetheless turned over to the DA's office. *Id*. However, as [Appellant] immediately noted, none of this information, and certainly none of those disks were ever furnished to the defense. T. 1283, 1287-88. *When called upon to explain this, the prosecutor acknowledged the truth of what the officer had testified to, told the court that he had not kept the ATF reports pursuant to a policy of not keeping evidence he knows to be potentially exculpatory*. T. 1288 ("I don't keep exculpatory stuff. And if l had any incriminating stuff that I was going to use, you'd know about it.")....

(Appellant's Br. at 91) (emphasis added and in the original). This simply is not true.

The misrepresentations of the record in the passage above must be addressed, beginning with those related to Investigator Nick Messersmith of the Jones County Sheriff's Department. Appellant relies on portions of Investigator Messersmith's testimony that were elicited by trial counsel on *cross* examination, not direct. On cross, Investigator Messersmith stated that "computers and cell phones" were seized from Appellant and Lilly Viners' residence. (Tr. 1282.). He did not identify the owners of those devices. He also testified that "electronic evidence" was "submitted to the ATF for electronic analysis[,]" not computers or cell phones. (Tr. 1282.). He stated that local law enforcement "received the results on discs and included in the case file but didn't use any of it in the investigation, there was very little found or if anything found that was useful to us." (Tr. 1282.). And when trial counsel asked, "you didn't find anything to indicate any type of guilt or anything on

the part of [Appellant][,] ..." Investigator Messersmith's response was simply, "Correct." (Tr. 1282.). Investigator Messersmith did not testify in any way to finding exculpatory evidence. And Investigator Messersmith testified that he had given the ATF analysis results to the DA. (Tr. 1282.).

Nevertheless, Appellant maintains that the record proves the prosecution denied him access to exculpatory evidence, which rose to such a level that it amounts to a due process violation under *Youngblood* and *Freeman.* But in applying *Youngblood's* three-part test to the facts in the record—rather than Appellant's skewed interpretations—the claim quickly crumbles. Appellant correctly states that this Court applies *Youngblood'*s three-part test in determining:

> whether the State's loss of evidence violates a defendant's due-process rights:
>
> > (1) the evidence in question must possess an exculpatory value that was apparent before the evidence was destroyed; (2) the evidence must be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means; and (3) the prosecution's destruction of the evidence must have been in bad faith.
>
> *State v. McGrone*, 798 So.2d 519, 523 (Miss.2001); *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 337-38, 102 L.Ed.2d 281 (1988).
>
> *Freeman v. State*, 121 So.3d 888, 895 (Miss. 2013)....

(Appellant's Br. at 92).

Turning to his brief, Appellant argues the prosecution's "admissions" prove the State knew the nature of the ATF analysis results was exculpatory and impeaching, thereby satisfying part one of the *Youngblood* test. (Appellant's Br. at 92). The prosecution admitted "nothing." (Tr. 1288.). And there is nothing about Investigator Messersmith's testimony proves the ATF analysis results "were forensic evidence that did not support the State's theory of a torture murder motivated by a desire to demonstrate to a racist neo-Nazi organization that he was worthy of admission to its ranks[,]" or "showed an absence of inculpatory evidence in a place where it might have been

expected to be found." (Appellant's Br. at 92-93). Without any reference and couched in a footnote, Appellant further asserts that:

> In 2010, no less than today, digital photography with cell phones and the ability to electronically share such photos with others via such phones or computers was ubiquitous. The fact that Blakeney's electronics contained nothing to establish he had been torturing, abusing and ultimately killing the child in a heinous way in order to demonstrate to the Aryan Brotherhood - with whom one would have expected him to share such proof - that he was worthy of becoming one of its members is clearly evidence that would have offered Blakeney the opportunity to undercut at least the State's theories of motive and statutory aggravation.

(Appellant's Br. at 93 n. 35). This is bald speculation. If he does not know what evidence was not disclosed to him, then how can he prove his allegation that: "Had the defense been given the ATF test results it could have been used to impeach witnesses advancing the State's torture and motive theories, ... as proof that there was no inculpatory evidence at a place where it might have been expected[]"? (Appellant's Br. at 93).

Appellant is incorrect. The record does not prove the ATF analysis results "possess[ed] an exculpatory value" or, as discussed below, that those results were ever destroyed. *Freeman*, 121 So. 3d at 895. He has not satisfied the first part of the *Youngblood* test, which is fatal to this issue.

Second, and because he cannot prove the ATF analysis results were not destroyed, Appellant cannot meet the second part of *Youngblood's* test. In fact, the record reflects that Appellant was aware of the ATF analysis results and had access to them. Appellant conveniently fails to mention the fact that trial counsel had Investigator Messersmith's 2010 summary report of the investigation of this case. Trial counsel questioned Investigator Messersmith about his summary report. The following exchange took place on cross:

> BY MR. LABARRE:
>
> ....

Q. I of course, reviewed a lot of your work that you performed in investigating this case as well because that's what you did then in 2010, right?

A. Yes, sir.

Q. I noticed and I'm sure you probably have reviewed your report that to me appeared to be some 37 pages in length as basically a summary report?

A. Correct.

Q. *And you do that you write down everything that you did.* And I think am I mistaken, I think you can hear your voice on that tape as well of the 911 tape?

A. *Yes, sir,* one of the latter phone calls is me requesting that CD be made.

Q. Sure. *And that's to preserve things for the future, like now?*

A. Yes, sir.

Q. Okay, *And I notice that you did in fact to my knowledge make a report of everything that you performed, all the duties that you performed in the investigation of this case?*

A. *Yes, sir.*

Q. You wrote a report for every single witness that you interviewed?

A. Yes, sir.

Q. I mean, that's what you do. That's what the protocol is at the sheriff's department, correct?

A. Yes, sir.

(Tr. 1276-77) (emphasis added).

The record shows the State neither suppressed nor disposed of the ATF analysis results. The State provided law enforcement reports to Appellant, which contained information relating to all the duties that Investigator Messersmith performed in the investigation of this case. (Tr. 1277.). Furthermore, the ATF analysis results were turned over to the prosecution and accessible to the defense. In *Youngblood*, the U.S. Supreme Court acknowledged that:

> In *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), we held that the prosecution had a duty to disclose some evidence of this description even though no requests were made for it, but at the same time we rejected the notion that a 'prosecutor has a constitutional duty routinely to deliver his entire file to

> defense counsel." [*Brady*, 373 U.S.] at 111, 96 S.Ct., at 2401; *see also Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

Youngblood, 488 U.S. at 55.

Third, this issue fails because Appellant has not, and cannot, show the State acted in bad faith. *Freeman*, 121 So.3d at 895. Appellant also misrepresents the portion of the record where the prosecution responded to trial counsel's asserted discovery violation. Following the State's brief re-direct of Investigator Messersmith, trial counsel charged the prosecution with having committed a discovery violation. (Tr. 1287.). Trial counsel claimed the State failed to disclose the results of the ATF analysis and complained "[w]e've gotten all kinds of things along the way Judge, as the Court is aware. And we'd like to know what else there is that we don't have. Other than that." (Tr. 1287.). The prosecution responded, "nothing." (Tr. 1287.). It went on to state that it had "not committed any discovery violations." It explained it did not know "specifically what Mr. Messersmith was talking about[,]" but would "go try to ask him and find out." (Tr. 1288.). The State rejected the assertion that it was suppressing—or as Appellant submits, disposing of—evidence in stating that it did not "keep exculpatory stuff...." It also stated that if it "had any incriminating stuff that [it] was going to use, [trial counsel] would know about it." (Tr .1288.).

Appellant has not demonstrated any bad faith on behalf of the prosecution. The record does not support his allegations that the prosecution instituted a policy to dispose of any evidence in order to prevent disclosure. The record does not support his contention that the ATF analysis results were unavailable to him. And the record does not support Appellant's allegations that the ATF analysis results had any exculpatory value whatsoever. There is no merit to the first issue supporting Appellant's fourth claim for relief.

B. Sentencing discretion

The second issue Appellant raises in support of his fourth claim is based on allegations that the prosecution abused its discretion in seeking the death penalty. (Appellant's Br. at 95-97). Specifically, Appellant claims the prosecuting attorney was overzealous in his advocacy, and was driven by personal achievement and ambitions of ascending to the bench. (Appellant's Br. at 95). The State submits this issue is procedurally barred, and alternatively without merit.

1. *Review is barred.*

First, review of this issue is procedurally barred. Appellant fails to cite any relevant authority to support the allegations in his second prosecutorial misconduct issue. His failure to do so "obviates [this Court]'s obligation to review [this] issue[.]" *Byrom v. State*, 863 So.2d 836, 866 (Miss. 2003). Because review is barred, this issue should be denied.

2. *The prosecution did not abuse its discretion in seeking the death penalty.*

Alternatively and without waiving the procedural bar, Appellant claims the prosecuting attorney chose to seek the death penalty as a means of pandering to the local electorate and boosting his record as a prosecutor in an effort to be elected circuit court judge. (Appellant's Br. at 95-96). In support, he quotes two newspaper articles as evidence, which "definitely suggests that the aggressive prosecution of Blakeney was undertaken to advance his electoral purposes and that the decision to cease negotiations and seek a death sentence simply based his on subjective belief as to what punishment Blakeney deserved...." (Appellant's Br. at 97). This issue is entirely without merit.

Well-established precedent recognizes:

> [T]he capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." ... As we have noted, a prosecutor can decline to charge, offer a plea bargain, ... or decline to seek a death sentence in any particular case. (citation omitted) Of course, "the power to be lenient [also] is the power to

> discriminate," ... but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

Ladner v. State, 584 So.2d 743, 751 (Miss. 1991) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 107 (1987)).

The State submits the information Appellant offers in support of his claim does not show the prosecutor abused his sentencing discretion in any way. He offers two newspaper articles, only one of which is related to this case. Both were published after Appellant had been tried, convicted, and sentenced. In fact, the article related to this case was published more than five months after Appellant had been tried, convicted, and sentenced.

More importantly, the judicial election, that Appellant claims was the motivating factor for the prosecutor's decision, took place in November of 2014, almost four years after Appellant had been formally arraigned on the offense charged in this case. (Tr. 7-8.). During the arraignment hearing, the prosecutor informed the trial court and Appellant that "this case does carry the possibility of the maximum penalty which is death." (Tr. 7.). Appellant offers no evidence that shows the prosecutor's purported bias before, during, or after trial. He makes no effort to demonstrate any person who served on the jury was unable to be impartial. The record completely belies his bald allegations. And, he fails to show—or even allege—that he was prejudiced in any way. Finally, the State submits the prosecutor committed no ethical violation. But even if he had, "that does not *per se* have any effect on the fairness of the trial." *Gulley v. State*, 779 So.2d 1140, 1147 (Miss. Ct. App. 2001).

The Court should deny the second issue supporting Appellant's second claim. Review of this issue is procedurally barred. Alternatively, this issue is not a basis for granting Appellant relief. Even if it were, Appellant offers no evidence to support his allegations that the prosecutor abused

his discretion by seeking the death penalty in this case. He does not claim to have suffered any prejudice. Further, he makes no makes no attempt to show he was denied his right to a fair trial. There is no merit to the second issue. Therefore, the State respectfully requests that it be denied.

C. Closing arguments

As a carry over from his second issue above and from his third claim for relief, Appellant insists the prosecutor, driven by personal achievement and ambitions of ascending to the bench, committed prosecutorial misconduct during his closing arguments during both phases of trial. (Appellant's Br. at 97-103). He claims the prosecutor argued "inflammatory facts not supported by the admissible evidence at both phases of the trial[,] ..." which violated his Sixth Amendment right to a fair trial. (Appellant's Br. at 97). The State disagrees. As demonstrated below, this issue like those before it, has no merit and should be denied.

Attorneys are afforded wide latitude in arguing their cases to the jury. *Galloway v. State*, 122 So.3d 614, 642-45 (Miss. 2013); *McGilberry v. State*, 741 So.2d 894, 910 (Miss.1999). The standard or review this Court applies in reviewing a claim of lawyer misconduct during closing arguments is "whether the natural and probable effect of the improper argument is to create unjust prejudice against the accused so as to result in a decision influenced by the prejudice so created." *Sheppard v. State*, 777 So.2d 659, 661 (Miss. 2000). "Any allegedly improper prosecutorial comments must be considered in context, considering the circumstances of the case, when deciding on their propriety." *McGilberry*, 741 So.2d at 910 (citing *U.S. v. Bright*, 630 F.2d 804, 825 (5th Cir. 1980)); *U.S. v. Austin*, 585 F.2d 1271, 1279 (5th Cir. 1978).

" 'The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts.' " *Galloway*, 122 So.3d

at 643 (quoting *Bell v. State*, 725 So.2d 836, 851 (Miss. 1998). In analyzing the prosecutor's closing argument, "it is necessary to examine the surrounding circumstances and be careful not to take a statement out-of-context." *Spicer v. State*, 921 So.2d 292, 318 (Miss. 2006) (citing *Williams v. State*, 522 So.2d 201, 209 (Miss. 1988)). " '[T]he court cannot control the substance and phraseology of counsel's argument; there is nothing to authorize the court to interfere until there is either abuse, unjustified denunciation, or a statement of fact not shown in evidence.' " *Grayson v. State*, 118 So.3d 118, 139 (Miss. 2013) (internal quotation marks omitted) (quoting *Manning v. State*, 735 So.2d 323, 345 (Miss. 1999)). To violate Due Process, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." *Grayson*, 118 So.3d at 139 (internal quotation marks omitted) (quoting *Manning*, 735 So.2d at 345).

1. *Guilt phase argument and State's Exhibit S-15*

Appellant claims the prosecutor's arguments, relating to a recorded conversation between Appellant, Marsha Blakeney, and Greg Hancock that was offered and accepted into evidence during the culpability phase of trial, amounts to prosecutorial misconduct. (Appellant's Br. at 98-100). According to Appellant, "[t]he prosecutor's argument these things in support of [Appellant]'s guilty was argument of facts not in evidence that deprived [Appellant] of a fair trial, and requires reversal of [his] conviction as a consequence." (Appellant's Br. at 100). The State does not agree.

Review of the third issue supporting Appellant's fourth claim, to the extent they concern the prosecutor's closing arguments related to State's Exhibit S-15, is procedurally barred. Trial counsel made no contemporaneous objection. Therefore, these assertions are not properly before the Court. *Galloway*, 122 So.3d at 642-43 (citing *Scott v. State*, 8 So.3d 855, 864 (Miss. 2008); *Caston v. State*, 823 So.2d 473, 503-02 (Miss. 2002); *McCaine v. State*, 591 So.2d 833, 835 (Miss. 1991)). The

Court should refuse to consider them.

Alternatively, and without waiving the bar, the State submits there is no merit to Appellant's related to State's Exhibit S-15. Appellant's arguments are, in reality, evidentiary challenges. His statement, that "the entire tape recording was admitted into evidence over [Appellant]'s objections on relevancy, hearsay and confrontation clause grounds, and there was never any showing by the State that anything on that tape beyond the conversation with HOBO during its first two minutes, transcribed in Hearing (6-10-14) Ex. D-1, was relevant, or if relevant, was not excludable under Rule 403, 404 or as hearsay[,]" is a prime example that illustrates this point. (Appellant's Br. at 99). It is also worth noting that statements, like the one just quoted, are entirely inconsistent with others he makes in support of the same contention. For example, Appellant states: "The prosecutor's argument these things in support of [Appellant]'s guilt was argument of facts not in evidence that deprived [Appellant] of a fair trial, and requires reversal of [Appellant]'s conviction as a consequence." (Appellant's Br. at 100).[10] This is nonsense. One of those statements must be false. Either State's Exhibit S-15 was in evidence or it was not. It cannot be both. And the record reflects the trial court accepted State's Exhibit S-15 as evidence during the guilt phase of trial. " 'The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts.' " *Galloway*, 122 So.3d at 643 (quoting *Bell*, 725 So.2d at 851). Appellant's assertions with respect to State's Exhibit S-15 are barred, unsupported, inaccurate, self-contradicting, and utterly devoid of merit.

2. *Penalty phase argument*

[10] With respect to his stream-of-conciseness assertion related to Dr. Benton, those baseless allegations are contrary to the record and discussed, *infra*.

Appellant also takes issue with the State's penalty phase closing argument. He makes two arguments here. First, "the prosecutor improperly focused much of his argument in favor of sentencing [Appellant] to death on the victim impact of the crime and to have the jury weigh that impact against the mitigating evidence the defense ..." presented. (Appellant's Br. at 100). Second, that in "final closing" the prosecutor's argument amounted to a combination of " 'in the box,' *Stringer v. State*, 500 So.2d 928, 938-39 (Miss. 1986), 'golden rule,' *Chisolm v. State*, 529 So.2d 635, 639-40 (Miss. 1988), *Holliman v. State*, 79 So. 3d 496, 500 (Miss. 2011) and 'send a message,' *Brown v. State*, 986 So. 2d 270, 275 (Miss. 2008) arguments...." (Appellant's Br. at 100-101).

First, with respect to victim impact evidence, review is procedurally barred. Trial counsel made no contemporaneous objection on the basis of victim impact evidence. Therefore, this assertion is not properly before the Court. *Galloway*, 122 So.3d at 642-43 (citing *Scott*, 8 So.3d at 864; *Caston*, 823 So.2d at 503-02; *McCaine*, 591 So.2d at 835 (Miss. 1991)). In addition, Appellant makes no cognizable argument with respect to an "in the box" closing argument or a "golden rule" closing argument. His present contentions are barred for this reason as well. *See Brown v. State*, 690 So.2d 276, 297 (Miss. 1996) (barring review of claims, which were not supported by "meaningful argument or relevant authority"). The Court should refuse to consider them.

The Court should also carefully compare Appellant's misrepresentation of the State's closing argument with the closing argument in the record. In doing so, the Court will find Appellant's contentions are complete mis-characterizations. Appellant mis-characterizes the State's closing argument. The passage he quotes from the Record discusses photographs of V.V. that were properly admitted into evidence. " 'The prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts.' "

Galloway, 122 So.3d at 643 (quoting *Bell*, 725 So.2d at 851). Furthermore, the State's argument was relevant to showing a sentence of death was warranted as an especially heinous, atrocious, or cruel murder. V.V. was a two-year old, who depended on Appellant for basic needs. She was exceptionally vulnerable. There is no merit to this assertion.

When considering a send-a-message claim, the Court asks two questions and applies a two-part test. *Brown v. State*, 986 So.2d 270, 275-76 (Miss. 2008) (citing *Spicer v. State*, 921 So.2d 292 (Miss. 2006)). The first, and already answered question, is whether counsel objected. *Brown*, 986 So.2d at 276. He did. (Tr. 1807.). The second question is "whether it appears, in examining the surrounding circumstances, that defense counsel invited the comment." *Id.* (citing *Spicer*, 921 So.2d at 318). Next, in order to reverse, " 'the court must determine (1) whether the remarks were improper, and (2) if so, whether the remarks prejudicially affected the accused's rights.' " *Id.* (quoting *Spicer*, 921 So.2d at 318). " '[I]t must be clear beyond a reasonable doubt, that absent the prosecutor's comments, the jury [w]ould have found the defendant guilty. This goes beyond a finding of sufficient evidence to sustain a conviction.' " *Id.* (quoting *Spicer*, 921 So.2d at 318). The State submits again, that the Court should carefully compare Appellant's version of the State's closing penalty phase argument with the closing arguments in the record. (Appellant's Br. at 100). There, the Court will be hard-pressed to find any support for Appellant's contentions.

Second, with respect to his "combination" closing argument, the record reflects that trial counsel objected only to "a send-a-message argument" at closing. (Tr. 1807.). Review of his combination argument, to the extent he argues an "in the box" or a "golden rule" violation, is barred. *See Thorson v. State*, 825 So.2d 85, 112 (Miss. 2004) (holding the proposition that where no contemporaneous objection is made to such argument the claim is waived) (citing *Foster v. State*,

639 So.2d 1263, 1270 (Miss. 1994); *Walker v. State*, 671 So.2d 581, 597 (Miss. 1995) (same). He makes no cognizable "send a message" argument. *See Brown v. State*, 690 So.2d 276, 297 (Miss. 1996) (barring review of claims, which were not supported by "meaningful argument or relevant authority").

Without waiving the procedural bar above, the State would address Appellant's contentions regarding an "in the box" and a "golden rule" combination violation, beginning with his "in the box" contention. Nothing in the State's closing argument rises to the level of prosecutorial misconduct. A review of the State's closing argument, procedural bar notwithstanding, reveals no such violation. In order to sustain a claim of prosecutorial misconduct based on this closing argument, the conduct complained of must "be of sufficient significance to result in the denial of the defendant's right to a fair trial." *Gray v. State*, 728 So.2d 36, 54-5 (Miss. 1998) (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987)). That is not the case here.

The State's closing argument did not deprive Appellant of a fair trial in any way. Appellant's "in the box" argument, mis-characterizes the State's closing and his reliance on *Stringer v. State*, 500 So.2d 928 (Miss. 1986) is misplaced. *Stringer* concerned putting the jury in the box by "voir dire tactics" and then asking that jury to fulfil a promise made prior to trial to prior to trial, to "ignore evidence favorable to the defendant." *Id*. at 938-39. That is clearly not the case here. The Appellant's claim is barred from consideration and is alternatively devoid of merit. Appellant is entitled to no relief on this assignment of error.

Finally, Appellant claims the trial court committed error by allowing impermissible "golden rule" argument during the State's penalty phase closing argument. (Appellant's Br. at 101). As the Court held in *Wells v. State*, 698 So.2d 497, 507 (Miss. 1997), quoting from *Chisolm v. State*, 529

So.2d 635, 639-40 (Miss. 1988), in regards to the golden rule:

> It has long been the law in this state that "golden rule" arguments, *i.e.*, asking the jurors to put themselves in the place of one of the parties, will not be permitted in civil cases.... There is no reason on principle why this prohibition on "golden rule" arguments should not extend as well to criminal cases.

Here the prosecution was not asking the "jurors to put themselves in the place of one of the parties", which is why the State submits there was no "golden rule" violation.

To the extent the Court deems otherwise, the State submits that, as was the case in *Well*s, the error was harmless and was "sufficiently insignificant in the overall context of the case." *Wells v. State*, 698 So.2d at 507. In this case, as in *Well*s, "[i]n light of the overwhelming evidence against [Appellant], the jury's verdict likely was not influenced by any prejudice that might have resulted from the district attorney's isolated 'golden rule' argument." *Id*.

Appellant's claim that this question stands in violation of *Payne v. Tennessee*, 501. U.S. 808 (1991) is barred from consideration as the Appellant made no such objection at trial. Alternatively, and without waiving the bar, the Appellee submits their was no solicitation of sentencing which was improper. The State's argument is consistent with *Payne v. Tennessee*, 501. U.S. 808 (1991). For the reasons previously stated, should the Court determine such a violation, it should be deemed harmless. Appellant is entitled to no relief on this assignment of error.

D. The trial court's refusal to recuse the district attorney's office

Finally, Appellant argues the trial court erred for refusing to recuse the district attorney's office from participating in a post-trial motions hearing. (Appellant's Br. at 103-06). "A defendant cannot complain on appeal of alleged errors invited or induced by himself." *Singleton v. State*, 518 So.2d 653, 655 (Miss. 1988) (citing *Davis v. State*, 472 So.2d 428 (Miss. 1985); *Browning v. State*, 450 So.2d 789 (Miss. 1984); *Jones v. State*, 381 So.2d 983 (Miss. 1980)). The reason being:

> appellant cannot assail as prejudicial his own trial tactics, because it would fasten a propensity in litigants to create error to enhance the possibility of reversal and repeated trials. This he is not permitted to do. *Simpson v. State*, 366 So.2d 1085 (Miss. 1979).

Singleton, 518 So.2d 381 at 655 (quoting *Jones*, 381 So.2d at 991).

With respect to Appellant's first and second reasons for recusal that (1) the post-trial hearing on "motions required testimony from the District Attorney himself on contested matters raised in the post-trial motions" (Appellant's Br. at 104), and (2) "the hearing itself focused heavily on prosecutorial misconduct and abuse of the prosecutorial discretion misconduct ..." (Appellant's Br. at 105), the State has already addressed the issue of prosecutorial discretion. But it would reiterate the point in making another two. First, Appellant called the District Attorney to testify. And second, Appellant had absolutely no right to call the District Attorney and question him as to why the prosecuting attorney sought the death penalty in this case. For one, Appellant did not make a *prima facie* showing of any wrong-doing. And another, the law does not provide Appellant with an opportunity to call the District Attorney to testify as witness during a post-trial motions hearing, so that he can invite error. Again, well-established precedent recognizes:

> [T]he capacity of prosecutorial discretion to provide individualized justice is "firmly entrenched in American law." ... As we have noted, a prosecutor can decline to charge, offer a plea bargain, ... or decline to seek a death sentence in any particular case. (citation omitted) Of course, "the power to be lenient [also] is the power to discriminate," ... but a capital punishment system that did not allow for discretionary acts of leniency "would be totally alien to our notions of criminal justice."

Ladner v. State, 584 So.2d 743, 751 (Miss. 1991) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 107 (1987)).

In *McCleskey v. Kemp*, the United States Supreme Court also said:

> "[C]ontrolling considerations of ... public policy," *McDonald v. Pless*, 238 U.S. 264, 267, 35 S.Ct. 783, 784, 59 L.Ed. 1300 (1915), dictate that jurors "cannot be called

> ... to testify to the motives and influences that led to their verdict." *Chicago, B. & Q.R. Co. v. Babcock*, 204 U.S. 585, 593, 27 S.Ct. 326, 327, 51 L.Ed. 636 (1907). Similarly, the policy considerations behind a prosecutor's traditionally "wide discretion"[] suggest the impropriety of our requiring prosecutors to defend their decisions to seek death penalties, "often years after they were made."[] *See Imbler v. Pachtman*, 424 U.S. 409, 425-426, 96 S.Ct. 984, 992-993, 47 L.Ed.2d 128 (1976).[18] Moreover, absent far stronger proof, it is unnecessary to seek such a rebuttal, because a legitimate and unchallenged explanation for the decision is apparent from the record: McCleskey committed an act for which the United States Constitution and Georgia laws permit imposition of the death penalty.

McCleskey, 548 U.S. at 296 (some footnotes omitted). The *McCleskey* Court, in a footnote, went on to state that:

> Although *Imbler* was decided in the context of damages actions under 42 U.S.C. § 1983 brought against prosecutors, the considerations that led the Court to hold that a prosecutor should not be required to explain his decisions apply in this case as well: "[I]f the prosecutor could be made to answer in court each time ... a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S., at 425, 96 S.Ct., at 992. Our refusal to require that the prosecutor provide an explanation for his decisions in this case is completely consistent with this Court's longstanding precedents that hold that a prosecutor need not explain his decisions unless the criminal defendant presents a *prima facie* case of unconstitutional conduct with respect to his case. *See, e.g., Batson v. Kentucky, supra*; *Wayte v. United States, supra*.

Id. at 297 n. 17. This contention is without merit.

Thirdly and finally, Appellant claims the trial court erred in refusing to recuse the district attorneys office, because the District Attorney hired the trial court's law clerk. (Appellant's Br. at 105). The only basis he offers in support of this allegation is that: "Although the District Attorney testified, neither he nor the other attorney in the office who was representing the State in the proceedings made any statement or representation that any firewall was erected to preclude Ms. Martin from participating in this matter, as would, indeed, be almost impossible in an office that small with the case distribution methods described by the District Attorney." (Appellant's Br. at 105). Prior to the post-trial hearing, Ms. Martin, former law clerk of the trial court, executed and

then filed an affidavit with the trial court, which read:

> I, Kristen E. Martin, Assistant District Attorney for the 18th Circuit Court District, Jones County, State of Mississippi, do hereby make an oath as follows:
>
> I have, at no time, discussed the case of State of Mississippi v. Justin Blakeney, Cause Number 2010-294-KR2, with any member of the Jones County District Attorney's Office and will not do so.
>
> I will not participate in any hearings with regard to State of Mississippi v. Justin Blakeney nor in any possible re-trial of said case.

(C.P. 1172.). The trial court had the sworn statement of his former law clerk that she had not, and would not, concern herself with this case in any way. The trial court did not err in refusing to recuse the district attorney's office from participating in the post-trial motions hearing. There was no impropriety. And this issue is without merit.

The Court should deny Appellant's fourth claim for relief. It is entirely without merit. Appellant is entitled to no relief for any issue raised in support of his fourth claim. Therefore, the State respectfully requests that it be denied.

V
Double Jeopardy did not bar Appellant's retrial.

In his fifth assignment of error, Appellant claims the Double Jeopardy Clauses of the state and federal constitutions barred his capital murder retrial. (Appellant's Br. at 106-113). His reasoning is that the government and trial court induced the mistrial of his initial capital murder trial through prosecutorial misconduct and judicial error during the jury selection process. Appellant asked for a mistrial, and got one. He chose to move for a mistrial, rather than proceed with trial. He terminated his initial capital murder trial, and relinquished his right to have the first jury decide his case. And he fails to show judicial error or intentional prosecutorial misconduct induced him into moving for a mistrial or to avoid an acquittal

The Double Jeopardy Clauses of the Mississippi Constitution, Miss. Const. art. III § 22, and the Constitution of the United States, U.S. Const. amend V, provide three protections: "(1) protection from a second prosecution for the same offense after acquittal, (2) protection from a second prosecution for the same offense after conviction, and (3) protection from multiple punishments for the same offense." *Kelly v. State*, 80 So.3d 802, 805 (Miss. 2012) (citation omitted); *see Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982). ("The Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant from repeated prosecutions for the same offense.") (citing *United States v. Dinitz*, 424 U.S. 600, 606 (1976)). Double jeopardy prohibits a second prosecution following an acquittal or a conviction.

Double jeopardy may bar retrial when initial trial proceedings end before an acquittal or a conviction in order to protect a defendant's " 'valued right to have his trial completed by a particular tribunal.' " *Kennedy*, 456 U.S. at 671-72 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); *see U.S. v. Dinitz*, 424 U.S. 600, 607 (1976); *U.S. v. Jorn*, 400 U.S. 470, 484-85 (1971) (*plurality opinion*); *Downum v. U.S.*, 372 U.S. 734, 736 (1963). But that " 'does not mean ... every time a trial aborts or does not end with a final judgment the defendant must be set free.' " *King v. State*, 527 So.2d 641, 643 (Miss. 1988) (quoting *Watts v. State*, 492 So.2d 1281, 1284 (Miss. 1986); citing *Schwarzauer v. State*, 339 So.2d 980, 982 (Miss. 1976)). " '[A] retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused.' " *U.S. v. Campbell*, 544 F.3d 577, 58o (5th Cir. 2008) (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978)). The Double Jeopardy Clauses "[do] not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of criminal laws in one proceeding." *Kennedy*, 456 U.S. at 672 (citing *Jorn*, 400 U.S. at 483-84; *Wade*, 336 U.S. at 689).

"If the law were otherwise, 'the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.' " *Id.* (quoting *Wade*, 336 U.S. at 689).

A defendant's interests in avoiding repeated prosecution may be involved in two situations: "the first, in which the trial judge declares a mistrial; the second, in which the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence." *United States v. Scott*, 437 U.S. 82, 92 (1978). This claim involves a situation "in which the trial judge terminates the proceedings favorably to the defendant on a basis not related to factual guilt or innocence." *Scott*, 437 U.S. at 92.

In support, Appellant cites *Martinez v. Illinois*, ___ U.S. ___ , 134 S.Ct. 2070, 2074 (2014) (*per curiam*)., as authority that "makes it clear the purpose of getting another chance to try the case after witness becomes available again is sufficient, standing alone, to warrant double jeopardy preclusion. 134 S.Ct. at 2076." (Appellant's Br. at 110). But, the *Martinez* Court said It granted *certiorari* to remove the confusion the Illinois State Supreme Court's introduced when answering two questions that were clearly answered precedents. Did jeopardy attach during the proceedings? And if so, did the proceeding end in a way that would bar retrial? *Martinez*, 134 S.Ct. at 2074. It did nothing more.

In *Martinez*, the prosecution refused to participate in trial proceedings, because it was unable to locate key witnesses. The State proceeded to knowing it had insufficient evidence to convict Martinez. in nearly five years' time. *Id.* at 2072-73. In that time, the State had been given multiple opportunities to find and produce those witnesses. Just before the start of trial, the prosecution moved for a continuance on the ground that it could not proceed without two witnesses' testimony.

The state trial court denied the motion and placed the jury under oath soon after. *Id.* at 2073. When the trial court directed the prosecution to proceed with opening statements, the prosecution refused to participate. *Id.* at 2073. The defense, in turn, moved for and was granted a directed verdict. *Id.*

The prosecution appealed to the Illinois Appellate Court, over Martinez's objection that it had been improvidently granted his appeal. *Id.* The prosecution argued that jeopardy never attached, and Martinez was never at risk of being convicted. The appellate court agreed and ruled that jeopardy never attached. *Id.* Martinez then appealed to the Illinois Supreme Court, who affirmed the appellate court's decision that jeopardy had not attached. The supreme court acknowledged the general rule that jeopardy attaches when "the defendant is put to trial before the trier of facts." *Id.* at 2073 (citation and internal quotation marks omitted). It held "the relevant question [wa]s whether a defendant was subjected to the hazards of trial and possible conviction." *Id.* at 2074 (citations omitted).

Martinez's case ultimately made its way to the U. S. Supreme Court, where it was reversed. The *Martinez* Court held the state supreme court erred in applying the general rule "that 'jeopardy attaches when the jury is empaneled and sworn.' " *Id.* at 2074 (quoting *Crist*, 437 U.S. at 35; *see also Martin Linen Supply Co.*, 430 U.S. 564, 569; *Serfass*, *supra*, at 388; 6 W. LaFave, J. Israel, N. King, & O. Kerr, CRIMINAL PROCEDURE § 25.1(d) (3d ed. 2007)). The state supreme court "misread our precedents in suggesting that the swearing of the jury is anything other than a bright line at which jeopardy attaches. The state supreme court also erred in holding double jeopardy did not bar Martinez's retrial, because " 'the trial court's entry of directed verdicts of not guilty did not constitute true acquittals.' " The *Martinez* Court, in reversing the decision, said the state supreme court "misread our precedents in suggesting that the swearing of the jury is anything other than a

bright line at which jeopardy attaches."

The facts in *Martinez* are easily distinguishable from this case, particularly the fact that the U. S. Supreme Court held double jeopardy's subsequent prosecutions for the same offense following an acquittal. There was no acquittal in this case. "This case presents two issues. First, did jeopardy attach to Martinez? Second, if so, did the proceeding end in such a manner that the Double Jeopardy Clauses' bar retrial? Our precedents clearly dictate an affirmative answer to each question." *Martinez*, 134 S.Ct. at 2075. Appellant's initial capital murder trial ended in a mistrial, rather than an acquittal or a conviction. The Double Jeopardy Clauses of the state and federal constitutions did not bar his capital murder retrial. To reach that conclusion, this Court, like the *Martinez* Court, must answer two questions. Did jeopardy attached during the initial trial proceedings? And if so, did the proceedings end in a way that would bar retrial? *Martinez*,134 S.Ct. at 2074.

A. Did jeopardy attach?

With respect to the first question, the answer is yes. "There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.' " *Martinez,* 134 S.Ct. at 2073 (quoting *Crist v. Bretz*, 437 U.S. 28, 35 (1978) (some citations omitted). The rule, that jeopardy attaches when the jury is sworn, is the law in this State, and has been for more than three decades. *See Jones v. State*, 398 So.2d 1312, 1314 (Miss. 1981) (adopting the rule "that double jeopardy attaches in any criminal proceeding at the moment the trial is selected and sworn to try the case").

The record reflects that, on February 4, 2014, twelve jurors were selected by the parties, placed under oath, and instructed to inform the trial court "if anything happens that makes you feel uncomfortable or if something happens that makes you feel like you couldn't proceed as a fair and

impartial juror...." (Tr. 572.). Jeopardy attached during Appellant's initial capital murder trial.

B. Did the first trial end in a way that would bar retrial?

But the answer to the second question is, no. "The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with re-prosecution, *see U.S. v. Jorn*, 400 U.S. 470, 476, 91 S.Ct. 547, 552, 27 L.Ed.2d 543 (1971) (plurality opinion), while a dismissal may or may not do so." *Lee v. U.S.*, 435 U.S. 23, 30 (1977). In determining whether double jeopardy bars retrial when a defendant's initial proceedings ended prior to final resolution of the charged offense, the party responsible for the mistrial must be identified.

Appellant requested the mistrial that terminated his initial trial when the trial court and parties learned Larry Smith, Juror 4, would have to be excused. The record reflects that:[11]

> THE COURT: All right. Put on the record what you told the Court.
>
> THE CLERK: I'm just letting you know that juror number four --
>
> THE COURT: Okay. Put it on the record. Everything that's said in this trial has to be put on the record. Tell it on the record.
>
> THE CLERK: Juror number four, Larry Smith, informed the bailiffs that he does not have anyone to watch his children.
>
> THE COURT: Who was the bailiff?
>
> [BARROW]: Me.
>
> THE COURT: All right. Just state in the record what he told to you.
>
> [BARROW]: He told me that he has no one to watch his kids. He said he bought it up to us and we were going to try to tell somebody, in which we did. That's all I could tell him. We told him, and he was told he had to make arrangements. And he said, well, I have nobody to take care of my kids. I have no arrangements. And I said, I'll go tell them and I walked out of the room.

[11] [Barrow], identified above, refers to Bailiff Randy Barrow.

MR. PARRISH: Who does he think he told?

[BARROW]: He told me and he told Bart.

MR. PARRISH: You said you would tell somebody?

[BARROW]: Yeah. I told Bart this morning. He told Bart too as well.

....

MR. LABARRE: ... I was somewhat taken aback this morning concerning the drawing of additional jurors for the purpose of alternates after we had met about that and talked about it. Obviously, we had 12 jurors. You know, as the Court is aware, this individual who is in the 12 now has obviously got a problem. He stated it to the bailiffs. It's been put info the record, Your Honor, I'm concerned at this point about the sequestration issues with the current jurors that we have, the publicity issues dealing with the potential alternates or if one at this paint -- I'm just saying if something were to happen between now and selecting alternates, we end up where we're actually selecting someone to replace one that's already gone. I'm concerned about some of those issues. I believe that at this point, and possibly if I had, and I'm not saying the Court did not give me enough time to think about it, but it's possible that we were hasty in our decision concerning the additional jurors.

We would move for a mistrial. And again, this is not without some serious thought and consideration. I have discussed it with my client. He is in agreement in us making the motion. Your Honor, I think, again, under these circumstances and just the way this, you know -- and again, it's not the Court's fault that only 70 out of many people showed up. I thought -- I mean, we all thought we were going to have more than enough jurors, but for whatever reason we only had the numbers we did. We got down low. Just some of these issues, Your Honor, we just really feel like are going to be problems.

[MR. LABARRE:] And I'm not doing this without some discussion already with the State. I'm not speaking for them, but I'm not sure that there's any serious objection. I don't know. I'm sure that Mr. Parrish will speak for himself. But it just to --- to say it's unusual, that this whole procedure so far has been unusual is an understatement. And again, that's no reflection on anybody, the Court, the State, us, anything. It's just -- it doesn't-- it just hasn't been the normal situation.

THE COURT: You keep saying it's no reflection on the Court. How can it be a reflection on the Court.

> MR. LABARRE: I'm not trying to say that you have made anything unusual or extraordinarily different. I'm just saying that it just seemed like there was same things that rose during the course of the voir dire and jury selection that just made this more unusual than ordinary, Judge.

(Tr. 573-74; 579-81.) Here, Appellant moved for the mistrial.

The general rule that presently applies is: "A defendant who moves for a mistrial is generally barred from later asserting a double jeopardy violation." *Davenport v. State*, 662 So.2d 629,632 (Miss. 1995) (citing *McClendon v. State*, 387 So.2d 112, 114 (Miss. 1980)); *see Jones*, 398 So.2d at 1318 ("A mistrial granted in such a case would never bar a subsequent trial for the same offense."). "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Scott*, 437 U.S. at 93. A defendant's motion " 'for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error.' " *Id.* (quoting *Jorn*, 400 U.S. at 485); *see Kennedy*, 456 U.S. at 673; *Dinitz*, 424 U.S. at 609; *U.S. v. Tateo*, 377 U.S. 463, 467 (1964). By moving for a mistrial, Appellant chose to forgo having the initial jury try his case.

There is, however, a narrow exception to this rule. Precedent teaches that:

> In order to elevate an order granting a mistrial in a criminal case at the request of the defendant to one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court *for the purpose* of forcing the defendant to move for the mistrial.
>
> In other words, "[w]ithout proof of judicial error prejudicing the defendant, or 'bad faith prosecutorial misconduct,' double jeopardy does not arise.

McDowell v. State, 807 So.2d 413, 422 (Miss. 2001) (emphasis and brackets in the original) (quoting

Carter v. State, 402 So.2d 817, 821 (Miss. 1981)); *see also Kennedy*, 456 U.S. at 673-79 ("delineat[ing] the bounds of th[is] exception more fully than ... in previous cases"). "In other words, 'without proof of judicial error prejudicing the defendant, or bad faith prosecutorial misconduct, double jeopardy does not arise.' " *McDowell*, 807 So.2d at 422 (internal quotation marks and brackets omitted) (quoting *Jenkins*, 759 So.2d at 1234 (quoting *Jorn*, 400 U.S. at 482)).

The intent of the prosecutor or trial court must be examined in determining whether a claim meets this narrow exception. But, "[j]udicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused—cases in which the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori*, 367 U.S. at 369; *Kennedy*, 456 U.S. at 674-75 (refusing to broaden the exception with more general standards "bad faith conduct" or "harassment").

Appellant contends that a manifest necessity existed when Larry Smith, Juror 4, informed two bailiffs that he would have to be excused. (Appellant's Br. at 108). He cites *Spann v. State*, 557 So.2d 530, 532 (Miss. 1990), in asserting:

> when the sworn jury was reduced to 11 by the need to dismiss one of its members, and there was no way of obtaining any impartial alternate jurors, no valid verdict could be returned by the remaining jurors. This qualifies as a "manifest necessity" for the mistrial regardless of who seeks it, and a defendant's lack of opposition to it does not prevent review on appeal.

(Appellant's Br. at 108). He also relies on *Jenkins v. State*, 759 So.2d 1229, 1234 (Miss. 2000) as authority that holds, "[w]here a mistrial is granted for manifest necessity, retrial is prohibited only if the mistrial is the result of 'judicial error prejudicing the defendant, or bad faith prosecutorial

misconduct....' " (Appellant's Br. at 108-09).

Contrary to Appellant's interpretation, the only party with any burden to show a manifest necessity exists is the State. And the State must bear that burden only when it is the party seeking a mistrial over a defendant's objection. "A prosecutor, who moves for a mistrial over a defendant's objection, " 'must demonstrate manifest necessity for any mistrial declared....' " *Washington*, 434 U.S. at 505. Appellant moved for mistrial. And by doing so, Appellant "deliberate[ly] elect[ed] ... to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Scott*, 437 U.S. at 93. If Appellant's amalgamation of the law was true, he would be able to effectively deny the State of any opportunity to carry its burden. He would also be able to deny the trial court of any opportunity to consider and resolve timely objections to a motion for a mistrial. Fundamental fairness principles aside, the most obvious consequence of these denials would be limiting the scope of review on direct appeal. *See Puckett*, 556 U.S. at 134 (quoting *U.S. v. Padilla*, 415 F.3d 211, 224 (1st Cir. 2005) (" '[A]nyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.' ").

Appellant is confused. If the State moves for a mistrial or a trial court declares one, *sua sponte*, "a second trial is barred because of double jeopardy, unless taking into consideration all the circumstances there was a 'manifest necessity' for the mistrial." *Jenkins*, 759 So.2d at 1234 (citing *Watts*, 492 So.2d at 1284); *Box*, 610 So.2d at 1152; *see Jones*, 398 So.2d 1312. But, "a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Scott*, 437 U.S. at 93. Also, when a defendant consents, expressly or implicitly, to a mistrial, the "manifest necessity" standard has no

application and double jeopardy generally will not bar a retrial. *Kennedy*, 456 U.S. at 672; *see Palmer*, 122 F.3d at 218 (finding consent to a mistrial may be express or implied by failing to object) (citing *Bauman*, 887 F.2d at 549). The manifest necessity standard is inapplicable here.

Jeopardy did not bar Appellant's capital murder retrial. He moved for a mistrial after hearing counsels' concerns with selecting alternate jurors and when it became apparent that Juror Number 4, Larry Smith, would have to be excused. " '[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error.' " *Scott*, 437 U.S. at 93 (quoting *Jorn*, 400 U.S. at 485); *see Kennedy*, 456 U.S. at 673; *Dinitz*, 424 U.S. at 609; *Tateo*, 377 U.S. at 467. His motion "is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Id.*; *see Davenport*, 662 So.2d at 632; *McClendon*, 387 So.2d at 114.

Appellant agreed with counsel that moving for mistrial was in his best interest. He " 'retain[ed] primary control over the course to be followed....' " *Id.* at 93-94 (quoting *Dinitz*, 424 U.S. at 609). The State informed the trial court that it would not object if Appellant would waive "any prejudice, including claims of double jeopardy...." (Tr. 583-84.). When asked whether he would "agree with [the State] about jeopardy in this case[,]" Appellant, through counsel, stated that "[h]e waive[d] any jeopardy claim at this point as far as jeopardy attaching." (Tr. 585, 586.). So in addition to requesting the mistrial, Appellant expressly consented to terminating his initial trial. *See Palmer*, 122 F.3d at 218 (holding consent to a mistrial may be express be implied by failing to object). The manifest necessity standard does not apply here and the Double Jeopardy Clauses of the state and federal constitutions did not bar his retrial. *Kennedy*, 456 U.S. at 672; *Palmer*, 122 F.3d

at 218 (citing *Bauman*, 887 F.2d at 549).

It was noted earlier that the Double Jeopardy Clauses of the state and federal constitutions provide protection from prejudice caused by government oppression (*i.e.*, multiple prosecutions for the same offense after acquittal, or for the same offense after conviction, and multiple punishments for the same offense). But here, Appellant has not suffered any injury that the Double Jeopardy Clauses' protections prohibit. Appellant was not acquitted or convicted. Appellant moved for a mistrial on a basis that was entirely unrelated to the factual question of guilt or innocence. Appellant persuaded the trial court to terminate the proceedings before the question of his guilt or innocence was submitted to the jury. The trial court declared a mistrial before the jury heard any evidence. The Double Jeopardy Clauses of the state and federal constitutions did not bar his capital murder retrial. The Court's inquiry ends here.

C. The manifest necessity standard does not apply.

Nevertheless, the State will briefly address the manifest necessity standard. It "provides sufficient protection to the defendant's interests in having his case finally decided by the jury first selected while at the same time maintaining 'the public's interest in fair trials designed to end in just judgments.' " *Kennedy*, 456 U.S. at 672 (quoting *Wade*, 336 U.S. at 689). The standard is flexible, and "no simple rule or formula defining the standard of 'manifest necessity' or when exceptional circumstances exist justifying a declaration of mistrial by the trial court." *Jones*, 398 So.2d at 1318. "[A] manifest necessity may be found to exist in the following circumstances: failure of a jury to agree on a verdict; biased jurors; an otherwise tainted jury; improper separation of jury; and, when jurors demonstrate their unwillingness to abide by the instructions of the court...." *Jenkins*, 759 So.2d at 1235 (citing *Spann*, 557 So.2d at 532); *see Box*, 610 So.2d at 1152-53 (finding "a manifest

necessity ... where a juror failed to divulge, after an unambiguous inquiry, that she was related to a law enforcement officer in a case where the entire venire had been exhausted by the time twelve jurors had be selected to try the case").

With respect to the manifest necessity standard, a defendant who moves for a mistrial is fundamentally the same as a defendant who consents to a mistrial. In both situations, the defendant believes a mistrial should be declared. According to Appellant, "[w]here a mistrial is granted for manifest necessity, retrial is prohibited only if the mistrial is the result of 'judicial error prejudicing the defendant, or bad faith prosecutorial misconduct.' " (Appellant's Br. at 108-09). But the mistrial in this case was not granted for a manifest necessity. The mistrial was declared on Appellant's motion.

In any event, trial courts are given broad discretion in deciding whether to grant a mistrial for a manifest necessity. *Illinois v. Somerville*, 410 U.S. 458, 462 (1973); *Jones*, 398 So.2d at 1318-19. In *Jones*, this Court offered the State's trial courts sound advice concerning motions for a mistrial. It suggested:

> a prudent procedure for any trial court before declaring a mistrial would be to state into the record the reasons for declaring a mistrial. It is in his sound discretion to determine the necessity of declaring a mistrial, and upon any appeal his reasons as stated for the record will be accorded the greatest weight and respect by an appellate court.

Jones, 398 So.2d at 1318-19; *Knox v. State*, 912 So.2d 1004, 1007-08 (Miss. Ct. App. 2005).

In his brief, Appellant turns his sights to the trial court, who he contends, admitted to making "two specific constitutional errors that could, had not fate intervened with structural error caused by prosecutorial misconduct, have deprive[d] [him] of his 'most fundamental of all rights he possesses under our law: his right to a fair trial before an impartial jury...." (Appellant's Br. at 110-11). The

first error he identifies is the failure to grant Appellant's motion for a change of venue before attempting to seat a jury. (Appellant's Br. at 111). The second error is that the trial court "fail[ed] to dismiss the venire and grant the change of venue when [he] renewed his request after the pervasive bias had been displayed during the first day's voir dire." (Appellant's Br. at 111). With respect to the State, Appellant raises two issues. First, he argues "[t]he manifest necessity for the mistrial due to the publicity tainted venire was created by the publicity the prosecutor's misconduct had put into play in the first place." (Appellant's Br. at 109). Then, he complains the State refused to move for a mistrial, in spite the fact that it "really wanted" one, because "the prosecutor had at least one necessary medical expert who would not be available to testify due to the additional time that the latter process, at least, would have required." (Appellant's Br. at 109-110).

"The U.S. Supreme Court has said 'if [the trial judge] discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." ' " *Jenkins*, 759 So.2d at 1236 (quoting *Washington*, 434 U.S. at 509). Appellant fails to show that is what occurred in this case. As far as prosecutorial misconduct, "'[i]n order to prevail on this kind of error, it is incumbent upon an appellant to show that the prosecution by its argument intended to goad the defendant into moving for a **mistrial**, or intended to provoke the defendant into moving for a **mistrial**.'" *Wheat v. State*, 599 So.2d 963, 965 (Miss. 1992) (emphasis in the original) (internal punctual omitted) (quoting *Kennedy*, 456 U.S. at 673). Precedent teaches that:

> In order to elevate an order granting a mistrial in a criminal case at the request of the defendant to one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate to all such orders, but that such error was committed by the prosecution or by the court *for the purpose* of forcing the defendant to move for the mistrial.

> In other words, "[w]ithout proof of judicial error prejudicing the defendant, or 'bad faith prosecutorial misconduct,' double jeopardy does not arise.

Here too, Appellant fails to carry his burden. With respect to his contention, that the State knew at least one of its necessary witnesses would be unavailable to testify at a later time and refused to move for mistrial, he fails to show error or that the prosecution intended to goad or provoke him into moving for a mistrial. The record reflects that the State, prior to Appellant's motion wanted the trial court and the defense to:

> know in advance. This is not a problem, but if I have scheduling things I want everybody to understand. Right know I have Doctor Gruszecki, the pathologist, coming from. Jackson. I also have Doctor Benton who is a witness coming -- Doctor Gruszecki flew in from Dallas. Doctor -- I'm sorry. Doctor Benton is coming in from Jackson and he's on standby. He also has a funeral for Thursday of his mother-in-law. I had hoped, and I still will if I can, to get him through here by tomorrow. I also have one other witness, and these are things that are beyond my control too, with the Mississippi Bureau of Investigation, Jimmy Herzog, whose wife is having surgery tomorrow.
>
> So that being said, I just want that known. And we'll go ahead and draw these people. But if I get in a jam up with them, I'm trying to keep it all on a roll for everybody, for the Court and all. But please understand that I'm juggling them too, so, you know, we've got -- I don't want -- if somebody has to wait 30 minutes or we get wound up with them.
>
> That's what I'm dealing with with the witnesses, and I can't help that either. So if that comes up, you know, that's the reason. I'll try to have them all available at the right time, but some things happen that nobody can control. So I just want everybody to be aware of that. So that's where I'm having to come from.

(Tr. 565-66.).

The record reveals no error. The fact that the State, prior to Appellant's motion, gave notice of potential scheduling issues, makes it distinguishable from both *Martinez and Downum*. If, for example, a prosecutor proceeds to trial aware that key witnesses are not available to give testimony and a mistrial is later granted for that reason, a second prosecution is barred. *Downum*, 372 U.S. 734. That is not the case here.

For the reasons above, the State submits Appellant's fifth claim is entirely without merit. The State reiterates the point that Appellant's is mistaken in interpreting *Jenkins v. State*, to hold, "[w]here a mistrial is granted for manifest necessity, retrial is prohibited only if the mistrial is the result of 'judicial error prejudicing the defendant, or bad faith prosecutorial misconduct....' " (Appellant's Br. at 108-09). *Jenkins* clearly states: "If a mistrial is granted upon *the court's motion* or upon *the State's motion*, a second trial is barred because of double jeopardy, unless taking into consideration all the circumstances there was a 'manifest necessity' for the mistrial." 759 So.2d at 1234 (emphasis added) (citing *Watts*, 492 So.2d at 1284). And Appellant's reliance on *Spann* amounts to an admission that a manifest necessity existed in this case. (Appellant's Br. at 108). So assuming, *arguendo*, that Appellant is correct, double jeopardy would not bar his capital murder retrial. "[A] second trial is barred because of double jeopardy, *unless* ... there was a 'manifest necessity' for the mistrial." *Jenkins*, 759 So.2d at 1234 (emphasis added) (citing *Watts*, 492 So.2d at 1284). There is no merit to this claim. Therefore, the State respectfully requests it be denied.

VI
The jury was comprised of twelve impartial individuals.

In his sixth claim, Appellant argues the trial court denied him of his Sixth Amendment right to a fair trial when it empaneled a jury comprised of Greene County jurors. (Appellant's Br. 113-22). First, he takes issue with the Greene County venire, in general. Second, he challenges the trial court's decision to overrule his objection to Cynthia Hicks, venire person number 62, as an abuse of discretion. As demonstrated below, Appellant is mistaken in both instances.

A. The jury was not tainted by the media.

According to Appellant, he was denied his Sixth Amendment right to a fair trial, because the

jury that actually convicted and sentenced him was seated from a Greene County jury pool that was exposed to the same prejudicial media exposure that "tainted the jury pool in Jones County...." (Appellant's Br. at 115). He argues "[t]he trial court denied [his] request [for a change of venue within the broadcast radius of local media outlets], ... and ordered the venire selected from Greene County, because it was an easy commute from Laurel and people from that county did not appear to mind being sequestered. T. 599-600." (Appellant's Br. at 115). This simply is not true.

First, the trial court selected Greene County in accordance Section 99-15-35 and prior experience where it " had very good success getting a jury...." (Tr. 599.). During sequestered *voir dire* and in response to trial counsel's *ore tenus* renewed motion for a change of venue, the trial court reiterated the fact that it was:

> satisfied that we have a venue that we can obtain a fair and impartial. jury. I've used this venue before. And the venue here, the juries that have been selected here has been tested in cases that's gone before the Supreme Court of Mississippi and the Supreme Court of the united States of America. And as far as that issue is concerned, it was settled, as far as I'm concerned, at such time as those cases were approved to be -- this venue was approved by then to continue. That's my explanation.

(Tr. 1049-50.).

"The decision to grant a change of venue rests soundly in the discretion of the trial judge." *King v. State*, 960 So.2d 413, 429 (Miss. 2007). And that decision will not be reversed where there is no abuse of discretion. *Howell v. State*, 860 So.2d 704, 718 (Miss. 2003). Section 99-15-35 states:

> On satisfactory showing, in writing, sworn to by the prisoner, made to the court, or to the judge thereof in vacation, supported by the affidavits of two or more credible persons, that, by reason of prejudgment of the case, or grudge or ill will to the defendant in the public mind, he cannot have a fair and impartial trial in the county where the offense is charged to have been committed, the circuit court, or the judge thereof in vacation, may change the venue in any criminal case to a convenient county, upon such terms, as to the costs in the case, as may be proper.

Miss. Code Ann. § 99-15-35.

Appellant relies on the broadcast radius of various media outlets as proof, which he believes is proof that shows an impartial jury could not be seated from a Greene County jury pool. He cites *Cox v. State*, 183 So.3d 36, 45-46 (Miss. 2015), *Rideau v. State of Louisiana*, 373 U.S. 723, 726 (1963), *Fisher v. State*, 481 So.2d 203, 215 (Miss. 1985). (Appellant's Br. at 115). But those cases do not support his position.

In *Cox*, the Court specifically stated that:

> Cox's reliance on *Rideau v. State of Louisiana* is misplaced, as the facts of *Rideau* are markedly different from those presented in this case. *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). *Rideau* reveals that the trial occurred only two months after Rideau confessed in a televised interview conducted by the sheriff, which was broadcasted on three different occasions to a total of 97,000 viewers. *Rideau*, 373 U.S. at 724, 83 S.Ct. 1417. Three members of the jury stated that they had seen the "interview," and two members of the jury were deputy sheriffs. *Id*. at 725, 83 S.Ct. 1417. The United States Supreme Court held that the denial of the change of venue was a denial of Rideau's due process rights. The Court stated that:
>
> > For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial-at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.
>
> *Id.* at 726, 83 S.Ct. 1417. *See also Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751 (1961) (After a thorough review of the record, the Supreme Court noted that eight of the twelve jurors believed the defendant to be guilty prior to the start of the trial. "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.").
>
> Cox "presented no evidence of "saturation media publicity" (see *Fisher*, 481 So.2d at 215), "pervasive exposure" (*see Rideau*, 373 U.S. at 726, 83 S.Ct. 1417), or "public passion" (*see Irvin*, 366 U.S. at 728, 81 S.Ct. 1639). Nor, as posited by the dissent, are the elements of *White v. State*, 495 So.2d 1346 (Miss. 1986), present. There is no evidence of "threatening crowds" or "an inordinate amount of media coverage." *Id*. at 1349. The cases relied upon by both Cox and the dissent are so

> factually dissimilar from the present case that it cannot be argued logically that the presumption of prejudice is irrefutable. "Mississippi law on the subject of change of venue has been primarily summarized in the cases of *Cabello v. State*, 490 So.2d 852 (Miss. 1986); *Wiley v. State*, 484 So.2d 339 (Miss. 1986); *Fisher v. State*, 481 So.2d 203 (Miss. 1985); *Johnson v. State*, 476 So.2d 1195 (Miss. 1985); and the cases incorporated therein." *White*, 495 So.2d at 1348. However, those cases focus on the presence of "extraordinary and intensely prejudicial pretrial publicity." *Id*. There is no evidence of any such "extraordinary or intensely prejudicial pretrial publicity" in this case.

Cox, 183 So.3d at 45-46.

Appellant, like Cox, is mistaken in his reliance on *Rideau*. The same is true of his reliance on *Fisher*. In that case, this Court emphasized the fact that, "saturation media coverage" created a communal sense of fear and the disclosure of prejudicial, and inadmissible, facts. 481 So.2d at 217. That did not occur in this case. Under this Court's precedent, negative pretrial publicity is insufficient, on its own, to show an abuse of discretion. *See Barfield v. State*, 22 So.3d 1175, 1184 (Miss. 2009); *Welde v. State*, 3 So.3d 113, 119 (Miss. 2009); *Byrom v. State*, 927 So.2d 709, 716 (Miss. 2006); *Howell*, 860 So.2d at 720; *Harris v. State*, 537 So.2d 1325, 1328-29 (Miss. 1989).

Additionally, the record in this case does not support Appellant's contention.[12] The trial court conducted sequestered *voir dire* and allowed both sides to individually *voir dire* the members of the venire who had not been excused during general *voir dire*. The record reflects that all of the Greene County jurors who were seated in this case all stated that they either had not been exposed to media coverage; or, if they had been exposed, were not predisposed toward any finding, could apply the law as instructed, and would be objective when considering the evidence. (Tr. 981-1196.).

The Court should deny this issue. There is no merit to Appellant's contention that the Greene

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[12] Appellant's contention, that the trial court failed to consistently admonish the jury not to talk to anyone (Appellant's Br. at 116, n. 46), is also belied by the record. (Tr. 885-86, 918, 977-78, 983-84, 997-98, 1005, 1212, 1214; see 1012.).

County jurors were tainted by media exposure. Appellant is not entitled to relief for this issue.

B. Seating venire person no. 62 on the jury was not error.

Appellant also challenges the trial court's decision to overrule his objection to seating venire person number 62, Ms. Cynthia Hicks. (Appellant's Br. at 118-22). He cites to portions of the record, which he believes shows Ms. Hicks was predisposed to find Appellant guilty and impose a sentence of death. (Appellant's Br. at 119). He is mistaken. To emphasize this point, the State would address each instance below by quoting the relevant portions of the record in this case.

1. *That Ms. Hicks was predisposed to find Appellant guilty.*

First, Appellant cites pages 901 and 902 of the trial transcript as evidence that shows Ms. Hicks would consider information beyond the evidence presented and legal instruction given in determining whether Appellant was guilty or innocent. (Appellant's Br. at 119). The record does not support his first contention. Looking there, the Court will find the following exchange between the State and the venire:

> The question to each of you is can you base your decision that you reach in this case on the evidence that you hear in this courtroom and the late which he will give you at the conclusion of this case, that and that alone? And also I might add, and the Judge can tell you in his instructions, in reaching your conclusion, whatever it may be, from the law and the evidence that you hear in this courtroom, you know, you don't have to come in as zombies. You use your common, every day life experiences. You can believe what you want to believe from the evidence, reject whatever you want to believe from the evidence or whatever. That's your privilege.
>
> So I get back to this question which I want you to answer regardless of all this other stuff, can you base your decision on the law and the evidence in this case? And I'm going to have to I've done this almost 40 years. And, you know, I ask these questions all the time and everybody just sits there sort of like (demonstrating). But it's hard for me to tell. I know you're trying to answer. But you know, raise your hand if your answer is yes because I don't want to make everybody go down and say yes. We'd be here two or three days. Can you do that? Can you tell me you can do that and base your decision on the law and an the evidence? A lot of people ain't raising their hand. Okay. That's the easy way to do it folks. The other easy way to

> do it is if you have some agenda or you have some reason that you think you can't base your decision in this case on the lacy and the evidence that you hear in that courtroom in that in Laurel, Mississippi, raise your hand if you think you can't confine your decision to that.
>
> Okay. I have one person. Okay. Raise them up long enough for me to tell. If you think that you -- you let me make sure you understand now. The law and the evidence that you hear in the courtroom. If you think you'd have to base your decision on something else, well then, that's what I'm getting at. So go ahead and let me. Number 62. Raise them up again if that's the way you feel. 62, 64, 72, 68, 96, 34, 33, 94, 98.
>
> Okay. I want to try to figure out how to approach this. Let me just put it this way and maybe we can move it along this way. I'm sure the Court will help us. When you say that you would also base your decision on something other than what you hear in court and the law and the evidence, whether that be pro or con or whatever, whether that's good for [Appellant] or bad for [Appellant], is it because you've already formed an opinion? Let's put it this way. You've already formed an opinion that you can't lay aside and base your decision on the law and the evidence? Is that what it is? If it's because you've already formed an opinion, you folks that raised your card, if it's because you already have an opinion, put your card back up. Okay. All right.
>
> Now, the question is can you lay that opinion aside and base your decision in this case on the law and the evidence? If you can't, well then that's the bottom line. That's what we need to know. You know, we can go into a place and have an opinion about something, but we can base our decision on what the Judge says is admissible evidence. Now, those who can't do that, one mare times for the sake of brevity, raise your cards again if you can't lay that aside and hear this case in the courtroom. Got 72. Anybody else? 72, 96, and 98. Anybody else? Okay.

(Tr. 900-02.).

Appellant claims that pages 901 through 902 of the trial transcript show Ms. Hicks had formed an opinion on Appellant's guilt or innocence, could not lay her opinion aside, and make a decision based on the law and evidence in this case. (Appellant's Br. at 119). But, the passage above shows that is not the case. Ms. Hicks did not raise her card when specifically asked: "[C]an you lay that opinion aside and base your decision in this case on the law and the evidence?" (Tr. 902.). Only three members of the venire raised their cards: 72, 96, and 98. (Tr. 902.). Appellant's

reliance on pages 901 through 902 of the trial transcript is misplaced.

2. *That Ms. Hicks might be inclined to base her decision on emotion.*

Second, Appellant cites pages 925 and 926 of the trial transcript as evidence that shows Ms. Hicks would consider information beyond the evidence presented and legal instruction given in determining whether Appellant was guilty or innocent. (Appellant's Br. at 119). Here too, a fair reading of the record does not support Appellant's contention. Pages 926 through 928 of the trial transcript state as follows:

> Are there ether people among you, any of you, feel like that because a child has died in this case that somebody needs to pay? Okay. Let's write the numbers down. Y'all keep them up.
>
> THE BAILIFF: 2, 4, 5, 10, 15, 18, 19, 20, 22, 24, 26, 27, 28, 29, 31, 32, 35, 36, 39, 41, 42, 44, 46, 47, 98, 101, 102, 105, 110, 51, 54, 59, 57, 56, 55, **62**, 72, 71, 70, 69, 68, 67, 74, 75, 76, 78, 84, 83, 82, 81, 80, 86, 89, 90, 95, 93, 118, 122, 123, 125.
>
> BY MR. LABARRE:
>
> ... Maybe I should have asked another question. How many of you believe that just because a child has died that somebody doesn't have to pay, how about that? There's a few of you. Okay. Well not many of you I might add. But let's talk about that a minute.
>
> Now, I know that probably most of you have children. If you don't have children, raise your hand. Just very few of you that don't have children. And children are very precious to us all as a society. I know. So are my own. Part of this process is for you to determine was the death of a child, of this child in this case, a crime. Let that sink in a minute. Was the fact that a child died, was a crime committed? In other words, that's really the first thing you have to ask yourself when you are looking at the elements of the case. Okay. Mr. Parrish mentioned that earlier, that you're going to hear the law from the Judge where he's going to tell you what the law says and what you would have to find from the evidence beyond a reasonable doubt. In other words, that's their burden of proof that you would find these elements beyond a reasonable doubt to determine has a crime been committed and is that crime capital murder. Okay. Does everybody understand that?
>
> I mean, obviously we're here. If [Appellant] had said I'm guilty, we would not be here for a trial, would we? The fact that we're here today is him telling you I am not guilty. Okay. Everybody understand that?
>
> Okay. Now, those of you that raised your hand about the fact that a child has died,

do you believe that you're going to be able to put that aside and listen to the evidence itself, okay, to hear what the State says it can prove and what the evidence is and put aside the fact that a child has died from what you've heard so far has been described to you as a crime? Can you put that aside and listen to it and not jump to that conclusion? Okay. Does everybody understand what I'm saying? How many of you that raised your hand a few moments ago will be able to say, even though I raised my hand and said somebody has got to pay, I can listen to the evidence, and I can say I'm not going to say guilty or not guilty until I hear all the evidence? How many of you feel like you can do that?

Well let ask you this, how many of you feel like you can't? That might be the better question. If you'll just raise them, I'll go ahead and call out the numbers. Number 20, number 32, 39, 44, 98, 105, 67.

(Tr. 926-28) (emphasis added). The passage above shows that Ms. Hicks, venire person number 62, was capable of considering the evidence presented and following the law as instructed.

3. *That Ms. Hicks could not be impartial due to media exposure and discussions with others.*

Third, Appellant cites pages 1109 through 1111 of the trial transcript as evidence that shows Ms. Hicks would consider information beyond the evidence presented and would not follow the legal instruction given when deciding the issues in this case. (Appellant's Br. at 119).

BY MR. LABARRE:

Q. *Number 65*, Ms. Hicks.

A. Yes, sir.

Q. You indicated yesterday that you did have some knowledge about the case before you came to court.

A. I did. Same thing. It was WDAM on the internet.

Q. From looking on the internet?

A. Yes. It was about a month ago also.

Q. And did you form any opinion at that time?

A. No, sir. It was just strictly jury and redoing, retrial. That's all it was.

Q. If I can inquire, had you been served with a summons for this today?

A. No. No.

Q. So this was just unrelated, something you saw?

A. Right.

Q. And as far as you haven't -- you didn't form any opinion at that time?

A. No, sir.

Q. I take it that you did read a news article of some sort?

A. Yes.

Q. Did you read any others?

A. No, that was it.

Q. Did you discuss what you read with anybody else?

A. Yes, sir, we did. We had gone away the following week to our property for vacation. There was another couple there, and we talked about it just briefly. She just said had you seen it in the news and I said I saw it. And that was it.

Q. These other people weren't called for jury duty?

A. No, no.

Q. Okay. And the question again is, are you able to set aside What you know about this case and consider only what you hear in the courtroom if you're chosen?

A. Yes, sir,

Q. And you can be fair in this case based on what you know?

A. Yes sir.

Q. Thank you. Ms. Malone. Is it Patricia Malone. I'm sorry. You're number 69; is that correct?

(Tr. 1109-11) (emphasis added).

Pages 1109-1111 of the trial transcript do not support Appellant's contention for two reasons. First, venire person number 65, stated that she could be objective and would consider the evidence presented and follow the legal instructions that she was given. And second, the record reflects that trial counsel asked Ms. Hicks, venire person number 65, whether she had been exposed to information concerning this case and whether she had discussed it with others. (Tr. 1109-11.). But, there were two ladies that shared the surname, Hicks. Cynthia Hicks, venire person number 62, was

picked to serve on the jury. The record reflects that trial counsel was well-aware of this fact. In fact, he asked:

> Q. Do any of y'all feel the same way that she does? Okay. Ms. Hicks. *Number 62*, Ms. Hicks, I think you had said --
>
> A. (Number 62) There's two Hicks.
>
> Q. *Right.* I think you had said also on your questionnaire that if you had found a person guilty beyond a reasonable doubt of capital murder that you would vote automatically the death penalty?

(Tr. 1122) (emphasis added). This portion of the record does not support Appellant's contention that the trial court abused its discretion by overruling trial counsel's challenge to Ms. Cynthia Hicks from be seated as Juror number 11.

4. *That Ms. Hicks believed Appellant must be punished.*

Fourth, Appellant cites pages 1120 through 1121 of the trial transcript as evidence that shows Ms. Hicks, venire person number 62, would consider information not in evidence presented and would not follow the legal instruction given when deciding the issues in this case. (Appellant's Br. at 1119). It must be noted that Appellant represents this portion of the record as Ms. Hicks, venire person number 62, agreeing entirely with the statements of Ms. Pearce, vernire person number 59, on pages 1120-1121 of the trial transcript. (Appellant's Br. at 1119). This is false. The record reflects that trial counsel asked:

> Q. We were talking about -- or I guess Mr. Parrish was talking about the questionnaires. And I know that some of you -- we've read your questionnaires, so you'll know, and that's where we get a lot of this information that we start with. And have any of you -- again, you didn't know about the case was going to be until you got here. Have any of you changed your opinion from what you wrote on your questionnaire concerning the death penalty since you filled it out? Anybody?
>
> A. (Number 59) I strongly believe in the death penalty, I do. But I also feel that if he is found guilty of this, that it is -- it's an easy way out for him on that as far

as the death penalty, you know.

But also I have strong feelings about life without parole. With life without parole he has to live with this and has to suffer with it and deal with all the circumstances that he's going to have to deal with in prison or, you know, where he goes. And honestly, I mean -- and I haven't formed an opinion of this yet. I haven't. I don't know any of the details or anything before this. But honestly I feel, if he's guilty, I feel he needs to die, but I would love for him to suffer. I would love honestly -- do you want me to really truthfully tell you how I feel? I would love for him to be punished by and just beat down by every inmate that he could, you know, other inmates.

Q. Yes, ma'am.

A. I mean, I feel that because it's just too -- death is an easy way out. And if he killed this baby, I believe he needs to be punished.

Q. Okay. Let me ask it this way, based upon the fact of what you know now as far as in order to get to that penalty phase of this trial, you would as a juror have voted to convict him beyond a reasonable doubt. In other words, the State to you has proven all the elements of capital murder.

A. Right.

Q. And you have found him guilty. There's no defenses that are out there, there's no self-defense or anything of that nature

A. How can there be a self-defense with a two-year-old.

Q. And that's what I'm saying. These are things that you have found.

A. Right.

Q. That he's guilty beyond a reasonable doubt and all 12 jurors would have had to have done that to be at this paint.

A. Right.

Q. So based on that point, would you consider any other option?

A. I could consider. It would be death penalty or life without parole. Definitely not life in prison because I would not want him to have an opportunity to be able to get out.

Q. Yes, ma'am. I guess the question is though that you would consider other --

A. Yeah, I would consider. It would be between those two, yes.

Q. And I understand that -- I understand your passion and emotion.

A. Right. I have two children of my own. And there's -- my opinion, there's nothing a two-year-old can do, nothing, absolutely nothing, in my opinion for a

two-year-old to die, I mean, from influence from another human being. This child deserves justice. Whether it be dim or the mother that left him with him or -- someone is responsible.

Q. Yes, ma'am. And in light of Ms, Pearce's statements today, do any of the rest of y'all agree with that?

THE COURT: That's Ms. Pearce?

MR. LABARRE: Yes, sir, 59, Angela Pearce.

BY MR. LABARRE:

Q. Do any of y'all feel the same way that she does? Okay. Ms. Hicks. Number 62, Ms. Hicks, I think you had said --

A. (Number 62) There's two Hicks.

Q. Right. I think you had said also on your questionnaire that if you had found a person guilty beyond a reasonable doubt of capital murder that you would vote automatically the death penalty?

A. Let the punishment fit the crime. I'm sort of -- I'm leaning toward her. I would want to do one of the two. It would be an easy way out. And until found guilty, you know, maybe he was in the wrong place at the wrong time. You got to let them be innocent until proven guilty.

A. (Number 59) Right. I agree with that.

Q. So you would consider ether options other than the death penalty?

A. I'm with her too. No chance of parole though.

Q. Yes, ma'am, Mr, Pope, number 66....

(Tr. 1119-22.).

Appellant states that Ms. Hicks was in total agreement with Ms. Pearce's statements. Specifically, Appellant argues that Ms. Hicks "agree[d] 'that there's nothing a two-year-old can do, nothing, absolutely nothing, in my opinion for a two-year-old to die, I mean, from influence from another human being. This child deserves justice. Whether it be him or the mother that left him with him or -- someone is responsible.[']". (Appellant's Br. at 119). But as the passage above shows, at no point did Ms. Hicks agree with Ms. Pearce. Ms. Pearce agreed with Ms. Hicks's statement that Appellant was innocent until proven guilty. (Tr. 1122.). This portion of the record

does not support Appellant's contention that the trial court abused its discretion by overruling trial counsel's challenge to Ms. Cynthia Hicks from be seated as Juror number 11.

5. *That Ms. Hicks's would automatically impose the death penalty.*

Fifth, Appellant cites page 1122 of the trial transcript as evidence that shows Ms. Hicks's would automatically vote to impose the death penalty if the evidence proved Appellant was guilty of the offense charged, even though she stated that she would consider sentencing Appellant to life imprisonment without the possibility of parole or probation. (Appellant's Br. at 119). Again, the record reflects that trial counsel asked Ms. Hicks:

> Q. ... I think you had said also on your questionnaire that if you had found a person guilty beyond a reasonable doubt of capital murder that you would vote automatically the death penalty?
>
> A. *Let the punishment fit the crime*. I'm sort of -- I'm leaning toward her. I would want to do one of the two. It would be an easy way out. And until found guilty, you know, maybe he was in the wrong place at the wrong time. *You got to let them be innocent until proven guilty*.

(Tr. 1122) (emphasis added). Ms. Hicks clarified her questionnaire response during sequestered *voir dire*. During sequestered *voir dire*, Ms. Hicks stated that she could be objective and would consider the evidence presented and follow the law as instructed by the trial court. "Let the Punishment fit the crime.... You got to let them be innocent until proven guilty." (Tr. 1122.). Page 22 of the trial transcript does not support Appellant's contention that the trial court abused its discretion by overruling trial counsel's challenge to Ms. Hicks from be seated as venire person number 11.

6. *That Ms. Hicks could not be impartial due to Appellant's gang affiliation*.

Fifth, Appellant cites pages 1127-29 of the trial transcript as evidence that shows Ms. Hicks's could not be objective due to her "concern[s] with gang connections because [Appellant] 'has our names, you know. All you have to do is Google it[.]' " (Appellant's Br. at 119). Pages 1127

through 1129 of the trial transcript state as follows:

THE COURT: .... All right. Let's go. Anybody else got anything else? Anybody need to ask any questions? Anybody feel satisfied about where we are at this time? You raising your card?

A. (Number 57) Yes, sir. Yesterday evening he, the attorney, LaBarre, brought up witnesses that are going to be brought into this trial. He brought up gang members.

THE COURT: Who?

A. He brought up gang members. Some gang. I never heard of them.

THE COURT: Aryan Brotherhood?

MR. LABARRE: Possibly there may be information about that.

A. Is there any worry with our families? The guy who is the suspect over there, is writing down, he's got a list of our names and numbers. Is there and chance in the future, we get -- whoever is is on the jury gets --

THE COURT: I've never had any repercussions of that kind that I'm aware of ever happening.

A. I just know you see it on TV.

THE COURT: You know, gangs are gangs. And I can't offer you any advice or protection about that except, you know, we do have law enforcement people. I've never had any repercussions as far as I knew in that regard. Never had any complaints about it. I don't know.

A. I was just wondering when he brought that up yesterday.

THE COURT: He was bringing that up because I think that's going to come up here in the trial.

A. Right.

THE COURT: I don't think he brought it up because it would be a threat to the jurors.

A. Right. But I was just -- I guess I watch too much TV.

THE COURT: Anybody else have any concern about that?

A. (Number 58) I also have that concern. I thought the same thing.

A. (Number 62) I do too because he has our names, you know. All you have to do is Google it.

THE COURT: I don't know that that can affect the -- I mean, when you go to war I can't promise you you're coming back. It's a bad situation.

A. (Number 62) Yes, it is. Yes, it is.

THE COURT: But I promise you if anything ever comes up and that does happen, if you ever get threatened or there's any indication that you might be in danger in any way, if you'll get in touch with me I'll see that whatever can be done will be brought to bear against that individual or those individuals. That's the just the protection that the Court can always offer the jurors in that any situation. We always stand behind and protect the jury's verdict regardless of what it is. Okay. I'm sorry you're concerned, but I would be concerned too. That's just a natural thing. But I don't know of any situation that that has ever happened. If you do, I don't know.

(Tr. 1127-29.). Later, the trial court heard trial counsel argue:

MR. LABARRE: Your Honor, Cynthia Hicks, her statement towards the end about he's got our names. These were things --

THE COURT: Which one was she?

MR. LABARRE: 62.

THE COURT: After Mr. Breland brought that up she was concerned about it. But I gave her all the assurance that the Court could give her and she seemed to be satisfied that I gave her all the support that I could give her and offer her whatever assistance under the law. And she seemed to be satisfied with that. And I don't know what else you can do about that. Is that the only thing you get on her?

MR. LABARRE: Yes, sir.

THE COURT: Be overruled.(Tr. 1134-35.). Like the other portions of the record that he cites, pages 1127 through 1129 do not support Appellant's contention that Cynthia Hicks could not be objective in considering the evidence, or that she was incapable of applying the law as instructed. As far as any gang affiliation is concerned, Appellant seems to forget that it was *trial counsel* who raised this issue to the members of the venire. (Tr. 971.).

During general *voir dire*, trial counsel specifically asked:

Q. ... Okay. Very quickly, I want to ask you, you may hear in this case some

testimony about things that deal with gangs, specifically the Aryan Brotherhood. And I'd like to know if the fact that you may hear things of that nature, if any of y'all had any type of experience, and I say experience, any type of exposure to that type of thing, do you know anybody, that sort of thing. Anybody, raise your hand if you think you do. Okay. I'm going to start over here, sir. Number 25, Mark Thornton; is that correct?

A. Yes, sir.

Q. Is that something that you want to discuss out in the open?

A. I work with two guys who used to be in the Aryan Brotherhood in prison on my last job. Only way I knew I saw their tattoos and asked them about it.

Q. Okay. And based on that experience in this case if you learn about some information dealing with Aryan Brotherhood?

A. Yes, sir.

Q. It won't have any effect on you and you could be fair?

....

Q. Thank you, sir. Number 40, Ms. Jenkins?

A. Yes. My nephew is in that gang, is in their gang, the Aryan Brotherhood.

Q. Okay. And, Ms. Jenkins, is that something you want to talk about out here or not?

A. No.

Q. You want to talk about it privately?

A. Yes.

Q. Thank you, ma'am. Is there somebody else over here? Let's see, number 50. Is it Mr. Whiddon?

A. Yes. I worked down at the penitentiary.

Q. Yes, sir.

A. Dealt with them down there. SMCI.

Q. Yes, sir. And that's part of your job; is that correct, sir?

A. I don't work there no more, but I did.

Q. You did. You don't work there any more?

A. No.

Q. Was that experience there such that you'd be able to set that aside whatever knowledge you may have?

A. Yes, sir.

Q. And judge the facts in this case fairly?

A. Yes.

Q. Thank you. Somebody else, 52 that was Ms. Patton ,

A. Yeah. Was that the only gang involvement that you're talking about?

Q. Well, yes, ma'am. That was all that we expect in this case would be dealing with the Aryan Brotherhood.

Well, let me ask you this. Is there another gang experience that you feel would affect the way you would consider the evidence in this case?

A. No.

Q. Thank you ma'am. Anybody else.

(NO RESPONSE)

MR. LABARRE:That's all the questions I have, Your Honor.

(Tr. 971-73.).

As the passages above show, Appellant has cited to no portion of the record that shows Cynthia Hicks was ever exposed to the facts of this case. Most, if not all, of Appellant's citations to the record, are misrepresentations. Appellant has cited no portion of the record that shows Cynthia Hicks stated anything that suggested "she came into the courtroom with pre-existing knowledge and opinions that rendered her incapable of serving as an impartial juror in this matter." (Appellant's Br. at 119.). The State submits there is no basis to Appellant's contention. Appellant is entitled to no relief for this issue, as it is without merit. Indeed, neither of the issues that Appellant offers in support of his sixth claim entitle him to any relief. Both of these issues, as well as Appellant's sixth claim for relief, should be denied.

VII

Appellant's conviction was not the product of evidentiary error.

In his seventh claim, Appellant takes issue with the trial court's evidentiary rulings related

to Dr. Scott A. Benton's expert testimony and three photographs of V.V.'s autopsy. (Appellant's Br. at 122-29). Appellant is entitled to no relief for his seventh claim. Neither issue supporting it has merit. And in support, the State submits the following:

A. Dr. Scott Benton

Appellant first asserts the trial court violated Rule 702 of the Mississippi Rules of Evidence by allowing Dr. Scott Benton to testify to Appellant's credibility, outside his field of expertise without sufficient data to support his medical opinion. (Appellant's Br. at 123-26). To support his contention, Appellant attacks Dr. Benton's qualifications and misconstrues the substance of his testimony.

Whether to admit expert testimony is within the discretion of the trial court. *Bishop v. State*, 982 So.2d 371, 380 (Miss. 2008) (citing *Miss. Transp. Comm'n v. McLemore*, 863 So.2d 31, 34 (Miss. 2003)). A trial court's decision to admit expert testimony will not be reversed absent a showing of clear error that amounts to an abuse of discretion. *Bishop*, 982 So.2d at 380 (citing *McLemore*, 863 So.2d at 34 (quoting *Puckett v. State*, 737 So.2d 322, 342 (Miss. 1999)).

Mississippi Rule of Evidence 702, which governs the admissibility of expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

M.R.E. 702. "This Court has adopted the United States Supreme Court's standard for judging the admissibility of expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and modified by *Kumho Tire Co. v.*

Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).... Expert testimony must be relevant and reliable to be admissible.... Further, [t]he trial court must make a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning and methodology properly can be applied to the facts in issue." *Bateman v. State*, 125 So.3d 616, 625-26 (Miss. 2013) (internal quotation marks omitted) (quoting *McLemore*, 863 So.2d at 36 (quoting *Daubert*, 509 U.S. at 593))).

Trial counsel requested a bench conference when the State called Dr. Benton to testify. (Tr. 1366.). At the bench, trial counsel informed the trial court that he had briefly spoken with Dr. Benton earlier that morning. (Tr. 1366.). Trial counsel stated that Dr. Benton disclosed "some things ... that were not in his report." (Tr. 1366.). Trial counsel also asked to *voir dire* Dr. Benton on his qualifications under *Daubert*, outside the jury's presence. (Tr. 1366.). The State had no objection, and noted that trial counsel had spoken with Dr. Benton on at least two prior occasions, which was conceded during the *voir dire* of Dr. Benton. (Tr. 1367, 1368.).

During voir dire, trial counsel asked Dr. Benton to clarify his qualifications. Dr. Benton responded by stating that he was board certified "[i]n general pediatrics and child abuse pediatrics by the American Board of Pediatrics." (Tr. 1368.). He was asked to explain what an expert in child abuse pediatrics involved. (Tr. 1368.). Dr. Benton explained that child abuse pediatrics was "a sub-specialty of Pediatrics which applies the science of pediatrics to medical legal questions particularly about child mal-treatment." (Tr. 1368.). He also noted that child abuse pediatrics was formally "called forensic medicine, the American Board of Pediatrics, for whatever reason was concerned that forensic pediatrics would be confused with forensic pathology and decided to choose the term child abuse pediatrics." (Tr. 1369.).

At that point, trial counsel changed course, and bluntly asked Dr. Benton to state what he would be testifying to as it related to this case. (Tr. 1369.). The State objected on the basis that trial counsel was "getting into a voir dire about his qualifications, not a preview of his testimony." (Tr. 1369.). It called attention to the fact that the defense "had years to go over that with [Dr. Benton]." (Tr. 1369.). The trial court overruled the objection and explained:

> You've either got to let him explore this or make a proffer. So, What's the difference. Let him go ahead. Make a proffer or find out one way or the other he's going to be testifying on a proffer or testifying on his qualifications, so let him put it on the record. This is out of the presence of the jury.

(Tr. 1369-70.).

Trial counsel then asked Dr. Benton about his opinion and the bases supporting it, specifically studies related to prior statements of witnesses and how he applied that information to the facts in this case. (Tr. 1370.). Dr. Benton stated that his opinion was supported by "all the information available to me as laid out in my report[.]" (Tr. 1370.). The trial counsel attempted to challenge Dr. Benton's opinion with questions concerning his belief that Blakeney was lying and taking the blame to "cover up for someone else...." (Tr. 1371.). In response to that characterization, Dr. Benton stated his belief that trial counsel was 'mismatching a lot of what our conversation [wa]s." (Tr. 1371.). Dr. Benton then explained that he and trial counsel had spoken "about how to restrict the timing and fatal head injuries and that included using the statements of the defendant. It did include the consideration of whether the defendant was telling the truth, what we could interpret from that and whether he was lying, what we could interpret from that." (Tr. 1371.).

The following exchange between trial counsel and Dr. Benton took place:

> Q. And as far as any and of course, you yourself took a statement from my client, [Appellant], prior to any other statements. Are you aware of that?

A. I'm not aware of any subsequent statements but when we were in the hospital with [V.V], [Appellant] did provide a statement to me which I audio recorded.

Q. Audio recorded? It's been transcribed as well?

A. It was, yes sir.

Q. And that was on August 11th. Do you recall?

A. I don't recall but that sounds right.

Q. Now, I need to know, I don't know for sure if when you prepared a final report for the records in this case, for the medical records in this case?

A. That was some months later.

Q. Some months later, did you confer with any other experts who had done any work in this case?

A. *In terms of talking to go them personally, no, in terms of using work product of the medical examiners office, yes. My main contacts were with the law enforcement investigators who were supplying me with information as I asked for it.*

Q. So as far as speaking with the forensic pathologist in this case?

A. She was -- I'm going by memory. She was from Dallas if I'm not mistaken and was in and out like a locum tenens position with the medical examiner's office. I have never met her. I don't know her and I don't have any recall of talking to her.

Q. Have you been informed of her testimony in this case?

A. Very limitedly.

Q. Her testimony yesterday?

A. Yes. Mr. Parrish and I spoke yesterday evening and he limitedly told me some of her testimony.

Q. Did he inform you of her opinion as to a time period for injury to onset of loss of consciousness?

A. He mentioned something about 24 hours. But when I questioned him extensively, I didn't get a sense of what question you or he had asked to a elicit a 24 hour number. I also asked him what science did she offer to explain such a number because there's none that I'm aware of. That was the extent of our conversation with with regard to that.

Q. So I can be clear. This is something that we don't -- I don't know what you know, okay. That's why we're doing this and as far as what you would base your opinion on. You've explained to us this morning that there are several, I don't

remember your words but possibly clusters or categories of injury onset of symptoms; is that correct?

A. I mean, restate your question, I'm not sure how to answer it.

....

Q. ... You had mentioned studies that talked about clusters, was it clusters were your word?

A. *Clusters was my word but not studies about clusters. There are clusters of studies. You can group studies in other words, to look at different aspects to get at an answer. When we talk about restriction of timing and fatal head injuries as we mentioned you can't go about hitting kids in the head and seeing how long it takes for them to be symptomatic. We can't do the usual studies that science expects so we can use proxies for that.*

We can look at accidental studies and look at the fatal components of those and see what happens to children who sustain accidental fatal head injuries. I also mentioned there's another grouping of studies that looks at people who have injured children fatally and what do they say about what happened in those who are willing to either remorsefully or have a consciousness of guilt discuss what they did with those children.

We can then look at just expectations of mechanisms of injury and what do we expect from those. And I had mentioned there are a lot of studies looking at falls and short falls particularly falls under 10 feet and what's the expectation for timing of injuries.

Q. So, as far as you -- as far as your testimony, do you believe that you can state an opinion based on a reasonable degree of medical certainty as to the time of injury to the onset of symptoms or loss of consciousness in this case?

A. *Yes.*

Q. And what would that be?

A. *It's kind of a multi filled opinion but with respect to the timing of this injury, if we use a functional restriction there's no way this child sustained a fatal head injury prior to the statements that [Appellant] made to me. Meaning there's no way that this child had a fatal head injury. Acknowledged that she wanted to have milk, acknowledged his presence in the room, walked behind him down a hallway.*

That child did not have a fatal head injury at that point in time. It had to be subsequent to that. That's what we mean by restricting by functional statements. Now, as we discussed in the hallway, he's either telling the truth about that or he's lying. Either way there's implications from that.

Q. So in essence based on your opinion and your testimony, you would say that

he's lying?

A. I don't think he's telling the full truth with respect to how this child died. The other thing I will say with reasonable medical certainty, is there's no way a trip and fall from fainting or whatever mechanism you want caused this child's death.

Q. So, and you had not put that into any type of written report or opinion?

A. *I believe that is in my report. This is abusive head trauma*.

Q. I understand. I mean, I reviewed it, I don't know what I was in there. That's what I'm asking. I haven't seen it that's why I'm asking.

A. Well, we can point it out to you if you want to show it to me.

Q. Let me ask you this question, now, there was some discussion in testimony and in the reports and affidavits about a seconds to minutes timeframe. Is that attributed to you? Is that what your words were?

A. I'm aware that that is attributed to me. I don't necessarily disagree with it. I'm sort of surprised. It's not what I would usually say but I could have said it. I would definitely have said in agreement with bulk of the literature and my colleagues that she would be immediately symptomatic and that's well supported by science.

Q. You're not a forensic pathologist?

A. I'm not.

Q. And you did not have the benefit of actually conducting or even being present for the autopsy in this case? You weren't there?

A. I don't recall. *I go to most of the autopsies on children if I'm able to, they call me.* I don't recall in fact I don't think I was because I don't recall ever meeting Doctor Gruszecki.

Q. And as far as her opinion which she's entitled to, I'm sure you understand that?

A. Sure.

Q. As far as her timeframe, you're saying there's no science to support he timeframe?

A. Well, I don't know --- I would have to hear her testimony. I wasn't here. So I'm getting it from Mr. Parrish, who is not a physician, who is relating to me. I was trying to press him on what the exact questions that were asked that elicited the 24-hour type of thing. For example, if he said how long can she survive following a fatal head injury, I would agree, 24, 48. If she's in medical care we can survive these kids for a long time. If we had not taken her off the respirator this child would potentially still be with us today, although eventually she would be declared brain dead because that's how bad off she was.

Q. Yes, sir. As far as your areas of expertise, you're not an expert in neurology or neurosurgery either?

A. You know, there are subsets of those fields that I'm very expert in. *When it deals with injuries, accidental or non-accidental, that's what my career has been built on, is understanding the mechanisms of injury, what the sequela is and how to interpret them, either going forward or backwards, meaning going forward from what someone says happened or going backwards from the facts, just the physical facts. That's part of the Board certification in child abuse pediatrics and it includes head injuries, in fact, most injuries that involve children and how to interpret them.*

(Tr. 1371-73; 1374-78) (emphasis added).

After trial counsel completed the *voir dire* of Dr. Benton, the trial court stated that it was confused about the purpose of the hearing. It thought the defense wanted to determine the issue of Dr. Benton's qualifications. It noted that the defense did not make *Daubert* challenges. (Tr. 1379.). When the trial court inquired as to whether he was making *Daubert* challenges, trial counsel responded, "Partially, Your Honor, yes." (Tr. 1379.). Trial counsel then objected to Dr. Benton's testimony concerning the verity of Appellant's statements, based on the belief that he was not qualified to any degree of medical certainty as to Appellant's honesty. (Tr. 1379.). The State, in turn, argued that Dr. Benton was entitled to testify on the matter of V.V.'s injuries and whether she could have sustained the injuries to her head in certain factual scenarios, such as a short fall onto a carpeted floor. (Tr. 1379-80.).

The trial court agreed and found Dr. Benton was qualified to do so, and explained:

> It's not a question as to whether he's lying. That's not even an appropriate question to ask if he's lying. He is here to testify as to what his findings are or were and as to how he reached those findings and give an opinion about it. And a hypothetical. And as far as Daubert is concerned, rule 702, I don't see that he's -- he's qualified as far as I see.
>
> Daubert 702 says scientific, technical, or other specialized knowledge will assist the triers of fact to understand the evidence or to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience training, or education may

testify thereto in the form of an opinion or otherwise.

(Tr. 1380. 1381.).

The hearing concluded, the jury was returned to the courtroom, and the State's direct examination of Dr. Benton proceeded. On direct examination, Dr. Benton testified that his initial examination of V.V. did not lead him to suspect blunt force trauma as the cause of her injuries, but rather an acceleration / deceleration injury like whiplash. (Tr. 1397-98.). But after reviewing the autopsy report, Dr. Benton's opinion changed. It was his opinion that blunt force trauma to the head was the cause of V.V.'s injuries. (Tr. 1398-99.). Dr. Benton also testified about the statement Appellant gave him at U.M.M.C. on August 11, 2010, concerning to the events that led Appellant to call emergency medical responders. Appellant told Dr. Benton that on August 10, 2010:

> the mother had gone to work and the child was still asleep. In the early morning, somewhere around 10:15 10:30, he had gone to peak in and check on her, his practice was not to wake her up, to attend to her when she woke up. When he peaked in he saw she was awake. He related that he had a conversation with her of, do you want your milk, and that she had said yes.
>
> That he took her out of the crib, placed her by the crib and then subsequently that walked to fix her milk and she followed behind him. He stated that as he was walking he didn't see it but heard a thud behind him and that when he turned she was face down on the floor. That when he turned her over and picked her up she was completely limp and then subsequently also described that she had tensed up and was holding her fist to her chest.
>
> That's a medical sign called the decorticate posture meaning that you brain is disconnected from the rest of your body. And these were the observations that he made me. He said that he subsequently called 911, then attempted to call the mother didn't reach her that the mother called him back and that he discussed that [V.V.] was not breathing and had this injury as I described or this incident as he described to me I should say. And then the emergency medical personnel came and took her to the hospital.

(Tr. 1400-01.).

Even though the trial court had expressly accepted Dr. Benton as an expert, Trial counsel

objected to the State's question as to whether V.V's injuries were consistent with a short fall, arguing that Dr. Benton had not been accepted as an expert witness. (Tr. 1402.). So the State tendered Dr. Benton as an expert. (Tr. 1403.). Trial counsel chose not to *voir dire* Dr. Benton in the presence of the jury, and announced the defense would "stand on what we did in the prior hearing." (Tr. 1403.). The trial court accepted Dr. Benton as an expert as it had previously. (Tr. 1403-04.).

Direct examination resumed. And at that time, the State asked Dr. Benton: "Is there any way in your opinion based on a reasonable medical certainty that the traumatic head injury that contributed or caused the death of this child could have happened in the way that [Appellant] described to you?" (Tr. 1404.). Dr. Benton answered, "No." (Tr. 1404.). He then gave a detailed explanation of his opinion that V.V. did not sustain the fatal head according to the scenario that Appellant described to him. (Tr. 1404-06.).

His conclusion was based on his findings of the injuries V.V. sustained. Dr. Benton testified that there was no evidence of injury to V.V.'s face, including any sign of bruising, which indicated the child had not fallen onto her face. (Tr. 1405.). Dr. Benton also noted there were no signs of injury to the side of V.V.'s face. (Tr. 1405.). He explained that when child do fall face forward and catch themselves do not sustain fatal head injuries due to an insufficient amount of force. (Tr. 1405.). Dr. Benton also noted that V.V. had injuries to both sides of her brain, which was unusual for falls from standing heights. (Tr. 1405.). "We're going to see a bruise, maybe a skull fracture, maybe a little contusion to the brain but not both of the sides of the brain injured and injured to the point of dying." (Tr. 1405.). Dr. Benton also called attention to the subdural hematoma V.V. sustained. He testified that:

> [T]his is bleeding that is over the brain and it was on the right side and it went over the entire brain and into the two halves of the brain. This is blood that is only caused

> by trauma and severe trauma. Okay. So when we see that and we see both sides of the brain involved and I don't see any direct evidence of a blow to the face, of sufficient force that it should have left a mark if it's going to be killing her, then I have to conclude that that is not what caused this fatal head injury.

(Tr. 1405-06).

In addition, Dr. Benton testified as to the effect V.V.'s injuries would have on her ability to function. Dr. Benton testified, based on "the consensus of [his] colleagues in the science ..." V.V. would have been "immediately symptomatic, [meaning] you're not going to be normal." (Tr. 1408.). With respect to V.V.'s symptoms, Dr. Benton stated:

> We some times have trouble deciding is that just a sleeping two month old or is that a two month old who has a head injury. We don't have those problems with a child who is two years, 10 months old. We can tell immediately whether they're talking properly, whether their talking properly. Meaning when we have abilities to do advanced things it's easier to recognize when you can't do certain things. And if you have a fatal head injury you're not going to be acting normally or doing things that we depend an a normal brain to do.

(Tr. 1408.).

And based on his knowledge, skill, experience, training, and education in the fields of general and child abuse pediatrics, Dr. Benton review of the facts in this case led him to conclude that:

> There's no way in my medical opinion that she had a fatal head injury and said yes, I want some milk and walked behind somebody. It had to have occurred after that point in time if that is a truthful statement. Now the decorticate posturing is the end result of head injury. That can take time before you see this or it can be immediate. It all depends on the severity of the injury that is fatal that is causing the persons death.
>
> That's why when I said it felt like the question was mixing certain things in time. I do think that she sustained a fatal head injury. She was immediately symptomatic and possibly even unconscious and eventually she had this positioning showing the brain disconnect, again assuming that's a truthful statement.

(Tr. 1411.).

That said, the belabored point is that Appellant is mistaken. Under this Court's precedent,

it is entirely permissible "for an expert to testify regarding his or her opinion that the alleged victim's characteristics are consistent with a child who has been ... abused." *Bishop*, 982 So.2d at 381. And Mississippi Rule of Evidence 703 states that

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible.

M.R.E. 703.

Contrary to Appellant's assertions, the trial court did not allow Dr. Benton to offer the jury expert testimony as to whether Appellant was truthful or not. The trial court accepted Dr. Benton as an expert in the fields of general and child abuse pediatrics based on his medical knowledge and skill, more than two-decades worth of experience and training, as well as his extensive education in both areas. Dr. Benton opined that V.V.'s death was the result of severe and extensive brain injuries sustained as a result of blunt force trauma to the head. Additionally, Dr. Benton opined that V.V.'s injuries were inconsistent with a short-distance, face-first fall onto a carpeted floor.

Appellant further asserts the trial court erred for failing to exclude Dr. Benton's testimony because its prejudicial effect far outweighed its probative value. (Appellant's Br. at 125-26). In a single statement, Appellant asserts, "even if Dr. Benton's comment on [Appellant]'s "truthfulness" might have some relevancy to his opinions on the nature of V.V.'s injury and their probable means of infliction, his comments on whether [Appellant]'s statements to him were "truthful" cannot pass muster under Rule 403." (Appellant's Br. at 125). First, this assertion is procedurally barred from review on appeal. Appellant did not ask the trial court to perform a Rule 403 balancing inquiry with respect to Dr. Benton's testimony. "It is incumbent on the party asserting error to make a contemporaneous objection and obtain a ruling in order to preserve the objection." *Brown v. State*,

965 So.2d 1023, 1029 (Miss. 2007) (citing *Billiot v. State*, 454 So.2d 445, 456 (Miss. 1984). Second and established above, Dr. Benton did not testify as to Appellant's truthfulness. Dr. Benton opined that V.V.'s death was the result of severe and extensive brain injuries sustained as a result of blunt force trauma to the head. And, that V.V.'s injuries were inconsistent with a short-distance, face-first fall onto a carpeted floor.

Appellant also asserts that Dr. Benton and Dr. Gruszecki gave conflicting testimony as to the timing of V.V.'s loss of consciousness. This is specious. Dr. Gruszecki testified that, in general, "if there is a subdural hematoma it could have happened any time within 24 hours of [V.V.] becoming unresponsive." (Tr. 1332.). Whereas, Dr. Benton testified that "the consensus of [his] colleagues in the science ..." V.V. would have been "immediately symptomatic, [meaning] you're not going to be normal." (Tr. 1408.). He thought "that V.V. sustained a fatal head injury. She was immediately symptomatic and possibly even unconscious and eventually she had this positioning showing the brain disconnect...." (Tr. 1411.). Dr. Gruszceki and Dr. Bentons' opinions are consistent. But Appellant is correct. There is a contradiction. Dr. Gruszceki and Bentons' opinions directly contradict his theory that V.V. died from injuries she sustained as a result of a short fall on August 10, 2010 and entirely undiagnosed injuries V.V. sustained from analleged fall that occurred days, possibly a week, earlier. Their testimonies also entirely contradict the testimonies of Amber Everett, John Henry, and Marsha Blakeney in that neither doctor found any whatsoever evidence of facial injuries, including bruising.

Dr. Benton did not opinion on the credibility of Appellant. The trial court did not err in accepting Dr. Scott Benton as an expert witness. The trial court's ruling is consistent with this Court's precedent. This issue is without merit and should be denied.

B. Autopsy Photographs

Appellant complains the trial court abused its discretion when it admitted the State's Trial Exhibits S-7, S-8, and S-9, which are photographs of V.V.'s autopsy, into evidence at trial. (Appellant's Br. at 126-29). His reasoning is that the trial court erred in allowing the State to introduce photographs, which were not in " dispute as to the existence, size or location of any of the things of purported forensic interest, and alternate means were available to the pathologist to represent these things to the jury. T[.] 1136-47." (Appellant's Br. at 127). The State, of course, disagrees, and would show the trial court properly admitted the photographs into evidence and did not err in overruling Appellant's objections.

A trial court enjoys wide latitude in admitting photographs and will be reversed only upon a showing of clear abuse. *Bennett v. State*, 933 So.2d 930, 946 (Miss. 2006). "The discretion of a trial judge to admit photos in criminal cases, runs toward almost unlimited admissibility regardless of gruesomeness, repetitiveness, and the extenuation of probative value." *Bennett*, 933 So.2d at 946 (internal punctuation omitted) (quoting *Woodward v. State*, 726 So.2d 524, 535 (Miss. 1997) (quoting *Brown v. State*, 690 So.2d 276, 289 (Miss. 1996))). "Admission of photos of a deceased is within the sound discretion of a trial court and is proper so long as the photos serve some useful, evidentiary purpose." *Id.* (citing *Jackson v. State*, 672 So.2d 468, 485 (Miss. 1996); *Mackbee v. State*, 575 So.2d 16, 31 (Miss. 1990); *Griffin v. State*, 557 So.2d 542, 549 (Miss. 1990); *Boyd v. State*, 523 So.2d 1037, 1040 (Miss. 1988)). Autopsy photographs are admissible so long as they possess probative value. *Id.*; *Puckett v. State*, 737 So.2d 322, 338 (Miss. 1999).

Dr. Amy Gruszecki, a forensic pathologist and an employee of American Forensics based in Dallas, performed V.V.'s autopsy. (Tr. 1324.). The State called her as an expert witness to opine

as to the cause and manner of death based on her findings from the au V.V.'s death. (Tr. 1320.). Based on her findings from V.V.'s autopsy and medical records, Dr. Gruszecki formed the opinion that the cause of V.V.'s death was blunt force trauma to the head. (Tr. 1324, 1326.).

Dr. Gruszecki stated that, during the course of V.V.'s autopsy, she found "a small subdural hematoma ... on the right side of [V.V.'s] brain which was approximately one millimeter, ... symmetrical brain edema [(swelling)] and ... a two inch subgaleal hematoma at the vertex of her scalp." (Tr. 1324-25.). It is important to note that Dr. Gruszecki informed the jury that a subgaleal hematoma was a type of hematoma that one:

> from the outside of the scalp you can't see it, but as part of the autopsy examination I reflect the scalp and I can see the inside of the scalp as it touches where the skull is. There is a contusion there that you couldn't see from the outside. And often times you can't see it from the outside because somebody's hair is there. But when I reflect the scalp, or my tech reflects the scalp to remove the brain so I can examine the brain I can see the inside of the scalp and so the subgaleal is the area just underlying the scalp on the top of the skull up there.

(Tr. 1325-26.). A blow to the head could produce a subgaleal hematoma, according to Dr. Gruszecki. (Tr. 1326.). She also informed the jury that, in her opinion, V.V.'s manner of death was "Homicide." (Tr. 1326.). Soon after, trial counsel sought and obtained a hearing outside the jury's presence to address the admissibility of four photographs. (Tr. 1332-41).

During the hearing, the State informed the trial court it had selected only four photographs from "dozens and dozens taken" for the purpose of proving V.V.'s identity as the victim and proving the underlying felony of felonious abuse of a child. (Tr. 1333-34.). Trial counsel objected on two grounds. First, he argued the photographs were inflammatory. And second, trial counsel argued that there were alternative methods, such as diagram that could be used in place of the photographs. (Tr. 1335.). The trial court overruled the objection, noting that the State was required

to prove the underlying felony of felonious child abuse. (Tr. 1336.).

Trial counsel claimed the prejudicial effect of publishing a photograph of V.V.'s brain (marked as St.'s Tr. Ex. 8) far outweighed its probative value. It asked the trial court to perform a MRE 403 balancing test to determine the probative value of the photograph with its prejudicial effect. (Tr. 1337; 1339.). So it did, stating that:

> I don't think this is going to be something -- it doesn't look good, but this is not -- the circumstances of this case is not a good thing for anybody to have to look at. But the jury is entitled to know and see what her examination shows. And I don't think it's to the extent for the purpose of exciting the jury. I think it's for the purpose of informing the jury. So that's my ruling.

(Tr. 1337-38.).

The trial court then permitted trial counsel to make the following proffer outside the presence of the jury:

> Q. Doctor Gruszecki I'm going to show you this picture. Can you describe what that is?
>
> A. Yes. This is a picture of the basically the top and back of the decedent's brain. What you see in the picture here is edema and there's some subarachnoid hemorrhage and this is also some subdural hemorrhage on the right side of the brain. What you also see on this left side is the portion of the dura which is the fibrous covering that is folded towards the left. So this that you're seeing with that blood underneath there was on the right side of the deceased and is now on the left, based on the photograph.
>
> And what you also see in phis photograph is evidence of the edema, essentially because there is a smooth sort of ball like surface to the brain, the brain should normally be bumpy. So that demonstrates edema as well, sir. And then also has my case number which ties into the autopsy report.
>
> Q. Sure and I realize these have not been marked yet, but that is a picture of the scalp refracted, is that correct?
>
> THE COURT: Okay. Let's go ahead and mark them far ID just to keep the record straight.
>
> (PHOTOGRAPHS WERE MARKED STATE'S EXHIBIT NUMBERS 7, 8 AND 9 FOR IDENTIFICATION ONLY)

Q. (Mr. LaBarre) We were talking about the one with the scalp refracted, it's marked Number 8 for Identification.

A. Yes, sir. This is a photograph of the scalp of the deceased as it is essentially reflected is the word that we use, forward basically over her face. And that's what you see here. You also see the area of the contusion which actually is an the left side of her head. And I think I said is on the right. So that's what you see in that photograph.

Q. So now, in this last one that is marked number 9 for Identification?

A. Correct. This is a photograph of her face essentially as she was received by us. But with also the case number. It's taken for identification purposes.

Q. Sure.

A. So we can identify the deceased with the number.

Q. Yes, ma'am. Now, Doctor, these two that are marked seven and eight, are you able to use any other diagram that is not. in other words, not an actual photograph in order to demonstrate to a jury these injuries or what they show?

A. It's not --- *I'm not able to identify with a diagram brain edema*. I possibly would have been able to do that with a subdural or even a subgaleal hemorrhage. But I was not asked to do that prior to coming here today so I cannot produce that at this moment. *But this actually is the best way to describe it because it shows not schematically but in real life what was seen at the autopsy*.

Q. Sure. If I can -- so I be clear, I misunderstood, on number eight with the reflected scalp instead of refracted?

A. Yes.

Q. Is this the subgaleal hematoma?

A. That is the subgaleal. And it's actually on the left. So it's an incorrect in my report. I think I called it right.

MR. LABARRE: Your Honor, I'm through with my proffer.

(Tr. 1338-40) (emphasis added).

The passage above supports the State's position and wholly undermines Appellant's. That is, the photographs discussed above were necessary to: (1) identify V.V.; and, (2) demonstrate V.V.'s injuries. As the trial court found, the probative value of these photographs outweighed their prejudicial effect. The trial court did abuse its discretion in accepting them into evidence.

For the reasons above, Appellant's seventh claim for relief and both issues raised in support of it, are without merit. Appellant's conviction was not the product of erroneous evidentiary rulings. His seventh claim entitles Appellant to no relief. So the State respectfully requests that it be denied.

VIII
The trial court properly instructed the jury during the guilt phase of trial.

In his eighth claim, Appellant argues the trial court improperly prohibited him from presenting his theory of the defense by refusing to instruct the jury on criminally negligent manslaughter, child homicide manslaughter, and on excusable accident or misfortune jury instructions: D-15, D-22, D-25, and D-18. He states that his "principal defenses at the culpability phase were that the crime committed was not a killing occurring in the course of the crime of felonious child abuse, but rather either criminal negligent manslaughter or completely excusable death by accident or misfortune." (Appellant's Br. at 130). He cites *Ronk v. State*, 172 So.3d 1112, 1126 (Miss. 2015) as authority that holds manslaughter is a defense in capital felony murder cases where the evidence supporting the underlying felony is "hotly disputed." (Appellant's Br. at 131). The State disagrees entirely.

This Court's recent decision in *Ealey v. State*, 158 So.3d 283 (Miss. 2015) is controlling. A trial court's decision to grant or deny a jury instruction is reviewed for abuse of discretion on appeal. *Ealey*, 158 So.3d at 289 (citing *Newell v. State*, 49 So.3d 66, 73 (Miss. 2010)). " '[T]he court may refuse an instruction that incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.' " *Id.* at 290 (brackets omitted) (quoting *Newell*, 49 So.3d at 74 (quoting *Hearn v. State*, 3 So.3d 722, 738 (Miss. 2008))). " 'Jury instructions should be given only when facts developed in the case being tried support them.' " *Id*. (quoting *Simmons v. State*,

805 So.2d 452, 473 (Miss. 2001)). "The trial court will not be put in error for denying a jury instruction when the evidence was insufficient to support the instruction." *Id*. (citing *Simmons*, 805 So.2d at 473; *Batiste v. State*, 121 So.3d 808, 845-46 (Miss. 2013)). As demonstrated below, the trial court properly refused proposed instructions D-15, D-22, D-25, and D-18.

A. Proposed Instruction D-18

Appellant contends the jury would have found him not guilty had it been given his accident or misfortune if the jury believed his statements to police, and Dr. Benton, in which he denied having ever struck V.V. or engaging in any activity that constituted felonious abuse, and disbelieving all of the State's other evidence. (Appellant's Br. at 130). As to this theory, Appellant proffered Proposed Jury Instruction D-18, which read as follows:

> The Court instructs the jury that the killing of any human being by the act, procurement, or omission of another shall be excusable when committed by accident and misfortune in doing any lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
>
> If you find from the evidence in this case that the killing of [V.V.] was the result of accident or misfortune resulting form any lawful act of [Appellant] done by lawful means with usual an ordinary caution and without any unlawful intent, then it is your sworn duty to find [Appellant] not guilty.

(C.P. 828.).

At trial, the State objected to Proposed Instruction D-18, arguing that:

> MR. PARRISH: This is talking about an accident and we've already been through that. There's no evidence that an accident or whatever in this case. None whatsoever. They tried to cover that with a manslaughter instruction. There's no evidence to conclude accident or misfortune. There's no testimony at all about that. It's an improper instruction.
>
> THE COURT: Go ahead, Mr. Parrish.
>
> MR. PARRISH: It's talking about being excusable when it's an accident. There's no testimony about an accident of any kind in this case. This is

contrasted you know like when we had the case of Quincy Clayton. You know, he testified he accidentally pulled a trigger on a gun but we don't have any evidence of anybody having any kind of accident that caused her death in this case.

THE COURT: Be refused.

MR. LABARRE: Judge, if I could for the record? I think that Doctor Benton was very clear in that in the event that some act occurred it was either intentional or accidental.

THE COURT: Okay.

MR. LABARRE: I think that was his testimony.

MR. PARRISH: He ruled out accidental.

MR. LABARRE: He may have ruled out accident but obviously that was something that was considered. Whether he ruled that out or not, I think if this jury accident they may find [Appellant] not guilty. It's appropriate under the circumstances and this is right out of the statute.

THE COURT: Be refused....

(Tr. 1659-61.).

The trial court did not err in rejecting Appellant's Proposed Instruction D-18 for the following reasons. First, there was no factual basis to support it. The passage above shows that Appellant relied on Dr. Benton's testimony at trial as evidence of an accident. But, it is clear from the record that Dr. Benton did not believe V.V.'s death was the result of an accident. The record reflects that Dr. Benton was asked: "Is there any way in your opinion based on a reasonable medical certainty that the traumatic head injury that contributed or caused the death of this child could have happened in the way that Justin Blakeney described to you?" (Tr. 1404.). He responded, "No." (Tr. 1404.). He then gave a detailed explanation for his response. (Tr. 1404-06.). In conclusion, Dr. Benton stated that he did not "see any direct evidence of a blow to the face, of sufficient force that it should have left a mark if it's going to be killing her, then I have to conclude that that is not what

caused this fatal head injury." (Tr. 1406.).

Appellant also relies on his own statements as evidence proving he did not commit an act that would constitute felonious child abuse. But like the defendant in *Ealey*, Appellant's own statements contradicted his theory. First, the discussion between Appellant and Hobo Hancock concerning V.V.'s murder as part of his acceptance into the Aryan Brotherhood directly contradicts his theory. (State's Tr. Exhibit 15; Tr. 1429.). The same if true of Randall Smith's letter of recommendation and the note written in Appellant's Bible. (St.'s Tr. Ex. 19, 22; Tr. 1484-85, 1520-21.). *See Ealey*, 158 So.3d at 291 (holding "[t]he evidence did not support the accident-or-misfortune instruction, because the evidence presented did not show that Ealey acted with 'with usual and ordinary caution,' and Ealey's own statements contradicted her theory that the child died before she put him in the suitcase").

Additionally, Appellant contends that he and Lilly Viner were negligent for failing to seek medical care for V.V. after a purported fall from a stool. The evidence presented at trial did not show that [Appellant] acted ... "with usual and ordinary caution[.]" *Id.* (quoting Miss. Code Ann. § 97-3-17(a)). Like *Ealey*, however, there is no evidence to support the contention that Appellant and Lilly Viners' decision not to seek medical care "was anything other than intentional and purposeful." *See id.* (recognizing that " 'failure to ... provide medical care to a child can be *intentional*, and such a refusal may cause serious bodily harm' and acts of omission are included as abusive behavior") (quoting *Buffington v. State*, 824 So.2d 576, 582 (Miss. 2002)). And because here was no evidence of an accidental or mistaken killing of V.V, the trial court did not err in refusing Proposed Instruction D-18.

Second, Proposed Instruction D-18 was fairly covered elsewhere in Jury Instructions S-1-C

and S-2C. (C.P. 809, 810.). Jury Instructions S-1-C instructed the jury that:

> [I]f you believe from the evidence presented in this case beyond a reasonable doubt that ... [Appellant], in Jones County, Second Judicial District, did:
>
> 1. On or about the 10th day of August, 2010, willfully, unlawfully, and feloniously without authority of law, with or without the design to effect death;
> 2. Did kill [V.V.], age two (2), a human being; and
> 3. Said killing occurring as a result of the said ... [Appellant], committing the crime of felonious child abuse or battery of a child, namely [V.V.], age two (2); and
> 4. As a result of said felonious child abuse or battery, [V.V.], age two (2), actually died on or about [A]ugust, 2010;
>
> then it is your sworn duty to find the ... [Appellant], guilty as charged of Capital Murder.
>
> If the State has failed to prove any one or more of the above listed elements beyond a reasonable doubt, then you shall find ... [Appellant], not guilty of Capital Murder.

(C.P. 809.). And Jury Instruction S-2C defined:

> Felonious Abuse or Battery of a child as the underlying felony of Capital Murder is defined as the offense of intentionally whipping or striking or otherwise abusing a child in such a manner as to cause serious bodily harm.

(C.P. 810.). Based on Jury Instruction S-1-C and S-2C, the jury's failure to find that Appellant killed V.V. during the commission of felonious child abuse of V.V. would have resulted in an acquittal.

Finally, Proposed Instruction D-18 is not a correct statement of law under Appellant's theory on appeal. He argues that: "Had the jury believed [his statements denying ever having struck or otherwise engaged in any activity constituting felony child abuse of V.V.], and disbelieved the evidence contradicting it, ... this would have warranted a verdict of not guilty under the accident or misfortune instruction...." (Appellant's Br. at 130). As the State appreciates this argument, Appellant contends that had the jury received this instruction and believed that he had not committed the crime of felonious child abuse, then it could have found Appellant committed excusable homicide rather than capital murder by finding that he accidentally killed V.V. But how?

Appellant offers no explanation. If the jury had been given Proposed Instruction D-18 and had believed that V.V. died as a result of a short fall onto her face and died from injuries sustained on August 10, 2010 in conjunction with other injuries sustained the previous week, then how could the jury find a homicide, much less an excusable homicide? The State submits that as a matter of law, it could not. The scenario Appellant relies on involves a purely accident death, not a homicide. *See e.g., Hull v. State*, 174 So.3d 887, 899-900 (Miss. Ct. App. 2015). Appellant proffered an excusable homicide instruction, D-18. (C.P. 828.). But under his theory of the case, there was no homicide. Under his theory, V.V.'s death was an accidental death. Proposed Instruction D-18, then, was an incorrect statement of law and properly refused as such.

B. Proposed Instructions D-15 and D-22

Additionally, Appellant proffered two manslaughter instructions, Proposed Instructions D-15 and D-22. (C.P. 826; 832.). Proposed Instructions D-15 and D-22 were proffered for the purpose of showing V.V.'s murder was not a killing occurring in the course of felonious child abuse, but a criminally negligent manslaughter. (Appellant's Br. at 130). He mistakenly relies on *Ronk*, 172 So.3d 1112, as authority that holds the Legislature intended manslaughter to be a defense to Capital Murder. This issue has no merit.

To begin, Proposed Instruction D-15 read as follows:

> If you believe from the evidence in this case beyond a reasonable doubt that:
>
> 1. [Appellant], on or about, the 10th day of August, 2010, in the Second Judicial District of Jones County, Mississippi;
> 2. Killed the deceased, [V.V.];
> 3. By doing some act that resulted in a blow to her head; and
> 4. [Appellant] was negligent and that negligence was so gross as to be tantamount to a wanton disregard of, or utter indifference to, the safety of human life; and

5. Such negligence, if any, directly caused the death of the deceased; and further

6. [Appellant] was not acting in self defense or was not acting in defense of another;

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

(C.P. 826.). And, Proposed Instruction D-22 stated that:

> If you find that the State has failed to prove any one or more of the essential elements of the crime of murder, you will then proceed with your deliberations to decide whether the State has proven beyond a reasonable doubt all of the elements of the crime of manslaughter.
>
> If you find from the evidence in this case, beyond a reasonable doubt, that the Defendant in some way caused the death of [V.V.] by culpable negligence, and without authority of law, then you shall find the Defendant guilty of manslaughter. You are further instructed that "culpable negligence" is conduct which exhibits or manifests a wanton or reckless disregard for the safety of human life, or such indifference to the consequences of the Defendant's act under the surrounding circumstances as to render his conduct tantamount to willfulness.
>
> If the prosecution has failed to prove, beyond a reasonable doubt, any one or more of the elements of the crime of manslaughter, then you shall find the Defendant not guilty.

(C.P. 832.).

With respect to Proposed Instructions D-15 and D-22, Appellant argues that had the jury believed the statements to the police and Dr. Benton, and believed that V.V. died as a result of a short fall in conjunction with a pre-existing head injury V.V. sustained when she fell from a stool, then the jury could have found him guilty of manslaughter. (Appellant's Br. at 130-31). This issue can be quickly laid to rest, "because a person who causes death during the commission of felonious child abuse can be convicted of only capital murder, not manslaughter." *Ealey*, 158 So.3d at 295 (citing Miss. Code Ann. §§ 97-3-27, 99-3-19(2)(f) (Rev. 2014)).

Appellant was charged with Capital Murder in violation of Miss. Code Ann. § 97-3-19(2)(f),

which states:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> ....
>
> (f) When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of subsection (2) of Section 97-5-39, or in any attempt to commit such felony....

Felony manslaughter is, and has been for more than two decades, defined at Section 97-3-27. According to that Section, felony manslaughter is:

> The killing of a human being without malice, by the act, procurement, or culpable negligence of another, while such other is engaged in the perpetration of any felony, *except those felonies enumerated in Section 97-3-19(2) (e) and (f), or while such other is attempting to commit any felony besides such as are above enumerated and excepted*, shall be manslaughter.

Miss. Code Ann. § 97-3-27 (emphasis added).

Proposed Instructions D-15 and D-22 incorrectly stated the law. "[W]here the evidence supports a conviction for child abuse, the resulting death cannot be manslaughter. The crime is capital murder even if the defendant acted 'without any design to effect death.' " *Ealey*, 158 So.3d at 295 (quoting Miss. Code Ann. § 97-3-19(2)(f)). Here, the evidence supports Appellant's Capital Murder conviction.

C. Proposed Instruction D-25

Finally, Appellant contends the trial court erred in refusing his child homicide instruction, Proposed Instruction D-25. (Appellant's Br. at 130). He argues that had Proposed Instruction D-25 been given, then the jury could have acquitted him of Capital Murder by finding him guilty of child homicide. (Appellant's Br. at 130). Not so.

Proposed Instruction D-25 read as follows:

The Court instructs the jury that if you believe that the State has failed to prove each and every element of the crime of capital murder, and not guilty of capital murder then you may continue your deliberations to consider whether or not the defendant in this case, is guilty of child homicide.

If you find from the evidence in this case beyond a reasonable doubt that:

1. On or about the 10th day of August, 2010, [Appellant] killed [V.V.], with said killing being without malice but said act being intentional and not accidental; and,

2. At the time of said act, [Appellant] was over the age of twenty-one (21) years and [V.V.] was a child under the age of eighteen (18) years;

   Then you shall find [Appellant] guilty of child homicide.

   If the State has failed to prove any or more of these elements beyond a reasonable doubt, then you shall find [Appellant] not guilty of child homicide.

(C.P. 834.).

At trial, trial counsel proffered Proposed Instruction D-25 and asked that:

MR. LABARRE: ... the Court to review our this child homicide instruction.

THE COURT: That's the post facto.

MR. LABARRE: Again, Your Honor --

THE COURT: That's something that has been put into the law. This case happened in 2010. That law was passed in 2013.

MR. LABARRE: It was, Your Honor and the ex post facto effect is only -- is when it harms the defendant as far as a greater penalty. In other words, he should be able to benefit from a different sentencing instruction or alternative. If he had been charged with simple manslaughter and there had been a change in the statute that increased the penalty, that would of be an ex post facto penalty to him if it gave a greater penalty. In this situation there is no greater penalty than death.

THE COURT: I don't think that there's been any law that has changed the capital murder case statute as far as I'm concerned or any of the requirements that are necessary to prove capital murder because of the requirement -- underlying requirement of a felony being committed along with the death of an individual. I don't think that that was contemplated in this knew statute at all.

MR, PARRISH: The order thing about it is, Judge, if he were convicted of regular

manslaughter the maximum is 20 years, the instruction he's arguing for, the penalty would be 30 years. So I don't even know how it's --

THE COURT: I'm just not going to give that. I'm not going to do it I don't think this is the prove here allows the consideration of the jury in regards to giving this man -- I just don't believe there's any testimony here that can back up the lesser included offense. So in that regard let's go on to something else.

(Tr. 1646-48.). The trial court was correct.

This issue also can be quickly dispensed with, as it has no merit. Section 97-3-25 was amended in 2013 to include what is commonly known as, "Karen's Law". This amendment took effect years after V.V.'s murder and Appellant's prosecution for V.V.'s murder began. 2013 Miss. Laws Ch. 379 (S.B. 2255) (Eff. Jul. 1, 2013). Section 99-19-1, which concerns the retroactive effect of newly enacted laws states that:

> No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of such penalties, notwithstanding amendatory or repealing statutes, unless otherwise specially provided in such statutes.

Miss. Code Ann. § 99-9-1.

But even if Section 97-3-25(2) applied, retroactively, nothing changes. The trial court's refusal of Proposed Instruction D-25 would be correct. Section 97-3-25 provides, in part, that:

> (2)(a) A person is guilty of child homicide if:
>
> (I) The person is found guilty of manslaughter in circumstances where the killing, although without malice, was *intentional and not accidental*; and
>
> (ii) The perpetrator was over the age of twenty-one (21) years and the victim was a child under the age of eighteen (18) years.
>
> (b) A person found guilty of child homicide shall be imprisoned in the custody

of the Department of Corrections for a term not to exceed thirty (30) years.

Miss. Code Ann. § 97-3-25(2) (emphasis added).

As stated earlier, Appellant was convicted of Capital Murder with the underlying felony of felonious child abuse. Capital murder with the underlying felony of felonious child abuse does not require the State prove he intended to kill. " 'The killing of a human being without authority of law by any means or in any manner shall be capital murder ... when done with or without any design to effect death, by any person engaged in the commission of the crime of ... felonious abuse of a child.' " *Ronk*, 172 So.3d at 1126. "[T]he fact that the killing was a manslaughter rather than a murder would have no effect on his guilt under Section 99-3-19(2)([f])." *Id.* at 1127.

For the reasons state above, the trial court did not abuse its discretion in giving Sentencing Instructions D-15, D-22, D-25, and D-18.

IX

The trial court properly instructed the jury during the penalty phase of trial.

Appellant's ninth complaint is based on allegations of error related to penalty phase jury instructions. (Appellant's Br. at 134). This Court reviews a trial court's jury instructions for an abuse of discretion, and will affirm the entire jury charge if, when read together and taken as a whole, fairly and correctly states the applicable law. *Dickerson v. State*, 175 So.3d 8, 26 (Miss. 2015) (quoting *Flowers v. State*, 158 So.3d 1009, 1062 (Miss. 2014) (quoting *Gillett v. State*, 56 So.3d 469, 496 (Miss. 2010) (quoting *Rubenstein v. State*, 941 So.2d 735, 787 (Miss. 2006))). While a defendant enjoys the right to jury instructions that present his theory of the case, a trial court may refuse an instruction that is not a correct statement of law, is fairly covered elsewhere, or is not supported by evidence. *Dickerson*, 175 So.3d at 24, 25 (citations omitted). Appellant alleges the

trial court erred in refusing the following sentencing instructions:

A. Proposed instruction DS-37

Appellant takes issue with the trial court's refusal of proposed instruction DS-37 (Appellant's Br. at 134-38), which read as follows:

> If you cannot, within a reasonable time, agree as to punishment, I will dismiss you and impose a sentence of life without the benefit of parole. If you cannot agree, know that any of you may inform the bailiff of this.

(C.P. 880.).

Appellant alleges that, by refusing instruction DS-37, the trial court erred for failing to inform the jury what would happen if they could not agree on a sentence. At the outset, Appellant fails to cite any relevant authority that would entitle him to this instruction. His failure to do so bars review of this issue. *Fulgham v. State*, 46 So.3d 315, 341 (Miss. 2010). The Court is under no obligation to consider this issue, and should refuse to do so.

Alternatively, and notwithstanding the procedural bar, Appellant's allegations of error concerning instruction DS-37 have no merit for several reasons. For one, Mississippi's capital punishment scheme requires a trial court to sentence a death-eligible defendant to life in prison without the possibility of parole in cases where the jury is unable to reach a sentencing decision. Miss. Code Ann. § 99-19-103. The trial court was not required to give instruction DS-37, even though it tracked the language of Miss. Code Ann. § 99-19-103. *See Gillett*, 56 So.3d at 516 (finding no error for failing to inform jury what would happen if they were unable to agree on punishment) (citing *Wilcher v. State*, 697 So.2d 1123, 1136-37 (Miss. 1997) (citing *Stringer v. State*, 500 So.2d 928, 945 (Miss. 1986))). For another, instruction DS-37 was fairly covered elsewhere. *See Flowers*, 158 So.3d at 1062 (finding no error for refusing to give a redundant instruction) (citing *Montana v.*

State, 822 So.2d 954, 961 (Miss. 2002)); *Gillett*, 56 So.3d at 516 (same) (citing *Walker v. State*, 671 So.2d 581, 613 (Miss. 1995)). And another, this Court repeatedly affirmed the refusal of this instruction. *Cox v. State*, 183 So.3d 36, 57 (Miss. 2015); *Dickerson*, 175 So.3d at 26; *Flowers*, 158 So.3d at 1062; *Gillett*, 56 So.3d at 516; *Pitchford v. State*, 45 So.3d 216, 255 (Miss. 2010) (citing *Edwards v. State*, 737 So.2d 275 (Miss. 1999); *Stringer*, 500 So.2d at 945). Recently, in *Corrothers v. State*, 148 So.3d 278 (Miss. 2014), the Court rejected this issue, stating that:

> This Court dealt with this argument in *Gillett v. State*, 56 So.3d 469, 516 (Miss. 2010). The defendant in *Gillett* requested an instruction that, in substance, was identical to that requested by Corrothers. *Id*. Applying the rule that jury instructions are to be read as a whole, we found that the failure to grant the instruction was not reversible error. As in this case, Gillett's jury had been instructed that the three sentencing options were death, life imprisonment, and life without the possibility of parole, and that one possible verdict it could return was that the jury was unable to agree unanimously on punishment. *Id*. We find that, under *Gillett*, no reversible error resulted from the failure to grant the instruction.

Corrothers, 148 So.3d at 317-18. Like *Corrothers*, *Gillet*, and many others, the record reflects that sentencing instruction S-5 instructed the jury that:

> Your verdict should be written in one of the following forms:
>
> ...
>
> "We, the Jury, find that the Defendant should be sentenced to life imprisonment without parole."
>
> or,
>
> "We, the Jury, find that the Defendant should be sentenced to life imprisonment."
>
> or, return the following form:
>
> ""We, the Jury, are unable to agree unanimously on punishment[.]"

(C.P. 847, 848.).

As demonstrated above, the trial court did not abuse its discretion in refusing proposed instruction DS-37. The Court should deny Appellant's first issue offered in support of his ninth

claim. Review of this issue is procedurally barred. Alternatively, this issue is without merit. Appellant is entitled to no relief for this issue.

B. Proposed instruction DS-1

Next, Appellant takes issue with the trial court's refusal of proposed instruction DS-1 (Appellant's Br. at 138-39), which read as follows:

> A conviction for capital murder is punishable by death or life imprisonment without the possibility of parole or early release. However, a person with intellectual disability may not be sentenced to death.
>
> In this case the Mr. Blakeney has offered evidence that he is intellectually disabled. Therefore, before you may consider the sentence to be imposed in this case you must unanimously find, beyond a reasonable doubt, that he is not intellectually disabled. In determining if Mr. Blakeney is intellectually disabled consider the following definition:
>
> > Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as express in conceptual, social, and practical adaptive skills. This disability originates before age 18.
> >
> > Intellectual disability is measured by IQ testing and significant limitations are indicated by an IQ score of 75 or below. A person has adaptive deficits if they have limitations in two or more of the following applicable adaptive skill areas: communication; self-care; home living; social/interpersonal skills; use of community resources; self-direction; health; safety; functional academics; leisure; and work.
>
> If, after considering all the evidence in this case, there remains in your mind any reasonable doubt as to whether or not he is intellectually disabled you must stop your deliberations and report this to the Court. The Court will then sentence him to life imprisonment without possibility of parole or early release.
>
> If you find the Defendant is not intellectually disabled, you may then proceed with your deliberations in an attempt to decide whether he shall be sentenced to life imprisonment without the possibility of parole or early release or death.
>
> Nothwithstanding a finding as a jury that Mr. Blakeney is not intellectually disabled you, as individuals, must consider his intellectual level as a mitigating circumstance in your further deliberations.
>
> As with all mitigating circumstances you, as individual jurors, may consider evidence to be mitigating and give it the weight you individually believe it deserves even if one or all other eleven jurors disagree with you. If you believe Mr. Blakeney is

> intellectually disabled or while not meeting the definition has low intellectual function, you must find that as a mitigating circumstance and weigh it in your further deliberations.

(C.P. 856-57.). Here, Appellant alleges that the trial court denied him of "his [*Atkins*] hearing" when it refused to instruct the jury on the "elements of *Atkins*". (Appellant's Br. at 138). The Court should deny Appellant's issue with proposed instruction DS-1 for the reasons below.

1. *Review is barred.*

As an initial matter, Appellant cites no relevant authority that entitles him to this instruction. His failure to cite relevant authority obviates this Court's duty to consider this issue. *Gillett*, 56 So.3d at 517 (quoting *Thorson v. State*, 895 So.2d 85, 109-110 (Miss. 2004)); *Fulgham*, 46 So.3d at 341. Appellant misconstrues *Dickerson v. State*, as holding a "capital accused" is entitled to a sentencing instruction on the issue of intellectual disability so long as the "capital accused" produces "the same kind of affidavit and expert opinion that he is intellectually disabled as is required in post-conviction review of the question by *Chase v. State*, 873 So.2d 1013 (Miss. 2004), and its progeny." (Appellant's Br. at 138). Appellant's position is that *Dickerson* alters the procedure for establishing a claim of intellectual disability as an exemption from execution.

But *Dickerson* makes it abundantly clear that *Chase's* procedure was not at issue, much less modified. "[T]the Court has held that the determination of whether the defendant is mentally retarded is to be made by the circuit court sitting without a jury, *Goodin*, 102 So.3d at 1112 (citing *Chase*, 873 So.2d at 1028), for purposes of today's case we do not revisit that holding...." *Id.* *Dickerson*, 175 So.3d at 24. The issue in *Dickerson* was "whether [Dickerson] would be entitled to have any *Atkins* issues presented to the jury, as he produced no evidence of such an instruction." *Dickerson*, 175 So.3d at 24. The Court found the refusal of his *Atkins* criteria instruction was

warranted, because Dickerson could not be found intellectually disabled as a matter of law. *See id.* at 25 ("Because no expert opined that Dickerson met the definition of mental retardation to a reasonable degree of certainty, as a matter of law, the jury could not find that Dickerson was mentally retarded and exempt from execution."). *Dickerson* does not stand for the proposition that a defendant may elect to have a sentencing jury, rather than a trial court sitting without a jury, determine a claim of intellectual disability so long as he makes the requisite showing for obtaining an evidentiary hearing.

In addition, the record does not support Appellant's allegation that the trial court denied him of "his [*Atkins*] hearing". The record shows the State, during a February 3, 2014 motions hearing, reminded the trial court that trial counsel:

> MR. PARRISH: ... filed a motion for a mental exam for the purposes of determining Mr. Blakeney's solely, and if somebody disagrees they can state so, his capacity to meet the -- is it Atkins standards?
>
> MR. LABARRE: Yes.
>
> MR, PARRISH: In the event he were convicted to qualify for the death penalty that could be imposed. He was examined. We received a report back from Doctor Goff; is that right?
>
> MR. LABARRE: It was Doctor Storer.
>
> MR. PARRISH: Doctor Storer. I'm sorry.
>
> Basically I think we have -- he and I both have a copy of it. Doctor Storer's opinion was that Mr. Blakeney did not meet the criteria that would absolutely prohibit the imposition of the death penalty. We have that report. I don't know if it's sufficient to introduce that into evidence at the sufficient time or whether we've got to go through here and have a full blown hearing with Doctor Goff (sic) on the stand. So I'm just bringing that up because I don't know if the defense has an opinion about how that should be handled or not.
>
> MR, LABARRE: Your Honor, the report, number one, has been filed in the court file. It's of record. *The report says what it says, which is that*

Doctor Starer did not find sufficient deficiencies in those adaptive functioning areas that could qualify Mr. Blakeney as being intellectually disabled. Based on that I don't see any way that I could go forward with a motion in order to have him found intellectually disabled without the support of that doctor.

THE COURT: In other words, you don't feel like that the sworn testimony on the stand would determine any other or bring out any different results that he's found in his statement to you and to the Court?

MR. LABARRE: That is correct, Your Honor. I mean, Doctor Storer -- we asked that Justin be sent to the state hospital. Doctor Storer did the evaluation. I was there for a significant part of the questioning of Mr. Blakeney.

(C.P. 252-53.) (emphasis added).

The trial court did not deny Appellant record shows the record shows that trial counsel chose not to go forward with a hearing to determine whether Appellant was intellectually disabled. As a consequence, Appellant did not obtain a ruling from the trial court on the issue of intellectual disability. "This Court has repeatedly held that it is the responsibility of the movant to obtain a ruling from the court on motions ... and failure to do so constitutes a waiver." *Byrom v. State*, 863 So.2d 836, 851 (Miss. 2003) (citations, brackets, and some punctuation omitted). Appellant now argues that he "elected to have the jury ..." decide whether he was intellectually disabled. (Appellant Br. at 138). This is contrary to binding precedent. Indeed, *Dickerson* reiterates the procedure for determining a claim of intellectual disability requires a defendant to present a claim of intellectual disability to "[t]he circuit court, sitting without a jury," and "prove that he meets the standard for [intellectual disability] by a preponderance of the evidence." *Dickerson*, 175 So.3d at 24 (quoting *Goodin v. State*, 102 So.3d 1102, 1112-13 (Miss. 2012)).

The Court should refuse to consider this issue to the extent that Appellant argues *Dickerson* alters the procedure of *Chase* and its progeny. Appellant's issue with the trial court's refusal of

proposed instruction DS-1 is legally unsupported. And because the procedure of *Chase* and its progeny governs, Appellant waived review of this issue when he failed to obtain a ruling from the trial court.

2. *Proposed instruction DS-1 is not supported by the evidence.*

Without waiving the procedural bars above, the State submits the trial court's refusal of proposed instruction DS-1 does not constitute an abuse of discretion. It was noted above that this Court affirmed the trial court's decision to refuse Dickerson's *Atkins* criteria instruction "[b]ecause no expert opined that Dickerson met the definition of mental retardation to a reasonable degree of certainty, as a matter of law, the jury could not find that Dickerson was mentally retarded and exempt from execution." *Dickerson*, 175 So.3d at 25.

This case is no different in that no expert opined to a reasonable degree of certainty that Appellant was intellectually disabled. Appellant admits as much. He concedes the fact that Dr. John H. Goff, "did not opine that [Appellant] met the three prong definition of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002)...." The State would also note that Dr. Goff testified that Appellant "did not display the adaptive skills deficits that typically are required." (Tr. at 1757.). And the record reflects Dr. Robert Storer, who also evaluated Appellant for intellectual disability, opined "to a reasonable degree of pyschological certainty that [Appellant] does not have Intellectual Disability/Mental Retardation as conceived by the United States Supreme Court's decision in *Atkins v. Virginia* (2002) and the Mississippi Supreme Court's in *Chase v. State* (Miss. 2004) and *Lynch v. State* (Miss. 2007). (C.P. 476.).

The trial court did not abuse its discretion in denying Appellant's proposed instruction DS-1. for a jury instruction to be given it must be supported by the evidence presented." *Dickerson*, 175

So.3d at 24 (citing *Hardy*, 137 So.3d at 302 (quoting *Austin*, 784 So.2d at 192)). No expert opined that Appellant was intellectually disabled. *Id.* at 25. So as a matter of law, the jury could not find Appellant intellectually disabled. The evidence presented was legally insufficient to support a finding of intellectual disability. The trial court did not error in refusing proposed instruction DS-1.

3. *Proposed instruction DS-1 is fairly covered elsewhere.*

The trial court did not abuse its discretion for refusing proposed instruction DS-1, because the jury was given sufficient instruction. Sentencing instruction S-5 informed the jury that it could:

> consider the following examples in mitigation, those which tend to warrant the less severe penalty, life imprisonment without parole, or life imprisonment, in determining whether the death sentence should not be imposed:
>
> 1. [Appellant] had limited regular education;
> 2. [Appellant] has a history of mental illness;
> 3. [Appellant] suffered from poor parenting;
> 4. [Appellant] has Borderline mental retardation represented by an IQ in the 70's;
> 5. [Appellant] had severe health problems as a child;
> 6. [Appellant] has been a good worker despite being disabled;
> 7. [Appellant]'s family love and care about him;
> 8. Any other circumstance or combination of circumstances of the crime or of the life and character of [Appellant] you believe should mitigate in favor of a sentence of life imprisonment without parole.

(C.P. 846.).

Similar to *Dickerson*, Sentencing Instruction S-5 gave the jury sufficient instruction concerning mental illness, Appellant's IQ score, and other facts that could be considered as mitigating evidence. A trial court did not err in denying proposed instruction DS-5, because it was fairly covered in Sentencing Instruction S-5. *Dickerson*, 175 So.3d at 24 (citations omitted); *e.g., id.* at 25. The trial court did not abuse its discretion in refusing to give the instruction.

4. *Proposed instruction DS-1 is an incorrect statement of law.*

Finally, the trial court did not err in denying proposed instruction DS-1, because the

instruction did not correctly state the applicable standard for determining intellectual disability. First, the instruction incorrectly states the burden of proof. Proposed instruction DS-1 instructs the jury that "before you may consider the sentence to be imposed in this case you must unanimously find, beyond a reasonable doubt, that he is not intellectually disabled." (C.P. 856.). This is contrary to precedent. The defendant bears the burden to "prove that he meets the standard for mental retardation by a preponderance of the evidence." *Dickerson*, 175 So.3d at 23 (quoting *Goodin*, 102 So.3d at 1112); *see generally Keller v. State*, 138 So.3d 817, 868-69 (Miss. 2014) (*Thorson*, 895 So.2d at 810-11 (quoting *Edwards v. State*, 737 So.2d 275, 314 (Miss. 1999)) (citing *Simmons v. State*, 805 So.2d at 500; *Berry v. State*, 703 So.2d 269, 289-90 (Miss. 1997)).

Second, proposed instruction DS-1 makes no mention of malingering. A finding on the issue of malingering is necessary in determining a claim of intellectual disability. To establish a claim of intellectual disability at an evidentiary hearing:

> the defendant must prove by a preponderance of the evidence that "(1) he has significantly subaverage intellectual functioning; (2) he has deficits in two or more adaptive skills; (3) he was eighteen or younger when the retardation manifested itself; and (4) *he is not malingering*."

Chase v. State, 171 So.3d 463, 468 (Miss. 2015) (emphasis added) (quoting *Thorson v. State*, 76 So.3d 667, 676-77 (Miss. 2011)); *Dickerson*, 175 So.3d at 24 (reaffirming the rule that "experts should use ... tests and procedures permitted under the Mississippi Rules of Evidence, and deemed necessary to assist the expert *and the trial court* in forming an opinion as to whether the defendant is malingering'") (emphasis added) (quoting *Goodin*, 102 So.3d at 1113 (quoting *Chase*, 873 So.2d at 1028 n. 19)). Proposed Instruction DS-1 incorrectly states the intellectual disability standard in Mississippi. The jury could not find Appellant intellectually disabled, as a matter of law, under Proposed Instruction DS-1's standard. *Dickerson*, 175 So.3d at 25.

For the reasons stated above, the State submits the trial court did not abuse its discretion by refusing to give proposed instruction DS-1. This issue is unsupported, improperly before the Court, without merit, and entitles Appellant to no relief.

C. The heinous, atrocious, or cruel (HAC) aggravator

In his third issue, Appellant claims "the trial court erred in instructing the jury on the 'heinous, atrocious or cruel' aggravator because the evidence was insufficient to justify giving it or to meet the stringent requirements of the limiting instruction under the Eighth Amendment. (Appellant's Br. at 139-140). He is mistaken in both respects. The Court should deny this issue for the following reasons:

1. *The facts in this case support the use of the HAC aggravator.*

First, Appellant argues trial court erred by instructing the jury that it could consider whether the capital offense was especially heinous, atrocious or cruel (the HAC aggravator), because the evidence was insufficient. (Appellant's Br. at 139-140). Sentencing Instruction S-5 informed the jury that it could consider whether "[t]he capital offense was especially heinous, atrocious or cruel." (C.P. 846.). And Sentencing Instruction S-3 read as follows:

> The Court instructs the Jury that an especially heinous, atrocious or cruel capital offense is one accompanied ed by such additional acts as to set the crime apart from the norm of murders – the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence beyond a reasonable doubt that the defendant utilized a method of killing in that the defendant inflicted physical or mental pain before death, or that there was mental torture or aggravation before death, or that a lingering or tortuous death was suffered by the victim then you may find any of these an aggravating circumstance...

(C.P. 843.). The facts in this case support the use of the HAC aggravator.

When considering a sufficiency of evidence claim, the Court views "all evidence and all reasonable inferences which may be drawn from that evidence in the light most consistent with the

verdict. [The Court] ... [will not] disturb the verdict of the jury unless no rational trier of fact could have found the fact at issue beyond a reasonable doubt." *Ballenger v. State*, 667 So.2d 1242, 1259 (Miss. 1995). "The HAC aggravator is set forth by Mississippi Code Annotated Section 99–19–101(5), and the factors to consider in support of such aggravator include the length of time it takes the victim to die, the number of wounds inflicted, the factors leading up to the final killing, whether the defendant inflicted physical pain before death, the mental anguish and physical torture suffered by the victim prior to death, and the vulnerability of the victim." *Bennett v. State*, 933 So.2d 930, 954 (Miss. 2006) (citing *Dycus v. State*, 875 So.2d 140, 164 (Miss. 2004); *Knox*, 805 So.2d at 533-34; *Stevens*, 806 So.2d at 1060; *Underwood v. State*, 708 So.2d 18, 39-40 (Miss. 1998)).

As Appellant sees it, the evidence showed that V.V. sustained an injury, which rendered her almost immediately comatose and unable to feel pain to and until her death two days later. (Appellant's Br. at 139). And because she felt no pain, He argues the evidence is insufficient to constitute an extraordinarily or unnecessarily torturous death that the Eighth Amendment requires. (Appellant's Br. at 139-140). He cites *King v. State*, 960 So.2d 413, 440 (Miss. 2007), as authority in support of his position. (Appellant's Br. at 139). Appellant is simply mistaken for the reasons below.

To begin, Appellant's reliance on *King v. State* as it is entirely misplaced. In *King*, the State's case in aggravation included testimony from a pathologist who stated that the victim's death could have been caused either by manual strangulation, blunt force trauma to the head, or drowning. *King*, 960 So.2d at 441. On appeal from a new sentencing trial, King argued the State's evidence, which offered to prove the HAC aggravator, was insufficient in that it "was unclear that [the victim] suffered extended or torturous suffering before losing consciousness." *Id.* The Court rejected that

argument and "the notion that the victim's 'ability to remain conscious' after sustaining the lethal wounds has any relevance to the issue." *Id.* (citing *Manning v. State*, 735 So.2d 323, 349-50 (Miss. 1999); *Underwood*, 708 So.2d at 39).

And in *Manning v. State*, 735 So.2d 323 (Miss. 1999), the Court rejected a similar argument. At trial, the State presented evidence, including the testimony of a pathologist, that showed both of Manning's victims suffered severe blunt force trauma to their heads, which caused "bleeding under the scalp and inside the skull[,] ... bruises to the brain[,] and ... bleeding within the brain." *Manning*, 735 So.2d at 349. The State's evidence also showed the throats of both victims had been "slashed to the backbone[,]" approximately ten minutes after they were severely beaten about the head and face. *Id.* The pathologist testified that the head injuries probably rendered the victims unconscious. *Id.* But, the pathologist could not state with certainty that either victim lost consciousness. *Id.* The pathologist also testified that, if the victims had remained conscious, they would have endured laborious breathing until their throats were slashed. *Id.*

On appeal, Manning claimed the trial court erred in instructing the jury that could find the HAC aggravating circumstance. *Id.* He argued the trial court should have refused the HAC instruction, because "there was no evidence that either victim in this case suffered extended or torturous suffering before losing consciousness." *Id.* The Court rejected Manning's argument and "the notion that the victim's 'ability to remain conscious' after sustaining the lethal wounds has any relevance to the issue." *Id.* at 349-50 (citing *Underwood*, 708 So.2d at 39). The Court pointed to the evidence, which showed "[b]oth victims sustained severe beatings about the head and face before having their throats viciously slashed to the backbone ...[,]" and explained " '[t]he number of wounds, the number of lethal weapons used to inflict these wounds, and the fact that death was not

immediate, but prolonged' may all be considered as evidence supporting a jury's finding of the HAC aggravator." *Id.* at 349 (quoting *Davis v. State*, 684 So.2d 643, 662 (Miss. 1996)).

This case is similar to *Manning* and the evidence as a whole demonstrates supports the HAC aggravator and the trial court's decision to give it. Here, the facts support the conclusion that he jury found V.V.'s death was prolonged and torturous. The fact that V.V. suffered a prolonged death is undisputed. What is in question is the reason that caused her suffer a prolonged death. And rather than offer one, Appellant deflects by blaming Lilly Viner. He argues that V.V. languished for two days, because it took that long to persuade Lilly Viner to remove her from life support. (Appellant's Br. at 139). Appellant is the reason V.V. suffered a prolong death. Appellant struck V.V.'s head with an amount of force so extreme, she suffered a hematoma, brain swelling to the extent that her brain was pushing out of skull, a subgaleal hematoma, and extensive bleeding on and into her brain. (Tr. 1314-15; 1324-29, 1341-46; 1390, 1399, 1405, 1411; State's Exhibits 7, 8, 9, 10.). She was admitted as a patient at U.M.M.C. And during her stay there, V.V. developed "acute pneumonia" in her right lung. (Tr. 1330.). So for two days, she languished in a comatose state, sick from infection, attached to machines, unable to blink much less move, as a direct result of Appellant's unconscionable brutality.

The events leading up to the final killing and the vulnerability of V.V. are also factors that support the HAC aggravator. *Bennett v. State*, 933 So.2d 930, 954 (Miss. 2006) (citing *Dycus v. State*, 875 So.2d 140, 164 (Miss. 2004); *Knox*, 805 So.2d at 533-34; *Stevens*, 806 So.2d at 1060; *Underwood*, 708 So.2d at 39-40). V.V. was a toddler, not quite three years old or three feet tall, who relied on Appellant for basic needs and care. (Tr. 1331, 1345-46; 1400-01, 1408). Appellant and V.V. were alone, together, for approximately thirty to forty-five minutes on the morning of August

10, 2010. (Tr. 1417.). He was the only other person who was present at the time V.V. was injured. (Tr. 1302). And he gave conflicting accounts of the events that occurred on the morning of August 10, 2010. Appellant told Lee Garrick, a first responder and the first to arrive at the scene, that he did not know what happened; and that he found V.V. lying in the hallway, unconscious. (Tr. 1304, 1306.). A day later, Appellant told Dr. Scott Benton that he removed V.V. from her crib, lead her down a hall in their home, heard a thud, and turned around to find V.V. face down on the floor in the hall. (Tr. 1400-01.).

Finally, the jury could have found V.V. sustained several severe wounds, was in pain at the time they were inflicted, and continued to suffer from that pain for a considerable amount of time. Again, Appellant and V.V. were alone, together, for approximately thirty to forty-five minutes on the morning of August 10, 2010. (Tr. 1417.). V.V. sustained injuries to both sides of her brain that morning. (Tr. 1405, 1410.). Blunt force trauma to the back of her head caused a subdural hematoma on the right side of her brain that bled over her entire brain and into both halves. (Tr. 1390, 1399, 1405.). The extensive bleeding was the result of severe trauma. (Tr. 1405.). Those injuries would have caused V.V. to become, "immediately symptomatic[,]" meaning, "you're not going to be normal." (Tr. 1408.). V.V. would not have been normal immediately after the blow to her head. (Tr. 1410.). it would be difficult to determine the extent of her, and even more difficult to determine whether she was consciousness. (Tr. 1410.).

Considering the evidence at trial, the jury could objectively find beyond a reasonable doubt that V.V. was murdered in an especially heinous, atrocious, and cruel manner. The trial court did not abuse its discretion by giving Sentencing Instructions S-3 and S-5. The State submits there is no error.

2. *Sentencing instructions S-3 and S-5 are constitutional.*

This Court has repeatedly held this instruction to be constitutional. For example, in *Havard v. State*, 928 So.2d 771 (Miss. 2006), the Court wrote:

> This issue is quickly laid to rest. "This Court has repeatedly held that the 'especially heinous, atrocious or cruel' provision of Miss. Code Ann. § 99-19-101(5)(h) is not so vague and overbroad as to violate the United States Constitution." *Stevens v. State*, 806 So.2d 1031, 1060 (Miss. 2001). *See also Crawford v. State*, 716 So.2d 1028 (Miss. 1998); *Mhoon v. State*, 464 So.2d 77 (Miss. 1985); *Coleman v. State*, 378 So.2d 640 (Miss. 1979). Indeed Havard himself concedes this Court's recognition of the constitutionality of this instruction. Despite this concession, Havard urges this Court to find that the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) held this instruction unconstitutional. We briefly revisit what we stated a little more than a year ago with regard to this same challenge:
>
> > Thorson argues that first paragraph of the above instruction was held unconstitutional by the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). Thorson further contends that in *Hansen v. State*, 592 So.2d 114 (Miss. 1991), this Court announced that the language held unconstitutional in *Shell* should not be submitted to juries. Therefore, Thorson concludes that Instruction SP-2 has been determined by the United States Supreme Court and this Court to be *per se* objectionable. In *Shell*, the Supreme Court found that when used alone, language identical to that used in the first paragraph of instruction SP-2 was not constitutionally sufficient. 498 U.S. at 2, 111 S.Ct. 313, 112 L.Ed.2d 1. However, in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), the Supreme Court determined that the first sentence of the second paragraph was a proper limiting instruction when used in conjunction with the language from *Shell*. This Court has repeatedly held this identical instruction to be constitutionally sufficient. *See Knox v. State*, 805 So.2d 527, 533 (Miss.2002); *Puckett v. State*, 737 So.2d 322, 359-60 (Miss. 1999); *Jackson v. State*, 684 So.2d 1213, 1236-37 (Miss. 1996).
>
> *Thorson v. State*, 895 So.2d 85, 104 (Miss. 2004). Havard invites us to overturn firmly entrenched Mississippi precedent on this issue. We decline to do so. For these reasons, this issue is without merit.

Havard, 928 So.2d at 800 (quoting *Thorson*, 895 So.2d at 104). The trial court properly instructed the jury regarding the HAC aggravating circumstance.

And in *Underwood v. State*, 708 So.2d 18 (Miss. 1998), this Court recognized that:

Judge Toney instructed the jury that "an especially heinous, atrocious, or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of capital murders, the conscienceless or pitiless crime which is unnecessarily torturous to the victim." The United States Supreme Court and this Court have repeatedly approved this language as a proper limiting instruction on the HAC aggravator. *Jenkins v. State*, 607 So.2d 1171, 1181 (Miss. 1992) (citing *Coleman v. State*, 378 So.2d 640, 648 (Miss. 1979); *Evans v. State*, 422 So.2d 737, 743 (Miss. 1982) *cert. denied*, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983); *Pinkney v. State*, 538 So.2d 329, 357 (Miss.1988), *vacated on other grounds*, 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990); *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990)).

In his dissent, Presiding Justice Sullivan asserts that because there was no testimony proving how long Mrs. Harris remained conscious after she was shot, "the jury could not know whether Mrs. Harris suffered to the extent required for a finding that her murder was so 'conscienceless or pitiless' as to set it apart from other murders." Following this logic, the measure of Underwood's lack of conscience and pity is the extent of pain and suffering that Mrs. Harris actually felt.

Justice demands that the focus remain strictly on the defendant. Underwood's culpability can only be measured by his own mental state and actions. Mrs. Harris' ability to remain conscious while sustaining gunshot wounds is irrelevant. Nonetheless, the evidence indicates that Mrs. Harris suffered greatly.

Underwood kidnapped Mrs. Harris from her own home. He made her walk to her impending doom on nerve damaged feet, all the while leaving her to ponder how, when, why and in what manner she would be executed. When the two arrived at Underwood's chosen execution site, he ordered Mrs. Harris to kneel before him. He then stood a couple of feet away, and savagely fired four shots into her fragile body. The first bullet tore through her right lung, diaphram and liver. The second ripped though her bloody back only to further tear apart her damaged right lung. The next bullet took a brutal path through her left ear, neck and shoulder. The final bullet ripped through Mrs. Harris' left arm.

We stated in *Davis v. State*, 684 So.2d 643 (Miss.1996), that,

> The number of wounds, the number of lethal weapons used to inflict these wounds, and the fact that death was not immediate, but prolonged, provided support for the jury's findings that this murder was unnecessarily tortuous to Hillman.
>
> *Davis*, 684 So.2d at 662.

Davis makes no mention of the victim's consciousness after sustaining the wounds that ultimately caused her demise. The length of time that it took the victim to die was relevant only to prove that she was still trying to defend herself from the defendant's stabbing attack after he had twice shot her. Furthermore, the length of

> time it took the victim to die was not the dispositive fact of Davis. It was only one factor considered. Our case law is replete with cases where the length of time that it took the victim to die was not considered to be dispositive on appeal. This case must not be treated any differently.

Underwood, 708 So.2d at 39-40; *see e.g., Berry v. State*, 703 So.2d 269, 282-83 (Miss. 1997).

The jury was properly instructed that it could consider whether V.V.'s murder was especially heinous, atrocious, or cruel. Appellant's assertions of constitutional violation through the use of Sentencing Instructions S-3 and S-5 must fail. The trial court did not abuse its discretion in giving Sentencing Instructions S-3 and S-5.

D. The use of felonious child abuse as an aggravator

Here Appellant asks the Court to revisit a well-settled issue, the use of the underlying felony (felonious abuse of a child) as an aggravating circumstance. Sentencing Instruction S-5 informed the jury that it could consider whether "[t]he capital offense was committed while [Appellant] was engaged in the commission of felonious abuse of a child, [V.V.] age two(2)." (C.P. 846.). According to him, the State's use of the underlying felony of felonious child abuse as an aggravating circumstance is unconstitutional. (Appellant's Br. at 141-44). He also asserts that V.V.'s age was erroneously given in Sentencing Instruction S-5. (Appellant's Br. at 141). The Court should deny this issue for the following reasons:

1. *The underlying felony may be used as an aggravator.*

The use of the underlying felony of felonious child abuse as an aggravating circumstance is not unconstitutional. Appellant's contention, that the dual use of the underlying felony of felonious child abuse is constitutional, is procedurally barred. Appellant admittedly cites no authority that supports his position that it is unconstitutional for the State to use the felony underlying a capital

murder conviction as an aggravating circumstance. (Appellant's Br. at 141).[13] His failure to cite relevant authority obviates this Court's duty to consider this issue. *Havard v. State*, 928 So.2d 771, 802 (Miss. 2006) (citing *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001)); *see Gillett v. State*, 56 So.3d 469, 517 (Miss. 2010) (same) (quoting *Thorson*, 895 So.2d at 109-110); *Fulgham*, 46 So.3d at 341 (same).

Without waiving that bar, this Court has repeatedly held, as Appellant confesses, such practice to be constitutional. Under U.S. Supreme Court precedent, the use of an underlying felony as an aggravator is not error. *Tuilaepa*, 512 U.S. at 972; *Lowenfield*, 484 U.S. at 233. And this Court has repeatedly and consistently rejected it. *See e.g., Corrothers v. State*, 148 So.3d 278, 320 (Miss. 2014); *Keller v. State*, 138 So.3d 817, 873 (Miss. 2014); *Moffett v. State*, 49 So.3d 1073, 1116 (Miss. 2010) (citing *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 233 (1988)); *Loden v. State*, 971 So.2d 548, 569 (Miss. 2007); *Ross v. State*, 954 so.2d 968, 1014 (Miss. 2007); *Le v. State*, 967 So.2d 627, 636 (Miss. 2007); *Brawner v. State*, 947 So.2d 254, 265 (Miss. 2006); *Bennett v. State*, 933 So.2d 930, 954 (Miss. 2006); *Havard*, 928 So.2d at 802-03; (citing *Manning v. State*, 735 So.2d 323 (Miss. 1998); *Smith v. State*, 729 So.2d 1191 (Miss. 1998); *Evans v. State*, 725 So.2d 613 (Miss. 1997); *Walker v. State*, 671 So.2d 581 (Miss. 1995)); *Walker v. State*, 863 So.2d 1, 19 (Miss. 2003) (citing a collection of cases); *Blue v. State*, 674 So.2d 1184, 1218 (Miss. 1996); *Lockett v. State*, 517 So.2d 1317, 1337 (Miss. 1987).

As a subpart of his challenge to the use of multiple aggravating sentencing factors, Appellant contends that permitting the jury to consider a "duplicative aggravator" violates *Ring v. Arizona*, 536

[13] Appellant cites *Ross v. State*, 954 So. 2d 968 (Miss. 2007) and *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), as two examples of cases where this Court has rejected this very argument.

U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Again, this very claim has been well addressed by this Court:

> [T]he alleged felony underlying the capital-murder conviction may properly be used as an aggravator. In *Ross v. State*, 954 So.2d 968 (Miss. 2007), this Court stated:
>
> > Relying primarily on *Ring* and *Apprendi*, [the defendant] maintains that the use of the underlying felony of armed robbery as an aggravating circumstance upon which the jury relied in returning a sentence was improper. However, evidence of the underlying crime can properly be used both to elevate the crime to capital murder and as an aggravating circumstance. *See Bennett*, 933 So.2d at 954; *Goodin v. State*, 787 So.2d 639, 654 (Miss. 2001); *Smith*, 729 So.2d at 1223; *Bell v. State*, 725 So.2d 836, 859 (Miss. 1998); *Crawford v. State*, 716 So.2d 1028, 1049-50 (Miss. 1998). Furthermore, the United States Supreme Court has held that there is no constitutional error in using the underlying felony as the aggravator. *Lowenfield v. Phelps*, 484 U.S. 231, 233, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). The Supreme Court stated in *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994), that "[t]he aggravating circumstances may be contained in the definition of the crime or in a separate sentencing factor (or in both)."
> >
> > The use of the underlying felony as an aggravator was not error.
>
> *Ross v. State*, 954 So.2d 968, 1014 (Miss. 2007).

Gillett v. State, 56 So.3d 469, 510 (Miss. 2010).

> And in *Havard v. State*, the Court explained that:
>
> The concept of one aggravating factor subsuming another exists in order to avoid "double counting," or allowing aggravating factors to become unconstitutionally duplicative, thus unfairly affecting the weighing process in states like Mississippi, whose criminal law requires mitigating factors to be weighed against aggravating factors. The Tenth Circuit is an example of one jurisdiction replete with cases dealing with questions of aggravating factors subsuming one another and offers helpful explanations in its opinions. "Under our cases, one aggravating circumstance is improperly duplicative of another only if the first aggravator 'necessarily subsumes' the other." *Patton v. Mullin*, 425 F.3d 788, 809 (10th Cir. 2005). "The fact that two aggravating circumstances rely on some of the same evidence does not render them duplicative." *Id*. The concern is that the aggravators are not duplicative. *Id*. When they are not duplicative, the Tenth Circuit allows use of the same evidence to support different aggravators. *Id*. The test for determining when aggravating factors impermissibly overlap and are duplicative is whether one aggravating factor necessarily subsumes the other, not whether certain evidence is relevant to both

> aggravators. *Fields v. Gibson*, 277 F.3d 1203, 1218-19 (10th Cir. 2002). Of the two aggravators on which Havard focuses, one does not necessarily subsume the other. The jury could have found from the evidence presented at trial that Havard was engaged in the commission of sexual battery while committing the acts on Chloe which led to her death. Additionally, the jury could have found this crime to meet the HAC standard because of factors other than the sexual battery, such as the relationship between Havard and Chloe's mother or Chloe's age.
>
> Finally, Havard claims that the evidence of the underlying felony used to elevate this crime to capital murder may not also be used as an aggravating circumstance. The State cites several examples of this Court's case law which disprove this assertion, laying it quickly to rest. *See, e.g., Manning v. State*, 735 So.2d 323 (Miss. 1999); *Smith v. State*, 729 So.2d 1191 (Miss. 1998). *See also Evans v. State*, 725 So.2d 613 (Miss. 1997) (sexual battery of ten-year old sufficient as both underlying felony and aggravating circumstance); *Walker v. State*, 671 So.2d 581 (Miss. 1995) (sexual battery of teenager sufficient as both underlying felony and aggravating circumstance). This issue is without merit.

Havard, 928 So.2d at 802-03; *see e.g., Bennett*, 933 So.2d at 954. Based on the preceding, Appellant has identified no legal or factual basis for this Court to revisit or disturb its well-settled precedent.

2. *The trial court did not err in giving the felonious child abuse aggravator.*

Appellant also asserts that V.V.'s age was erroneously given in Sentencing Instruction S-5. Review of this assertion is barred. He tells the Court that he objected to V.V.'s age being listed at Sentencing Instruction S-5's first of two aggravating circumstances under paragraph B. (Appellant's Br. at 141).[14] The record, however, does not support his representation. Rather, it reflects that trial counsel objected to a third aggravating circumstance under section B of Sentencing Instruction S-5 that was removed at trial counsel's request. According to the record, trial counsel argued:

> The rest of the instruction, Your Honor, in the next paragraph under B, the factors that are listed Your Honor, the aggravating factors that are listed there, there's three aggravating factors. And Your Honor as the Court is aware, aggravating factors or circumstances, are shall be limited according to 99-19-101 under paragraph five. And starting with, I'll start with number three, Your Honor. The age of [V.V.]

[14] Appellant cites page 846 of the Clerk's Papers and page 1772 of the Trial Transcript where he lodged this object.

> is not a statutorily allowed aggravating factor.
>
> It is not listed as any of the aggravating factors shown in paragraph five of 99-19-101. That's part of the requirement of the underlying crime of child abuse but not as an aggravating factor according to 99-19-101....
>
> ....
>
> Your Honor, again, number three is not a statutorily -- a statutory aggravating factor. We object to the use of that Your Honor, under the eighth and 14th amendments of the United States Constitution.

(Tr. 1772-73.). The State agreed with trial counsel, and removed the third aggravating circumstance listed in Sentencing Instruction S-5. (Tr. 1774-75.). The record reflects the third aggravating circumstance was removed and contained two aggravating circumstances—the felonious abuse of a child aggravating circumstance and the HAC aggravating circumstance. (C.P. 846.). The State's concession satisfied trial counsel's objection, who then moved on. (Tr. 1775.).

Review is barred for another reason. Appellant fails to cite any authority that supports his position. *See Havard*, 928 So.2d at 802 ("When a party fails to cite authority to support an argument on an issue, this Court is not required to review such issue.") (citing *Simmons*, 805 So.2d at 487). He cites *Coleman v. State*, 378 So.2d 378 So.2d 640, 648 (Miss. 1979), in an attempt to support that assertion. (Appellant's Br. at 141).

Without waiving either of the preceding bars, the State submits that *Coleman* wholly undermines Appellant's assertion. The defendant in *Coleman v. State*, claimed Miss. Code Ann. § 99-19-101 was unconstitutional, because sub-part (1) permitted the State to introduce evidence unrelated to the aggravating circumstances listed under sub-part (5). This Court rejected that argument, because sub-part (5) limited the State "to introducing evidence relevant to one or more of the eight enumerated aggravating circumstances." *Coleman*, 378 So.2d at 648 (quoting Miss. Code Ann. § 99-19-101(1), (5)).

Section 99-19-101(5) reads:

> Aggravating circumstances shall be limited to the following:
>
> ....
>
> (d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any ... felonious abuse ... of a child in violation of subsection (2) of Section 97-5-39....

Miss. Code Ann. § 99-19-101(5). Section 97-5-39 read, in part, as follows:

> ....
>
> (2)(a) Any person who shall intentionally (I) burn any child, (ii) torture any child or, (iii) except in self-defense or in order to prevent bodily harm to a third party, whip, strike or otherwise abuse or mutilate any child in such a manner as to cause serious bodily harm, shall be guilty of felonious abuse of a child....

Miss. Code Ann. § 97-5-39(2)(a). The State was required to prove the felonious abuse of a child aggravating circumstance beyond a reasonable doubt. The State was, in turn, required to prove V.V. was child. As stated above, this Court reviews a trial court's jury instructions for an abuse of discretion, and will affirm the entire jury charge if, when read together and taken as a whole, fairly and correctly states the applicable law. *Dickerson*, 175 So.3d at 26 (quoting *Flowers*, 158 So.3d at 1062 (quoting *Gillett*, 56 So.3d at 496 (quoting *Rubenstein*, 941 So.2d at 787)).

This Court should deny the fourth issue under Appellant's ninth claim. This issue is not supported by relevant authority, not properly before the Court, and procedurally barred. Additionally, Appellant's fourth issue is without merit. The use of an underlying felony of a capital murder conviction may be used as an aggravating circumstance. And contrary to Appellant's assertion, the jury was not "instructed on something that was not a statutory aggravating circumstance...." (Appellant's Br. at 141). The trial court did not err in giving the first aggravating circumstance, the underlying felon of felonious abuse of a child, listed under paragraph B of Sentencing Instruction S-5. Appellant has identified no legal or factual basis for this Court to revisit

or disturb its well-settled precedent. Appellant is not entitled to relief for the fourth issue supporting his ninth claim.

E. There are no invalid aggravating circumstances.

Appellant also suggests that in light of the trial court's sentencing instructions on the aggravating factors, his sentence should be vacated rather than attempting to reweigh or find harmless error pursuant to Miss. Code Ann. § 99-19-105(3)(d). (Appellant's Br. at 144-47). Citing to *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616, 622 (2016), Appellant requests this Court revisit Its holding in *Gillett v. State*, 148 So.3d 260, 266-67 (Miss. 2014), to consider the constitutionality of the statutory authority that permits the Court to reweigh or find harmless error. (Appellant's Br. at 145). Appellant argues that reweighing and the application of a harmless error analysis established by *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990), is no longer good law. But this Court disagreed, finding that the holding of *Clemons*, which permits appellate courts to cure an error cause by an invalid aggravator either by reweighing or applying harmless error to a death sentenced defendant, to be sound. *Gillett*, 148 So.3d at 265-67. The Court also specifically rejected the contention that the presence of an invalid aggravator automatically requires reversal. *Id*. at 266.

Appellant further argues that Miss. Code Ann. § 99-19-105, to the extent it allows the Court to reweigh and perform a harmless error review, is unconstitutional. This challenge was also considered by the Court in *Gillett* and found to be lacking. *Id.* at 266-67. The State submits there were no invalid aggravating factors submitted to the jury during sentencing. Accordingly, unless or until one of the sentencing factors has been deemed invalid, this case does not provide an appropriate

avenue to address the constitutionality of § 99-19-105.[15]

Should any one of the sentencing factors be found to have been submitted in error, the State submits that such error was harmless and that upon reweighing the remaining valid sentencing factors, Appellant's death sentence should be affirmed. There was no error with the submission of the aggravating sentencing factors. The "stacking" of aggravators, as was done in this case, has been approved by this Court as well as the United States Supreme Court. Finally and contrary to Appellant's claim, the holdings of *Ring* and *Apprendi* are inapplicable to Mississippi's sentencing scheme.

F. Proposed instructions DS-3, 4, 6, 7, 9, 13, 14, 15, 17, 18, 21, 22, 24, 26, 27, 29, 33, 34, 35, and 36.

Finally, Appellant complains the trial court erred by refusing twenty of his proposed sentencing instructions, DS-3, DS-4, DS-6, DS-7, DS-9, DS-13, DS-14, DS-15, DS-17, DS-18, DS-21, DS-22, DS-24, DS-26, DS-27, DS-29, DS-33, DS-34, DS-35, and DS-36. (Appellant's Br. at 147-49). He states these instructions were proposed for reasons of mercy or sympathy in order to give the jury sufficient guidance on the mitigating evidence he offered and the proper process in

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[15] To the extent that Appellant's constitutional challenge to Miss. Code Ann. § 99-19-105, that claim is procedurally barred due to Appellant's failure to make a contemporaneous objection in the trial court. This is also contrary to Supreme Court precedent. There is no right to have a jury determine whether to impose the death penalty under the federal constitution, *see Spaziano v. Florida*, 468 U.S. 447, 459 (1984), and is an important distinction from a jury determination under *Ring*, 536 U.S. 584. *See U.S. v. Fields*, 483 F.3d 313, 331 (5th Cir. 2007) ("[T]here is no constitutional right to jury sentencing in a noncapital or capital case."). The U.S. Supreme Court has held: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Clemons*, 494 U.S. at 745 (internal citations omitted). Due process is not implicated when a State permits appellate courts to make findings that a jury may also make. *Id*. at 747; *see Fields*, 483 F.3d at 313 ("Indeed, the Supreme Court has explicitly held that judges may do the weighing of aggravating and mitigating circumstances consistent with the Constitution.").

Additionally, the Court's consideration of a challenge to the constitutionality of a statute should be based on more than a couple of conclusive sentences within an argument. The placement of this "claim" in and of itself reveals its weakness. (Appellant's Br. at 146-47).

determining his punishment. (Appellant's Br. at 147). He also asks the Court to consider each and every one of his complaints even though he is well-aware of the fact "that this Court has heretofore rejected the claims raised here. *See e.g., Batiste v. State*, 121 So.3d 808, 866 (Miss. 2013)." (Appellant's Br. at 147). Each instruction is addressed below.

It bears repeating that this Court reviews a trial court's jury instructions for an abuse of discretion, and will affirm the entire jury charge if, when read together and taken as a whole, fairly and correctly states the applicable law. *Dickerson*, 175 So.3d at 26 (quoting *Flowers*, 158 So.3d at 1062 (quoting *Gillett*, 56 So.3d at 496 (quoting *Rubenstein*, 941 So.2d at 787)). While a defendant enjoys the right to jury instructions that present his theory of the case, a trial court may refuse an instruction that is not a correct statement of law, is fairly covered elsewhere, or is not supported by evidence. *Corrothers v. State*, 148 So.3d 279, 317-18 (Miss. 2014) (quoting *Montana v. State*, 822 So.2d 954, 961 (Miss. 2002)). As demonstrated below, this issue is without merit

1. *Review is barred*.

Appellant was not entitled to Proposed Instructions DS-3, DS-4, DS-6, DS-7, DS-9, DS-13, DS-14, DS-15, DS-17, DS-18, DS-21, DS-22, DS-24, DS-26, DS-27, DS-29, DS-33, DS-34, DS-35, or DS-36. He fails to cite for any relevant authority entitling to these instructions. For that reason, this issue should be barred from consideration. *See Fulgham, supra; Thorson, supra*.

2. *Proposed Instructions DS-3, DS-4, DS-6, DS-7, DS-9, DS-14, DS-15, DS-17, DS-22, DS-27, and DS-34*

Proposed Instructions DS-3, DS-4, DS-6, DS-7, DS-9, DS-14, DS-15, DS-17, DS-22, DS-27, and DS-34 provide the State's burden of proof with regard to aggravating circumstances, and reiterate that Appellant does not have the similar burden with regard to mitigating circumstances. The State's omnibus instruction was given by the court. (C.P. 845-48.). This is the standard,

long-form sentencing instruction, which this Court has held properly informs the jury how to consider aggravating and mitigating circumstances. *Ladner v. State*, 584 So. 2d 743, 760 (Miss. 1991). As the long-form sentencing instruction properly instructs the jury as to the burden of proof in capital cases, including how to consider aggravating and mitigating circumstances, any other instruction would be redundant. *Howell v. State*, 860 So.2d 704, 760-63 (Miss. 2003); *Ladner*, 584 So.2d at 760. Moreover, Miss. Code Ann. Section 99-19-101 requires only that the jury find the mitigators outweigh the aggravators. No other burden of proof is proper. *Simmons v. State*, 805 So.2d 452, 500 (Miss. 2001); *Edwards v. State*, 737 So.2d 275, 313 (Miss. 1999); *Smith v. State*, 724 So.2d 280, 301-02 (Miss. 1998); *Berry v. State*, 703 So.2d 269, 289-90 (Miss. 1997); *Williams v. State*, 684 So.2d 1179, 1202 (Miss. 1996).

Additionally, a defendant is not entitled to an instruction stating that the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt. Such an instruction is contrary to the statute and case law. Beyond a reasonable doubt is not the burden on the weighing process. *Simmons*, 805 So.2d at 500; *Edwards*, 737 So.2d at 314; *Bell v. State*, 725 So.2d 836, 860 (Miss. 1998); *Berry*, 703 So.2d at 289-90. Nor is a defendant entitled to an instruction that the jury must find beyond a reasonable doubt that death is the appropriate penalty. The Mississippi statutory scheme does not require this finding. *Id.*; *Williams v. State*, 684 So.2d at 1202; *see* Miss. Code Ann. § 99-19-103.

In light of the preceding, Proposed Instruction DS-3 reads as follows:

> An aggravating circumstance must be found unanimously — that is, by all twelve jurors before it can be considered against [Appellant]. This is not true of mitigating circumstances. The Court instructs you that you are not required to unanimously find that a mitigating circumstance exists before considering it. Each individual juror is required to consider all mitigating circumstances that he or she may find, regardless of whether the other jurors may agree or disagree that the factor is present.

In considering mitigating circumstances, each of you must decide for yourself what weight and consideration is to be given to mitigating circumstances. In other words, even if all eleven other jurors believe that a mitigating circumstance does not exist, or should be given no weight, if one individual juror believes that the circumstance does exist, or that it should be given more weight than it is given by other jurors, that individual juror should follow the dictates of his or her personal opinion.

(C.P. 858.). Proposed Instruction DS-4 read as follows:

You, as an individual juror, must consider mitigating circumstances. Therefore, even if all other eleven jurors find that a certain mitigating circumstance does not exist, if you believe it does exist, you must find that mitigating circumstance, and weigh it in your further deliberations.

(C.P. 859.). Proposed Instruction DS-6 read as follows:

Mitigating circumstances differ from aggravating circumstances because you are not required to be convinced beyond a reasonable doubt that a mitigating circumstance exists before you must take that circumstance into account as you deliberate this case. You must consider a mitigating circumstance if you believe that there is any evidence to support it. Neither are you bound to all agree on the existence of a mitigating circumstance, as you are with an aggravating circumstance. To the contrary, you must–as an individual juror–find a mitigating circumstance to be present if you believe there is any evidence to support it, even if one or all of the other jurors disagree with you. This is a wholly individual decision on your part.

(C.P. 860.). Proposed Instruction DS-7 read as follows:

Unlike the consideration of an aggravating circumstance there is no unanimity requirement in consideration of mitigating circumstances.

Mitigating circumstances differ from aggravating circumstances because you are not required to be convinced beyond a reasonable doubt that a mitigating circumstance exists before you may take that circumstance into account as you deliberate in this case. You must consider a mitigating circumstance if you believe that there is any evidence to support it no matter how weak you determine that evidence to be. Each of you must decide for yourself what weight and what consideration is to be given to mitigating circumstances.

(C.P. 861.). And, Proposed Instruction DS-9 read as follows:

Any finding that an aggravating circumstance has been proven beyond a reasonable doubt must be unanimous. That means that all twelve of you must agree that the aggravating circumstance exists beyond a reasonable doubt. If any of you, whether

several or only one, have a reasonable doubt about whether a particular aggravating circumstance exists, then you do not agree are that circumstance. If there is no unanimity on the jury, then no juror should force any other juror to change his or her mind just to reach agreement.

(C.P. 862.). Proposed Instruction DS-14 read as follows:

The Court instructs the jury that each of you must decide for yourself whether life imprisonment without parole is the appropriate punishment for [Appellant].

(C.P. 864.). Proposed Instruction DS-15 read as follows:

As the death penalty is never required, you may always find that [Appellant] should be sentenced to life without the possibility of parole in the custody of the Mississippi Department of Corrections.

(C.P. 865.). Proposed Instruction DS-17 read as follows:

You may consider whether [Appellant] has no significant history of criminal activity as a mitigating circumstance.

(C.P. 866.). Proposed Instruction DS-22 read as follows:

A mitigating circumstance is anything relevant that helps convince you to impose a sentence less that death.

I instruct you that you may consider any relevant, mitigating evidence.

(C.P. 871.). Proposed Instruction DS-27 read as follows:

If you individually find a mitigating circumstance exists, then you must consider that mitigating circumstance in your individual sentencing decision. Once you have considered that mitigating circumstance, you are also allowed to give it full consideration and full effect in your deliberations with fellow jurors.

(C.P. 874.). Proposed Instruction DS-34 read as follows:

In your sentencing decision, you may consider any aspect of [Appellant]'s character, his record and any of the circumstances of the offense as a reason for you to return a sentence less than death.

(C.P. 877.). The burden of proof was adequately covered by other jury instructions. Other instructions also addressed the burden of proof with regard to mitigating and aggravating

circumstances which accurately reflected the law. In addition to Sentencing Instruction S-5, Sentencing Instructions S-4, DS-2, DS-5, DS-8, DS-16A read as follows:

> The Court instructs the Jury that it must be emphasized that the procedure that you must follow is not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances. Rather, you must apply your reasoned judgement as to whether this situation calls for life imprisonment or life imprisonment without parole or whether the situation requires the imposition of death, in light of the total circumstances present.
>
> ....
>
> The Court instructs the jury that you are not required to find unanimously that a mitigatingating circumstance exists before considering it. Each individual juror is required to consider all mitigating circumstances found by that juror, whether or not the other jurors found them. A mitigating circumstance does not have to be proven beyond a reasonable doubt.
>
> ....
>
> You are the sole and exclusive judges of the facts and evidence. It is your duty alone to determine if the State has met its burden of proof with respect to the alleged aggravating circumstances. If you are unable to agree unanimously beyond a reasonable doubt that one or more of the alleged aggravating circumstances exists in this case, it is your duty to cease deliberations.
>
> ....
>
> You may find that death is not warranted even if there are one or more aggravating circumstances and not a single mitigating circumstance. You are not required to find any mitigating circumstances in order to return a sentence of life imprisonment without parole or life imprisonment. Nor does the finding of an aggravating circumstance require that you return a sentence of death. You, as a juror, always have the option to sentence [Appellant] to life imprisonment without parole or life imprisonment, whatever findings you may make.

(C.P. 844; 849; 851; 853.).

These were given in addition to the omnibus instruction describing juror's statutory duty with regard to mitigating and aggravating circumstances. (C.P. 845-48.). To the extent Appellant proffered an instruction that accurately reflected the law but was nonetheless refused, the record reflects that it was adequately covered by other instructions, including Sentencing Instruction S-5. There was no error when the court refused Proposed Instructions DS-3, DS-4, DS-6, DS-7, DS-9,

DS-14, DS-15, DS-17, DS-22, DS-27, and DS-34.

3. *Proposed Instructions DS-13, DS-26, DS-29, and DS-33*

Proposed Instructions DS-13, DS-26, DS-29, and DS-33 are nothing more than a mercy instruction. There is no requirement that mercy instructions be given. Proposed Instruction DS-13 read as follows:

> You are to begin your deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in this case would be life imprisonment. These presumptions remain with [Appellant] throughout the sentencing hearing and can only be overcome if the State convinces each one of you, beyond a reasonable doubt, that death is the only appropriate punishment.

(C.P. 863.). Proposed Instruction DS-26 read as follows:

> A mitigating factor is anything that in fairness or mercy may reduce blame or that may justify a sentence less than death. A mitigating factor is not a justification or excuse for the crime. It is any part of the character or record of [Appellant] or any circumstances of the crime that you feel justifies a sentence less than death. It is for each of you to decide if a factor is mitigating.
>
> Mercy alone can be a mitigating factor you can consider in deciding not to impose the death penalty and to impose a sentence of life without parole.

(C.P. 873.). Proposed Instruction DS-29 read as follows:

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

(C.P. 875.). Proposed Instruction DS-33 read as follows:

> You are to begin you deliberations with the presumption that there are no aggravating circumstances that would warrant a sentence of death, and the presumption that the appropriate punishment in this case would be life imprisonment. These presumptions remain with [Appellant] throughout the sentencing hearing and can only be overcome if the State convinces each one of you individually, beyond a reasonable doubt, that death is the only appropriate punishment.

(C.P. 876.).

Proposed Instructions DS-13, DS-26, DS-29, and DS-33 contain "presumption of life" language, which this Court has squarely rejected. *Watts v. State*, 733 So.2d 214, 241 (Miss. 1999) ("[W]e reject the proposition that a defendant should go into the sentencing phase with a presumption that life is the appropriate punishment."); *see also, Gillett*, 56 So.3d at 514; *Brown v. State*, 890 So.2d 901, 920 (Miss. 2004). Proposed Instruction DS-13, DS-26, DS-29, and DS were properly denied.

This Court has routinely refused this and similar mercy instructions. It affirmed the refusal to give an instruction with similar language in *Thorson*, 895 So.2d at 108, 111-12. The Court noted that "our cases have consistently refused to hold that the Court is required to grant a mercy instruction." *Id*. at 108; *Corrothers v. State*, 148 So.3d at 318. The Court reiterated "defendants do not have a right to a mercy instruction." *Corrothers*, 148 So.3d at 318 (citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)); *see also, Gillett*, 56 So.3d at 518 (listing cases for this same proposition). The result should be the same here. A defendant is not entitled to a mercy instruction. In fact, such an instruction results in a verdict based on "whim and caprice." *Howell v. State*, 860 So.2d 704, 758-59 (Miss. 2003); *see Thorson*, 895 So.2d at 111; *Foster v. State*, 639 So.2d 1263, 1300-01 (Miss. 1994). Proposed Instruction DS-13, DS-26, DS-29, and DS-33 were properly refused.

4. *Proposed Instructions DS-18, DS-21, DS-24, DS-35, and DS-36*

Proposed Instructions DS-18, DS-21, DS-24, DS-35, and DS-36 are nothing more than mercy instructions. Proposed Instruction DS-18 read as follows:

> You may impose a sentence of life imprisonment without parole for any reason or for no reason at all.

(C.P. 867.). Proposed Instruction DS-21 read as follows:

> You are never required to return a sentence of death to this Court.

(C.P. 870.). Proposed Instruction DS-24 read as follows:

> I instruct you that you may not totally disregard sympathy for [Appellant] in your deliberations as to the appropriate sentence in this matter.

(C.P. 872.). Proposed Instruction DS-35 read as follows:

> Should you find that mitigating circumstances do not exist, I instruct you that the lack of mitigating circumstances cannot be considered an aggravating circumstance.(C.P. 859.).

And, Proposed Instruction DS-36 read as follows:

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

(C.P. 879.).

This Court recently upheld the trial court's refusal of a similar instruction. *Corrothers v. State*, 148 So.3d at 318. The Court reiterated "defendants do not have a right to a mercy instruction." *Corrothers*, 148 So.3d at 318 (citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)); *see also, Gillett*, 56 So.3d at 518. A defendant is not entitled to a mercy instruction. In fact, such an instruction results in a verdict based on "whim and caprice." *Howell*, 860 So.2d at 758-59; *see Thorson*, 895 So.2d at 111; *Foster*, 639 So.2d at1300-01. Further, Proposed Instructions DS-18 and DS-36 are a type of mercy instruction and should not be given. *Ballenger*, 667 So.2d at 1264-65.

5. *Proposed Instructions DS-24, DS-26 and considerations of mercy or sympathy*

Additionally, Appellant maintains that it was error to instruct the jury that it may impose death if mitigation did not outweigh aggravation, without also giving Proposed Instructions DS-24 and DS-26. (Appellant's Br. at 148-49). He essentially contends that if mitigating and aggravating circumstances are in equipoise, then according to the court's instruction and the sentencing statute, a "tie" goes to death. This same argument was rejected by this Court in *Corrothers* and should be rejected again here. *See also, Batiste v. State*, 121 So.3d 808, 866 (Miss. 2013) (same and also

rejecting defendant's reliance on *Kansas v. March*, 548 U.S. 163 (2006)).

In conclusion and for the reasons above, Appellant's ninth claim for relief and all its issues and subparts have no merit. He invites the Court to revisit sound precedent. But he fails to establish a legal or factual basis for doing so. The jury was properly instructed. Appellant's ninth claim entitles him to no relief. Therefore, the State respectfully requests the Court deny Appellant's ninth claim for relief.

X
Appellant's sentence is constitutional.

Appellant next claims his death sentence is illegal, because Mississippi's capital punishment scheme is unconstitutional for several reasons. (Appellant's Br. at 149-72). None have merit. Mississippi's capital sentencing scheme is constitutional, period. Appellant is entitled to no relief. So, the State asks that the Court deny his tenth claim for the reasons below.

A. Mississippi's capital punishment scheme is constitutional.

Appellant's first issue is that Mississippi's capital punishment scheme is unconstitutional, because it violates the Eighth Amendment. (Appellant's Br. at 151-67). He contends the imposition of the death penalty: (1) is categorically excessive as a form of punishment for any murder; (2) is arbitrarily applied and serves no legitimate penological purpose; and (3) creates an unacceptable risk of executing innocent individuals. (Appellant's Br. at 151-58; 159-64; 164-67). He is mistaken.

1. *Review is barred.*

Review of this issue is barred, twice-over. First, it is not properly before the Court. Appellant tells the Court that this Eighth Amendment challenge was presented to the trial court as an omnibus challenge. (Appellant's Br. at 151). He cites portions of the Record where he claims

his omnibus challenge was raised, argued, and denied. For example, Appellant cites pages 62 through 72 of the Clerk's Papers. That portion of the Record contains four motions/papers: a "Demand for Notice of Aggravating Circumstances" (C.P. 62-64); a "Motion to Disclose the Past and Present Relationships, Associations and Ties Between the District Attorney and His Staff to Law Enforcement Agencies and Prospective Jurors" (C.P. 65-66); a "Motion to Sever" (C.P. 67-68); and a "Motion for Notice of Intent to Introduce 'Bad Act' Evidence Against Defendant Under Rule 404(B) or 608(B) of the Mississippi Rules of Evidence and Motion for a Determination of the Admissibility of this Alleged Evidence in Advance of the Proceeding Wherein Its Introduction Will be Sought" (C.P. 69-81). It must be noted that Appellant's Motion to Sever (C.P. 67-68) was, according to defense counsel, "filed ... in error." (Tr. 36). Appellant cites a portion of the trial transcript where he claims his omnibus challenge "was called up by the defense, argued by the parties and denied by the trial court.... Tr. 233-36, C.P. 723." (Appellant's Br. at 151). But that citation does not support his representation in the slightest. The same is true of his citation to page 723 of the Clerk's Papers, which contains one image of a single newspaper page. (See C.P. 723).

Appellant's Eighth Amendment challenge is not properly before the Court. "This Court has repeatedly held that it is the responsibility of the movant to obtain a ruling from the court on motions ... and failure to do so constitutes a waiver." *Byrom*, 863 So.2d at 851 (citations, brackets, and some punctuation omitted). Appellant failed to obtain a ruling on the matter and cannot show the trial court erred. He is barred from asserting error for the first time on appeal. *Keller v. State*, 138 So.3d 817, 875 (Miss. 2014) (citing *Chamberlin v. State*, 55 So.3d 1046, 1056 (Miss. 2010)). The record does not support Appellant's contention that he made the specific arguments he raises here. At best, what the record reflects is, that Appellant generally referred to the Eighth Amendment and other

constitutional provisions.

Review is also barred for Appellant's failure to cite any authority, which invalidates Mississippi's capital punishment scheme or holds the death penalty *per se* unconstitutional. He admits: "[N]either this Court nor the U.S. Supreme Court have yet adopted the positions he takes...." (Appellant's Br. at 149). " 'Failure to cite relevant authority obviates the appellate court's obligation to review such issues.' " *Keller*, 138 So.3d at 875 (quoting *Byrom*, 863 So.2d at 863); *see also Dickerson v. State*, 175 So.3d 8, 33 (Miss. 2015) (holding the failure to support challenges to capital sentencing statute constituted a waiver that barred review on appeal); *Brown*, 690 So.2d at 297 (barring review of claims, which were not supported by "meaningful argument or relevant authority").

Review of the first issue supporting Appellant's tenth claim is procedurally barred, twice-over. His failure to raise this issue during the proceedings below precludes review on appeal. And, his failure to support this issue with relevant authority effectively waives the Court's obligation to review it. The Court should hold refuse Appellant's first challenge to Mississippi's capital punishment scheme procedurally barred, refuse to consider it, and deny Appellant's tenth claim.

2. *Capital punishment is not per se unconstitutional.*

Without waiving the procedural bars above, the State submits Appellant's Eighth Amendment challenge to Mississippi's capital punishment scheme is entirely without merit. Appellant first contends Mississippi's capital punishment scheme violates the Eighth Amendment, because it permits the imposition of the death penalty for capital murder. Appellant believes the death penalty is categorically excessive as a form of punishment for any murder. To support his belief, he relies heavily, if not entirely, on Justice Breyer's Dissenting Opinion in *Glossip v. Gross*,

___ U.S. ___, 135 S.Ct. 2726, 2755-80 (2015), and recent death penalty abolitionists' opinions, studies, and statistics. He argues this opinion and information show a national trend to abandon the imposition of the death penalty. And as he sees it, the trend is proof that the death penalty is unusual punishment and the existence of a national consensus against the death penalty as an excessive form of punishment. (Appellant's Br. at 152-58). He asks the Court to reverse decades of Its precedent, which holds the death penalty is a constitutionally permissible form of punishment for capital murder as imposed under the State's capital punishment scheme.

The U.S. Supreme Court's decision in *Gregg v. Georgia*, 428 U.S. 153 (1976), controls the inquiry here, "whether the sentence of death for the crime of murder is a *per sei* violation of the Eighth and Fourteenth Amendments to the Constitution." *Gregg*, 428 U.S at 176. Appellant relies considerably on data of purported "public perceptions of standards of decency" to show the death penalty is excessive punishment for murder. *Id.* at 173. He bears "a heavy burden" to show the death penalty is not "cruelly inhumane or disproportionate to the crime involved." *Id.* at 175. But *Gregg* is clear in stating: "public perceptions of standards of decency with respect to criminal sanctions are not conclusive." *Id.* at 173. Appellant challenges the death penalty in the abstract, rather than in the particular.[16] His challenge asks:

> whether capital punishment may ever be imposed as a sanction for murder[.]... [T]he inquiry into :"excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain.... Second, the punishment must not be grossly out of proportion to the severity of the crime.

Id. (internal citations omitted). This Court must presume Mississippi's capital punishment scheme

[16] In *Gregg*, the Court brief noted that, when the challenge to the form of punishment is in the abstract, the question is: "whether punishment may ever be imposed as a sanction for murder...." *Gregg*, 428 U.S. at 173. A challenge to the form of punishment in the particular questions "the propriety of death as a penalty to be applied to a specific defendant for a specific crime...." *Id.*

is constitutionally valid. *Id.* *Gregg* also reminds courts should "not act a[s] judges as we might as legislators." *Id.* at 174-75. The reasoning is that::

> "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Dennis v. United States*, 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring in affirmance of judgment).

Id. at 175. And finally, the Court should "note first that history and precedent strongly support a negative answer ..." as to whether death for murder is a *per se* violation of the Eighth and Fourteenth Amendments. *Id.* at 176.

With respect to history and precedent, this Court has rejected this argument, repeatedly. *See Gillett v. State*, 56 So.3d 469, 525 (Miss. 2010) (rejecting Gillett's claim that " 'Miss. Code Ann. 99-19-101, the capital sentencing mechanism in the State of Mississippi, violates [the] Eighth and Fourteenth Amendment[s] ... in that the death penalty constitutes cruel and unusual punishment' "); *Walker v. State*, 740 So.2d 873, 889-90 (Miss. 1999) (rejecting the allegation that "the [death] sentence imposed by the jury [wa]s cruel and unusual punishment in violation of the eighth amendment to the United States Constitution"); *Smith v. State*, 419 So.2d 563, 566 (Miss. 1982) (reaffirming the holding "the death penalty is not *per se* unconstitutional") (citing *Bullock v. State*, 391 So.2d 601, 611 (Miss. 1980); *Washington v. State*, 361 So.2d 61, 66 (Miss. 1978)); *Coleman v. State*, 378 So.2d 640, 647 (Miss. 1979) (same); *Jackson v. State*, 337 So.2d 1242, 1249 (Miss. 1977) ("The death penalty is not per se unconstitutional.").

And, the U.S. Supreme Court has "time and again reaffirmed that capital punishment is not ***per se* unconstitutional**." *Glossip v. Gross*, ___ U.S. ___, 135 S.Ct. 2726, 2739 (2015) (emphasis

in the original). "[I]t is settled that capital punishment is constitutional...." *Glossip*, 135 S.Ct. at 2732; *see also Baze v. Rees*, 553 U.S. 35, 47 (2008) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional."); *Gregg v. Georgia*, 428 U.S. 153, 177, 187 (1976); *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878). In *Glossip*, Justice Scalia underscored the Court's consistency on this issue when he wrote:

> not once in the history of the American Republic has this Court ever suggested the death penalty offends the constitution impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly contemplates. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital... crime, unless on a presentment or indictment of a Grand Jury," and that no person shall be "deprived of life... without due process of law."

Id. at 2747 (Scalia, J., concurring) (brackets and alterations in the original). The Court would have to invalidate the Fifth Amendment's explicit reference to capital punishment, not to mention disregard binding U.S. Supreme Court precedent, to accept Appellant's contention.

To be sure, Appellant's Eighth Amendment challenge stands in direct opposition to controlling precedents of this Court and the U.S. Supreme Court. The fact that it does strongly supports the State's position that capital punishment is not *per se* unconstitutional. As noted above, Appellant relies on statistical data related to other states' legislative efforts as objective proof of a national consensus against the death penalty. He reports "[n]ineteen states plus the District of Columbia have abolished the death penalty, either by affirmative legislative enactment or inaction in the face of judicial abolition inviting legislative correction." (Appellant's Br. at 152). And of those nineteen states, he lists seven States that have legislatively abolished the death penalty in the past eight years. (Appellant's Br. at 153). His list, as discussed in the following paragraph, is now inaccurate. But more importantly, the fact that six states have legislatively abolished the death

penalty is not evidence that establishes a national consensus generally against capital punishment as a form of cruel and unusual punishment. *See e.g., Gregg*, 428 U.S. at 180-81 (noting thirty-five states enacting statutes post *Furman,* which is but four more states than present day's count according to Appellant's data).

Three significant events took place in November of 2016 when voters took to the polls in three States. First and speaking directly to Appellant's list of seven States, Nebraskans reinstated the death penalty and abrogated the repeal of that State's capital punishment statute, which State lawmakers pushed through Nebraska Legislature in the Spring of 2015. Voters abrogated State lawmakers' repeal of Nebraska's capital punishment state by a landslide. They did so in a matter of months. When the first opportunity arose, Nebraska's electorate turned out in mass and reinstated the death penalty by a convincing margin. Second, Oklahomans spoke loudly at the ballot box, and approved two State constitutional amendments by a definitive two-to-one margin. The Oklahoma Legislature now has the constitutional authority to adopt any execution method that is not banned by the U.S. Constitution. And, Oklahoma's constitution prevents the State's courts from declaring the death penalty, cruel and unusual punishment. Californians also voted on two important issues concerning its capital punishment scheme. First, California voters refused to abolish the death penalty. *Cf. Gregg*, 428 U.S. at 181 (recognizing California electorate's approval of a constitutional amendment that authorized capital punishment). And second, Californians approved legislation, which caps the number of state court death penalty appeals in favor of expediting executions. Californians' response to both issues is fact that speaks directly to Appellant's opinion that death sentences imposed by Californians are "entirely symbolic". (Appellants Br. at 157).

It is also worth noting the Mississippi Legislature's recent efforts. The Legislature, in 2015

and 2016, approved legislation in favor of capital punishment. First, it broadened Miss. Code Ann. § 97-3-19(2)'s definition of capital murder with two new offenses. Miss. Code Ann. § 97-3-19(2)(I), (j); 2015 Miss. Laws Ch. 450 (H.B. 1052). Second, it amended Section 99-19-51(2) of the Mississippi Code of 1972, Annotated, as a legislative measure to protect the identities of Mississippi's execution team. Miss. Code Ann. § 99-19-51(2); 2016 Miss. Laws Ch. 452 (S. B. 2237). The Legislature did so for a couple of reasons. One was to end costly and frivolous litigation. Another was to thwart death penalty abolitionists' undemocratic efforts to sabotage the execution of valid death sentences by disrupting the State's supply of lethal injection chemicals.

Appellant also claims evidence, other than formal legislation, supports his contention that a national consensus against the death penalty exists. (Appellant's Br. at 153-55). He cites *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, 1997 (2014), *Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008), *Roper v. Simmons*, 543 U.S. 551, 564-65 (2005), and *Atkins v. Virginia*, 536 U.S. 304 (2002) as examples where the U.S. Supreme Court considered the number of executions actually carried out supports as a factor in determining society's perception of standards of decency. (Appellant's Br. at 153-55). But none of those cases address a claim that capital punishment is *per se* unconstitutional for any form of murder. The number of executions cannot be considered in a vacuum as evidence of a national consensus. After all, a jury would never recommend a sentence of death if the prosecution chose not to seek to impose the death penalty. Appellant, however, offers no reason that supports his contention. *See Glossip*, 135 S.Ct. at 2749 (noting that "Justice BREYER uses the fact that many States have abandoned capital punishment—have abandoned *precisely because of* the costs those suspect decisions have imposed—to conclude that it is now "unusual"). For example, Appellant notes that "Oregon is one of four States – Colorado,

Washington and Pennsylvania are the others – whose governors have halted execution by moratorium." (Appellant's Br. at 154, n. 60). But the number of executions in those four States can be objectively attributed, at least in part, to the moratoria imposed by four individuals, rather than those States' electorates.

He also relies on opinion and statistics to support his contention. The problem with statistics is that they are easily manipulated to support opinion. But it is worth noting the historical trends reported by Gallup at http://www.gallup.com/poll/1606/death-penalty.aspx. Based on that data, support for capital punishment is equal to the support forty years ago and eighty years ago. It also indicates, that as of mid-October of 2016, 60% of the nation favors the imposition of the death penalty. In any event, the opinion and statistics that Appellant relies on do not show the existence of a national consensus against the death penalty.

The evidence Appellant relies on does not show a consistent change among the states to abolish the death penalty. The fact is, a majority of states, including Mississippi, and support capital punishment. "[I]t is settled that capital punishment is constitutional...." *Glossip*, 135 S.Ct. at 2732.

3. *No Legitimate purposes and narrowing functions*

Appellant's next contention is that no State's capital punishment scheme is capable of meeting the Eighth Amendment's requirements of serving only legitimate penological purposes and meaningfully narrowing the crimes and offenders. (Appellant's Br. at 159-64). He states that "[t]he Eighth Amendment commands that a punishment have a legitimate penological purpose. (Appellant's Br. at 159). He also points out that "the death penalty must 'be limited to those offenders who commit a narrow category of the most serious crimes *and* whose extreme culpability make them the most deserving of execution.' *Kennedy*, 554 U.S. at 420 (emphasis supplied)."

(Appellant's Br. at 159). According to him, "[n]either of these constitutional requirements is being met by the death penalty in practice today." (Appellant's Br. at 159).

The State first submits this issue is procedurally barred. Appellant "did not make this argument at trial and is procedurally barred from raising it for the first time on appeal." *Jordan v. State*, 786 So.2d 987, 1028 (Miss. 2001). Additionally, Appellant advances general assertions, but entirely fails to support them with meaningful argument and legal authority. *See Dickerson*, 175 So.3d at 33 (barring review of unsupported challenges to Mississippi's capital punishment scheme); *Brown*, 690 So.2d at 297 (barring review of claims that were not based on "meaningful argument or relevant authority"). Without waiving the procedural bar, the State further submits this issue is without merit.

According to Appellant, the death penalty has no retributive value or deterring effect when imposed upon adults, who are not intellectually disabled but "do suffer or suffered other mental defects or deficiencies, or addiction, or an abusive upbringing, or other things that would render death ... a proportionate sentence." (Appellant's Br. at 163). He argues that Mississippi's capital punishment scheme (or any other State's capital punishment scheme) lacks the procedural safeguards necessary to mitigate the "serious risk of wrongful execution ..." by a sentencer who is "ill-equipped to discern who falls into that narrow category." (Appellant's Br. at 163). So in other words, Appellant argues juries (and judges) lack the ability to appreciate the weight of mitigating evidence and more often than not, find it to be aggravating. And because of this inability, there is a risk of wrongful execution that may be removed simply by ending the use of capital punishment.

At the outset, the State would call attention to the total absence of support for this contention. The Court rejected a similar claim in *Puckett v. State*, 737 So.2d 322 (Miss. 1999). In that case,

Puckett claimed the State's capital sentencing scheme condoned the infliction of cruel and unusual punishment for the reasons stated in *Furman*, 408 U.S. 238. *Puckett*, 737 So.2d at 363. Puckett also relied on an American Bar Association's call for a moratorium on the death penalty to support his claim. *Puckett*, 737 So.2d at 363. The Court rejected that argument, finding:

> neither *Furman* nor the American Bar Association is controlling or even persuasive authority. Mississippi's death penalty statutes have been reviewed and upheld as constitutional in light of *Furman* as well as later United States Supreme Court cases. *See Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Johnson v. State*, 476 So.2d 1195, 1201 (Miss. 1985); *Billiot v. State*, 454 So.2d 445, 464 (Miss. 1984); *Williams v. State*, 445 So.2d 798, 809 (Miss. 1984); *Edwards v. State*, 441 So.2d 84, 90 (Miss. 1983); *Smith v. State*, 419 So.2d 563, 566 (Miss. 1982); *Bullock v. State*, 391 So.2d 601, 611 (Miss. 1980); *Coleman v. State*, 378 So.2d 640, 647 (Miss. 1979); *Washington v. State*, 361 So.2d 61, 66 (Miss. 1978); *Gray v. State*, 351 So.2d 1342, 1344 (Miss. 1977); *Jackson v. State*, 337 So.2d 1242, 1249 (Miss. 1976).

Id. at 363.

Additionally, this contention is policy argument to categorically end the death penalty. Appellant should present this argument to the State Legislature. "What purpose is served by capital punishment and how a State should implement its capital punishment scheme—to the extent that those questions involve only policy issues—are matters over which we, as judges, have no jurisdiction." *Harris v. Alabama*, 513 U.S. 504, 510 (1995). The Court's "power of judicial review" over a State's policies is limited to constitutional determinations of its legislative enactments. *Harris*, 513 U.S. at 510.

In *Dickerson v. State*, 175 So.3d 8 (Miss. 2015), Dickerson argued his history of mental illness removed him from the class of death-eligible offenders, similar to the intellectually disabled and juveniles. He asked the Court to hold the mentally ill exempt from the death penalty. *Dickerson*, 175 So.3d at 17-18. But the Court refused to do so, explaining:

> The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishment." In *Atkins v. Virginia*, the United States Supreme Court addressed whether the execution of mentally retarded individuals violated the Eighth Amendment and held that the death penalty was "not a suitable punishment for a mentally retarded criminal." *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. Three years later, in *Roper v. Simmons*, the Supreme Court held that the death penalty is a disproportionate punishment for those who were under age eighteen when their crime was committed. *Roper*, 543 U.S. at 575, 125 S.Ct. 1183. In both cases, the Supreme Court held that the penological justifications for the death penalty-retribution and deterrence-were not served by the execution of the mentally retarded or juveniles because those offenders had diminished culpability. *Roper*, 543 U.S. at 551, 125 S.Ct. 1183; *Atkins*, 536 U.S. at 318-19, 122 S.Ct. 2242.
>
> Dickerson now seeks to have this Court extend *Atkins* and *Roper* to preclude the death penalty for the mentally ill. The Fifth Circuit has rejected this argument repeatedly. *See Ripkowski v. Thaler*, 438 Fed.Appx. 296, 303 (5th Cir. 2011) ("[T]he Fifth Circuit has recognized the distinction between the mentally ill and the mentally retarded and has held that Atkins only protects the latter."); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (Defendant claimed that *Atkins* and *Roper* "created a new rule of constitutional law ... making the execution of mentally ill persons unconstitutional." The Fifth Circuit held that "[n]o such rule of constitutional law was created, however, by either *Atkins* or Roper."); *In re Woods*, 155 Fed.Appx. 132, 136 (5th Cir. 2005) ("*Atkins* did not cover mental illness separate and apart from mental retardation[.]").
>
> *Roper* exempted juvenile offenders from the death penalty, and *Atkins* exempted the mentally retarded. Dickerson is neither under eighteen nor mentally retarded. Therefore, he is not exempt from the death penalty under *Atkins* or *Roper*. We will not extend those cases to apply to the mentally ill when "[t]he Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence." *Ripkowski*, 438 Fed.Appx. at 303. We cannot take the Atkins opinion-which was so specific to mental retardation that the Court cited and discussed the clinical definition of mental retardation-and apply it to all other mental disorders. To do so would be no different than taking *Roper* and expanding it to preclude execution of criminals under age twenty-one, rather than age eighteen as the Supreme Court explicitly held. Dickerson's alternative argument that the death penalty cannot be imposed on the mentally ill is without merit.

Id. at 17-18.

A State's capital punishment scheme meets the Eighth Amendment's requirements if it: (1) narrows of the class of death-eligible offenses and offenders; and (2) focuses the sentencer's attention on the individual defendant and his crime. *Blystone v. Pennsylvania*, 110 S.Ct. 1078, 1084

(1990) (quoting *McCleskey v. Kemp*, 107 S.Ct. 1756, 1773-74 (1987)). Mississippi's capital punishment scheme narrows the class of death-eligible offenses and offenders in several ways. It limits the class of death-eligible defendants by narrowly defining capital murder. *See* Miss. Code Ann. § 97-3-19(2) (defining capital murder). Death is a punishment that is available only for a limited number of specified killings listed under the State's capital murder statute. *Id.* The state's capital punishment scheme requires a capital murder conviction be accompanied by at least one statutorily prescribed aggravating circumstance before the death penalty can be imposed. Miss. Code Ann. § 99-19-101(3), (5). "[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Zant v. Stephens*, 103 S.Ct. 2733, 2743 (1983).

Mississippi's capital punishment scheme also focuses the jury's attention on the defendant and his crime. Section 99-19-101, *et seq.*, sets out the procedure that governs the penalty phase proceedings in a capital murder trial. That procedure channels the jury's attention on the defendant and his crime with aggravating circumstances. "The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants...." *Blystone*, 110 S.Ct. at 1084. Likewise, the State's sentencing procedure channels the jury's attention on the defendant and his crime with mitigating circumstances. The defendant is given the opportunity to present the jury with essentially whatever relevant mitigating evidence that can be adduced during the penalty phase. And the State's sentencing procedure provides judicial review of the jury's decision in this Court as a measure, which promotes evenhanded, rational, and consistent death sentences.

Capital punishment's retribution function is:

> an expression of society's moral outrage at particularly offensive conduct. This function ... is essential in an ordered society that asks its citizens to rely on legal

processes rather than self-help to vindicate their wrongs.

> "The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law." *Furman v. Georgia*, *supra*, 408 U.S., at 308, 92 S.Ct., at 2761 (Stewart, J., concurring).
>
> ...
>
> Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[30]

FN 30: Lord Justice Denning, Master of the Rolls of the Court of Appeal in England, spoke to this effect before the British Royal Commission on Capital Punishment:

> "Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformative or preventive and nothing else.... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not." Royal Commission on Capital Punishment, Minutes of Evidence, Dec. 1, 1949, p. 207 (1950).

A contemporary writer has noted more recently that opposition to capital punishment "has much more appeal when the discussion is merely academic than when the community is confronted with a crime, or a series of crimes, so gross, so heinous, so cold-blooded that anything short of death seems an inadequate response." Raspberry, Death sentence, The Washington Post, Mar. 12, 1976, p. A27, cols. 5-6.

Gregg, 428 U.S. at 183-84, n. 30 (some footnotes omitted).

Appellant claims incarceration will likely cause him to suffer some mental illness or defect as a result of the conditions on Mississippi's death row. (Appellant's Br. at 164 n. 70). The Court has heard this claim on several occasions. In *Wilcher v. State*, 863 So.2d 776 (Miss. 2003), the Court rejected Wilcher's complaints about having been:

subjected to "cruel and inhuman" treatment because he has been kept in maximum confinement on Mississippi's Death Row under conditions including lock-down and isolation for at least 23 hours out of the day, and because he has been subjected to numerous execution dates during those 19-20 years. To support this argument, Wilcher relies on dissenting opinions in *Elledge v. Florida*, 525 U.S. 944, 119 S.Ct. 366, 142 L.Ed.2d 303 (1998) (Breyer, J., dissenting from denial of certiorari) and *Lackey v. Texas*, 514 U.S. 1045, 1045-47, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995) opinion of Stevens, J., respecting denial of certiorari).

This Court has spoken to this very issue before:

> Jordan argues that he has been incarcerated on death row from the time the crime was committed in this case, in 1976, until 1991, and then again in 1998, when the life sentence was vacated, until now. He claims that he has suffered psychological trauma waiting for his execution and that there is nothing gained by the State from 22 years of needless infliction of pain and suffering. He indicates that the United States Supreme Court has held that the death penalty violates the Eighth Amendment when it makes no measurable contribution to acceptable goals of punishment, *i.e.*, retribution and deterrence, and is nothing more than needless imposition of pain and suffering. *Penry v. Lynaugh*, 492 U.S. 302, 335, 109 S.Ct. 2934, 2956, 106 L.Ed.2d 256, 289 (1989).
>
> ...
>
> There is no precedent which supports Jordan's contention that his Eighth Amendment right against cruel and unusual punishment has been violated. Therefore, there are no grounds for reversal on this issue.

Jordan, 786 So.2d at 1028. This Court's language in *Jordan* goes to the very heart of the issue presented by Wilcher. There is no law of the United States or of this state to support Wilcher's claim. There are no grounds for post-conviction relief on this issue. *Jordan*, 786 So.2d at 1028.

Wilcher, 863 So.2d at 834; *King v. State*, 960 So.2d 413, 432 (Miss. 2007); *Russell v. State*, 849 So.2d 95, 144-45 (Miss. 2003); *Jordan*, 786 So.2d at 1028.

In *Gregg*, the U.S. Supreme Court noted that capital punishment was, in part:

> Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate.[31] The results simply have been inconclusive. As one opponent of capital punishment has said:
>
> "(A)fter all possible inquiry, including the probing of all possible methods of inquiry, we do not know, and for systematic and easily visible reasons cannot know, what the truth about this 'deterrent' effect may be....

> "The inescapable flaw is ... that social conditions in any state are not constant through time, and that social conditions are not the same in any two states. If an effect were observed (and the observed effects, one way or another, are not large) then one could not at all tell whether any of this effect is attributable to the presence or absence of capital punishment. A 'scientific' that is to say, a soundly based conclusion is simply impossible, and no methodological path out of this tangle suggests itself." C. Black, Capital Punishment: The Inevitability of Caprice and Mistake 25-26 (1974).
>
> Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties,[32] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.[33] And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.
>
> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. *Furman v. Georgia*, *supra*, 408 U.S., at 403-405, 92 S.Ct., at 2810-2812 (Burger, C. J., dissenting). Indeed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.
>
> In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of dea as a punishment for murder is not without justification and thus is not unconstitutionally severe.

428 US. at 184-86. And, in *Glossip*, Justice Scalia wrote, in part, that::

> Justice BREYER speculates that it does not "seem likely" that the death penalty has a "significant" deterrent effect. Post, at 2768. It seems very likely to me, and there are statistical studies that say so. See, *e.g.*, Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 166 (2004) ("[I]t is estimated that each state execution deters approximately fourteen murders per year on average"); Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344 (2003) ("[E]ach execution results, on average, in eighteen fewer murders"

> per year); Sunstein & Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life–Life Tradeoffs, 58 Stan. L. Rev. 703, 713 (2005) ("All in all, the recent evidence of a deterrent effect from capital punishment seems impressive, especially in light of its 'apparent power and unanimity' ").

Glossip, 135 S.Ct. at 2748-49 (Scalia, J., concurring).

Appellant has presented no argument or authority that has not been previously presented to the Court that would give grounds for this court to revisit Its prior rulings on this matter. In addition to being procedurally barred, this issue is without merit. Appellant is entitled to no relief for this issue.

4. ***An unacceptable risk of executing the innocent***

Appellant claims the death penalty is unconstitutional, because it is possible that innocent people may be executed. (Appellant's Br. at 164-67). Eleven years ago, in *Kansas v. Marsh*, Justice Scalia noted:

> at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has confirmed guilt.

Kansas v. Marsh, 548 U.S. 163, 188 (2006) (Scalia, J., concurring).

" 'Since 1878, the Supreme Court has upheld challenges to death penalty statutes based upon the Due Process Clause as well as the Eighth Amendment.' " *U.S. v. Honken*, 541 F.3d 1146, 1174 (8th Cir. 2009) (quoting *U.S. v. Quinones*, 313 F.3d 49, 65 (2d Cir. 2002)).[17,] In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court "was presented with, considered, and declined to adopt the

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[17] Citing *Wilkerson v. Utah*, 99 U.S. 130, 25 L.Ed. 345 (1878); *In re Kemmler*, 136 U.S. 436, 449, 10 S.Ct. 930, 34 L.Ed. 519 (1890); *State of Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 470, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (Frankfurter, J., concurring). *Quinones*, 313 F.3d at 65.

argument that capital punishment unconstitutionally deprives innocent persons who have been sentenced to death of the opportunity to exonerate themselves." *Honken*, 541 F.3d at 1174 (quoting *Quinones*, 313 F.3d at 65-66). "Under our Constitution, the government explicitly may, with due process of law, deprive a person of life." *Id.* (citing U.S. Const. amend. V).

Appellant does not claim to be one who is innocent and may be wrongfully executed. He makes no claim at all. He does, however, make a general policy argument against the death penalty. (See Appellant's Br. at 164-66). The statistical or theoretical possibility that an innocent person might be executed is not a reason for invalidating the death penalty as an unconstitutional form of cruel and unusual punishment. *See McClesky v. Kemp*, 481 U.S. 279, 319 (1987) ("It is not the responsibility—or indeed even the right—of this Court to determine the appropriate punishment for particular crimes."). This is an issue for the Legislature, not the Court. *See McClesky*, 481 U.S. at 319 ("It is the legislatures, the elected representatives of the people, that are 'constituted to respond to the will and consequently the moral values of the people.' ") (quoting *Furman*, 408 U.S. at 383); *Honken*, 541 F.3d at 1174; *see generally Johnson v. State*, 477 So.2d 196, 219 (Miss. 1985) (recognizing it is not the function of the Court "to curtail the legislative authority" to determine the aggravating circumstances). Appellant's policy argument has been presented to Congress.

In *Quinones*, the Second Circuit Court of Appeals noted that before enacting the Federal Death Penalty Act:

> Congress had been presented with extensive evidence in support of the argument that innocent individuals might be executed. *See, e.g.,* 140 Cong. Rec. S10394–02 (Aug. 2, 1994) (Statement of Sen. Simon) (discussing generally "False Convictions and the Death Penalty" and placing on the record a 1994 USA Today article that noted "at least 85 instances in the past 20 years in which prosecutors—knowingly or unknowingly—relied on fabricated, mishandled, or tampered evidence to convict the innocent or free the guilty" and suggesting that "such miscarriages of justice are more common than we might like to believe"); 140 Cong. Rec. H2322–02, *H2330 (April

> 14, 1994) (Statement of Rep. Nadler) ("The death penalty, once imposed, can never be recalled.... We have no way of judging how many innocent persons have been executed, but we can be certain that there were some."); *id*. at *H2327 (Statement of Rep. Mfume) ("a large body of evidence shows that innocent people are often convicted of crimes, including capital crimes, and that some of them have been executed. There have been, on the average, more than four cases per year in which an entirely innocent person was convicted of murder, and many of those persons were sentenced to death."); *id*. at *H2326 (April 14, 1994) (Statement of Rep. Kopetski) ("Stanford Law Review documented hundreds of cases in which innocent individuals were sentenced to death, 23 of whom were wrongly executed. Let me repeat that, because it's a staggering number: 23 people lay dead who were later exonerated of wrongdoing."); 139 Cong. Rec. S15745–01, *S15766 (Nov. 16, 1993) (Statement of Sen. Levin) (noting "case after case after case in which people have been sentenced to death only later to be found innocent and released" and placing on the record an October 21, 1993 study by the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee that "describes 48 cases in the past 20 years where a convicted person has been released from death row either because their innocence was proven or because there was a reasonable doubt that was raised as to their guilt")....

Quinones, 313 F.3d at 65-66. With respect to this information, the *Quinones* Court stated that:

> While not determinative, it is noteworthy that Congress enacted the FDPA against the backdrop of repeated assertions by some members that innocent people have been executed. This informed, deliberative legislative action itself casts doubt on the assertion that the right to a continued opportunity for exoneration throughout the course of one's natural life is "rooted in the ... conscience of our people."

Id. at 65-66.

The Court should deny Appellant's second issue. It is procedurally barred and entirely without merit. Mississippi's capital punishment scheme is entirely consistent with controlling precedents of this Court and the U.S. Supreme Court. "[I]t is settled that capital punishment is constitutional...." *Glossip*, 135 S.Ct. at 2732.

C. The indictment.

Appellant's third issue is that his sentence is constitutionally flawed, because the indictment did not include all the statutory aggravating circumstances. He cites to, and relies primarily on, the

U.S. Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Kansas v. Marsh*, 548 U.S. 163 (2006) for support. (Appellant's Br. at 166-68). This issue fails in light of this Court's precedent. *Apprendi* holds that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476. *Ring* holds that where aggravating factors operate as "the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. 584 at 609. But this Court has held that *Apprendi* and *Ring* do not apply to Mississippi's capital punishment scheme. *Havard v. State*, 928 So.2d 771, 801 (Miss. 2006) (citing *Berry v. State*, 882 So.2d 157, 172 (Miss. 2004) ("The Supreme Court has not found that state capital defendants have a constitutional right to have all aggravating circumstances listed in their indictments.")); *Thorson v. State*, 895 So.2d 85, 105 (Miss. 2004) ("As we have continuously held that these case[s] have no application to Mississippi's capital murder sentencing scheme.").

The Court recently reiterated these holdings in *Corrothers v. State*, 148 So.3d 279 (Miss. 2014). There, It explained:

> *Apprendi's* statement that any fact that increases the maximum penalty must be charged in an indictment relates to the Sixth Amendment right to a jury trial, not to requirements for an indictment. *Havard v. State*, 928 So.2d 771, 801 (Miss. 2006). Neither *Apprendi* nor *Ring* addressed state indictments. *See Berry v. State*, 882 So.2d at 170. We have held that "these cases ... address issues wholly distinct from our law, and do not address indictments at all." *Brown v. State*, 921 So.2d 901, 918 (Miss. 2004) (citing *Stevens v. State*, 867 So.2d 219 (Miss. 2003)).

Batiste, 121 So.3d at 871. Accordingly, *Apprendi* and *Ring* did not require the inclusion of aggravating circumstances in Corrothers's indictment.

Moreover, "[w]hen [Corrothers] was charged with capital murder, he was put on

> notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required." *See Goff v. State*, 14 So.3d 625, 665 (Miss. 2009). "The State is correct in its assertion that a defendant is not entitled to formal notice of the aggravating circumstances to be employed by the prosecution and that an indictment for capital murder puts a defendant on sufficient notice to what statutory aggravating factors will be used against him." *Brawner v. State*, 947 So.2d 254, 265 (Miss. 2006). The Court in *Brawner* further stated:
>
> Accordingly, all that is required in the indictment is a clear and concise statement of the elements of the crime charged. Our death penalty clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment. Thus, every time an individual is charged with capital murder they are put on notice that the death penalty may result. *Id*. at 265 (citing *Brown v. State*, 890 So.2d 901, 918 (Miss. 2004)).
>
> Finally, Corrothers argues that Mississippi's capital-sentencing scheme is indistinguishable from that in *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), and, therefore, the position that *Ring v. Arizona* has no application to Mississippi's scheme is incorrect. We rejected this argument in *Batiste*, holding that, because *Marsh* did not address the requirements for indictments, it did not alter our interpretation of *Apprendi* and *Ring*. *Batiste*, 121 So.3d at 871. This issue is without merit.

Corrothers, 148 So.3d at 320-22; *see Dickerson*, 175 So.3d at 33.[18]

Appellant cannot avoid controlling precedent. *See Dickerson*, 175 So.3d at 33; *Corrothers*, 148 So.3d at 320-22; *Batiste v. State*, 121 So.3d 808, 871 (Miss. 2013); *Goff v. State*, 14 So.3d 625, 665 (Miss. 2009); *Brawner v. State*, 947 So.2d 254, 265 (Miss. 2006); *Havard v. State*, 928 So.2d 771, 801 (Miss. 2006); *Brown v. State*, 890 So.2d 901, 918 (Miss. 2004); *Berry v. State*, 882 So.2d 157, 172 (Miss. 2004). His third issue is procedurally barred, and without merit. This issue does

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[18] In *Dickerson*, the Court called attention to the fact that:

> all of Dickerson's arguments pertaining to aggravating circumstances, constitutionality of the death penalty, and disproportionality of the death sentence have been raised—nearly verbatim—in several recent capital cases by the same attorneys at the Office of the State Public Defender. Each time, the claims have been rejected by this Court. *See Corrothers v. State*, 148 So.3d 278 (Miss. 2014); *Keller v. State*, 138 So.3d 817 (Miss. 2014); *Batiste v. State*, 121 So.3d 808 (Miss. 2013).

175 So.3d at 33 n. 5.

not entitle Appellant to any relief.

D. Mississippi's statutory scienter factors are constitutional.

Appellant's fourth issue is that Miss. Code Ann. § 99-19-101(7) adds an impermissible basis to the scienter requirements stated in *Enmund*, 458 U.S. 782 and *Tison*, 481 U.S. 137. (Appellant's Br. at 168-70). For the Court's convenience, Miss. Code Ann. § 99-19-101(7) reads:

> In order to return and impose a sentence of death the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
> (b) The defendant attempted to kill;
> (c) The defendant intended that a killing take place;
> (d) The defendant contemplated that lethal force would be employed.[19]

Appellant contends the fourth factor, that "[t]he defendant contemplated that lethal force would be employed[,]" is insufficient to impose death. Even though he admits as much, it bears repeating: The jury found Appellant killed V.V. while engaged in the crime of felonious child abuse. Appellant was not sentenced on the fourth factor. But even if he had been, the Court has rejected this identical issue. In *Batiste*, for example, the Court said:

> Batiste argues that Section 99-19-101(7)(d) is unconstitutional because it allows the jury to impose a sentence of death if "the defendant contemplated that lethal force would be employed." He argues that the statute unconstitutionally allows the jury to impose a death sentence without a finding of the intent required by *Enmund* and *Tison*. This Court has determined that Section 99-19-101(7)(d) is constitutional. *Knox v. State*, 901 So.2d 1257, 1268 (Miss. 2005). Further, the jury found that all four factors were present in this case.

Batiste, 121 So.3d at 871-72; *see Corrothers*, 148 So.3d at 322; *Knox v. State*, 901 So.2d 1257, 1268 (Miss. 2005); *Stevens v. State*, 867 So.2d 219, 223 (Miss. 2003).

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[19] The *Tison* Court recognized the amendment to Miss. Code Ann. § 99-19-101 in light of *Enmund v. Florida*, stating that: "Mississippi and Nevada have modified their statutes to require a finding that the defendant killed, attempted to kill, or intended to kill, or that lethal force be employed, presumably in light of *Enmund*. Miss. Code Ann. § 99-19-101(7) (Supp. 1986)[.]..." *Tison*, 481 U.S. at 152 n. 4.

Appellant fails to demonstrate any compelling factual or legal basis for the Court to reconsider these holdings. The statute is constitutional. Appellant's fourth issue is procedurally barred, inconsistent with this Court's precedents, and without merit. This issue does not entitle Appellant to any relief.

E. The State's proportionality review statute is constitutional.

Here, Appellant takes issue with Miss. Code Ann. § 99-19-105 for failing to provide constitutionally adequate appellate review of death sentences. (Appellant's Br. at 170-71). First, he complains that the death penalty is applied in a discriminatory manner to males, poor persons, and persons accused of killing white people. (Appellant's Br. at 171). The Court has repeatedly rejected this identical assertion. In *Corrothers v. State*, 148 So.3d 278 (Miss. 2014), the Court disposed of this assertion, recognizing that It had previously:

> addressed Mississippi's death-penalty scheme in relation to discrimination:
>
> > Lastly, Galloway claims Mississippi's death-penalty scheme is applied in a discriminatory and irrational manner in violation of the of the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment and corresponding clauses of the Mississippi Constitution. The United States Supreme Court rejected an almost identical argument in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). There, Warren McCleskey argued that Georgia's capital-punishment statute violated equal protection, based upon a study showing that black defendants were more likely to be sentenced to death than white defendants, and defendants murdering whites were more likely to be sentenced to death than defendants who murdered blacks. *Id*. at 291-92, 107 S.Ct. 1756. The Court held that, in order to raise a successful claim of an equal-protection violation, the criminal defendant must prove that "the decisionmakers in his case acted with discriminatory purpose." *Id*. at 292, 107 S.Ct. 1756. McCleskey's only proof supporting his claim was the results of the study. The Court determined that, due to the number of variables inherent in capital sentencing and the discretion allowed trial courts in implementing criminal justice, the use of statistical evidence was insufficient to prove purposeful discrimination. *Id*. at 292-97, 107 S.Ct. 1756.
>
> *Galloway v. State*, 122 So.3d 614, 680-81 (Miss. 2013). Like Galloway, Corrothers

> simply points to statistical evidence as evidence of discrimination and fails to demonstrate that the decision-makers in his case acted with a discriminatory purpose. Therefore, this argument is without merit.

Corrothers, 148 So.3d at 322-23; *see e.g., Ronk v. State*, 172 So.3d 1112, 1147 (Miss. 2015); *Galloway*, 122 So.2d 614, 680-81 (Miss. 2013); *Batiste*, 121 So.3d at 872.

Next, he argues Miss. Code Ann. § 99-19-105 is overly broad and vague because the HAC aggravating circumstance is overly broad and vague; and, is applied arbitrarily, because it does not allow the Court to review the mitigating circumstances the jury was presented or those cases where the death penalty was not imposed. (Appellant's Br. at 171-72).[20] He cites no relevant authority to support those arguments. Therefore, they issue are procedurally barred from review. *See Keller*, 138 So.3d at 874 (barring consideration of Keller's argument "that the Court has not undertaken to apply Section 99–19–105(3)(c), in such a way as to ensure that the death penalty has not been imposed in an arbitrary and capricious manner") (quoting *Byrom*, 863 So.2d at 863 (quoting *Simmons v. State*, 805 So.2d 452, 487 (Miss. 2001) (citing *Williams v. State*, 708 So.2d 1358, 1362-63 (Miss. 1998))).

Without waiving that bar, the Court, in *Batiste*, rejected all four of the arguments above, stating that:

> Like Batiste, Lester argued that all cases where the death penalty was not imposed should be considered. *Id*. We found that "the current guidelines are sufficiently specific, and we find no reason to undertake the overwhelming task of considering all death-eligible cases in our review." *Id*. We adhere to our decision in *Lester* and find this issue entitles Batiste to no relief.
>
> Batiste also argues that Mississippi's death-penalty scheme is unconstitutional because it has been applied in a discriminatory and irrational manner in violation of the Eighth Amendment, due process, and equal protection. We note that Batiste admits that the United States Supreme Court has not held that racial and gender

[20] Appellant incorrectly states that the jury "did not ultimately find that this aggravating circumstance HAC actually existed." (Appellant's Br. at 172). The jury did, in fact, find V.V.'s murder was especially heinous, atrocious and cruel. (C.P. 1132; 1134.).

> disproportion, without more, is sufficient to violate due process and equal protection. Batiste also argues that the death-penalty statutes are unconstitutionally overbroad and vague. He further argues that the death-penalty scheme is unconstitutional because it does not allow the death penalty in cases of simple murder, no matter how premeditated or atrocious. We find that Batiste is entitled to no relief. This Court has held that "the death penalty in Mississippi does not violate the U.S. does not does not violate the U.S. Constitution." *Gillett*, 56 So.3d at 525.

Batiste, 121 So.3d at 872.

Appellant has presented no factual or legal basis for this Court to deviate from the holdings in those cases, or to revisit them. Section 99-19-105 is constitutional. As he admits, no court has held otherwise. Appellant's position that Miss. Code Ann. § 99-19-105 is unconstitutional and the assertions offered to support it are barred from review and, alternatively without merit.

Appellant's tenth claim should be denied. The issues supporting Appellant's tenth claim are procedurally barred from review and entirely without merit. The challenges to Miss. Code Ann § 99-19-101, *et seq*., have been repeatedly found meritless by this Court. *See Gillett v. State*, 56 So.3d 469, 525 (Miss. 2010); *Howard v. State*, 945 So.2d 326 (Miss. 2006); *Brown v. State*, 890 So.2d 901 (Miss. 2004), *cert. denied*, 544 U.S. 981, 125 S.Ct. 1842, 161 L.Ed.2d 735 (2005); *Grayson v. State*, 879 So.2d 1008 (Miss. 2004), *cert. denied* 543 U.S. 1155, 125 S.Ct. 1842, 161 L.Ed.2d 735 (2005); *Grayson v. State*, 806 So.2d 241, 252 (Miss. 2001); *Simmons v. State*,805 So.2d 452, 507 (Miss. 2001); *Edwards v. State*, 737 So.2d 275, 307 (Miss. l999); *Berry v. State*, 703 So.2d 269, 286 (Miss. 1997); *Evans v. State,* 725 So.2d 613, 683-84 (Miss. 1997); *West v. State*, 725 So.2d 872, 894-95 (Miss. 1998); *Holland v. State*, 705 So.2d 307, 319-20 (Miss. 1997); *Evans v. State*, 725 So.2d 613 (Miss. 1997), *cert. denied* 525 U.S. 1133, 119 S.Ct. 1097, 143 L.Ed.2d 34 (1999); *Gray v. State*, 351 So.2d 1342, 1344 (Miss. 1977); *Bell v. Watkins*, 381 So.2d 118, 124 (Miss. 1980). Appellant is not entitled to relief for the reasons stated above. The State respectfully requests the Court deny

Appellant's tenth claim. He is entitled to no relief for this claim.

XI
Appellant's sentence is neither disproportionate nor excessive.

Appellant contends his death sentence must be vacated, because it is statutorily and constitutionally disproportionate for a couple of reasons. (Appellant's Br. at 173-76). His first contention is that Mississippi's capital punishment scheme allows mandatory imposition of the death penalty for the killing of a child during the commission of felonious child abuse. (Appellant's Br. at 173). His second contention is that his death sentence is disproportionate due to his mental illness and defect. (Appellant's Br. at 173-76). He claims that, during the penalty phase, "[e]xpert testimony established significant concerns about [hi]s developmental psychology and intellectual capacity suggesting that [he] suffers from a 'mental defect' that would render a death penalty in his case unconstitutional." (Appellant's Br. at 175). Consequently, "[t]his evidence suggests that [he] is therefore not someone whose 'extreme culpability' makes him 'the most deserving of execution.' " (Appellant's Br. at 175). He insists "[h]is sentence must ... be vacated on proportionality review and his case directly remanded for entry of a sentence of life in prison without the possibility of parole." (Appellant's Br. at 175-76). He is mistaken on both counts.

First, mandatory death sentences are unconstitutional because they do not allow for individualized assessment of punishment.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 96 S.Ct. 2978, 2991 (1976).

Earlier, it was noted that the Eighth Amendment, as construed by the United States Supreme Court, requires a state's capital sentencing scheme to (1) narrow of the class of death-eligible defendants and (2) focus the sentencer's attention on the individual defendant and his crime.

> In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Blystone, 110 S.Ct. at 1084 (quoting *McCleskey*, 107 S.Ct. at 1773-74).

The State reasserts Its position concerning Mississippi's capital punishment scheme here. Mississippi's capital punishment scheme is consistent with controlling precedent and the protections guaranteed by the Constitution of the United States. It simply does not allow the mandatory imposition of the death penalty for the killing of a child during the commission of felonious child abuse.

Second, when a defendant is sentenced to death, the State's capital punishment scheme requires this Court determine:

> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99-19-101;
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; and

> (d) Should one or more of the aggravating circumstances be found invalid on appeal, the Mississippi Supreme Court shall determine whether the remaining aggravating circumstances are outweighed by the mitigating circumstances or whether the inclusion of any invalid circumstance was harmless error, or both.

Dickerson v. State, 175 So.3d 8, 34 (Miss. 2015) (quoting Miss. Code Ann. § 99-19-105(3)).

In conducting the required proportionality review, the Court will find this case is similar to *Dickerson v. State*. Appellant, like David Dickerson did, claims "undisputed" evidence shows he mental illness and defect make him less morally culpable than those who are " 'most deserving of execution.' *Roper v. Simmons*, 543 U.S. 551 (2005)." (Appellant's Br. at 175). He then admits that this claim is not consistent with State law and controlling precedents. (Appellant's Br. at 174-75).

When conducting the statutorily required review, the Court will find Appellant's death sentence is proportionate to his crime. The State submits Appellant's sentence should be affirmed. First, the jury was not acting under the influence of passion, prejudice, or any other arbitrary factor when it imposed the death penalty. *Goff v. State*, 14 So.3d 625, 669 (Miss. 2009). The evidence presented to the jury supports its finding with respect to both statutory aggravating circumstances. Appellant does not argue otherwise. Instead, he argues "mental defect" renders his death sentence unconstitutional. (Appellant's Br. at 175).

The Court recently rejected a similar, if not identical, argument in *Dickerson v. State*. Dickerson claimed that he was exempt from execution due to mental illness. 175 So.3d at 17-18. The Court rejected his claim, writing:

> [Dickerson] likens the mentally ill to the mentally retarded and to juveniles, who have "diminished personal culpability," and who are constitutionally ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), respectively. Dickerson asks the Court to hold that mentally ill defendants are exempt from the death penalty. The State responds that the Court should not extend *Atkins* and *Roper* to those with mental illness, because the

Supreme Court has not held that mental illness renders a criminal ineligible for the death penalty.

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishment." In *Atkins v. Virginia*, the United States Supreme Court addressed whether the execution of mentally retarded individuals violated the Eighth Amendment and held that the death penalty was "not a suitable punishment for a mentally retarded criminal." *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. Three years later, in *Roper v. Simmons*, the Supreme Court held that the death penalty is a disproportionate punishment for those who were under age eighteen when their crime was committed. *Roper*, 543 U.S. at 575, 125 S.Ct. 1183. In both cases, the Supreme Court held that the penological justifications for the death penalty-retribution and deterrence-were not served by the execution of the mentally retarded or juveniles because those offenders had diminished culpability. *Roper*, 543 U.S. at 551, 125 S.Ct. 1183; *Atkins*, 536 U.S. at 318-19, 122 S.Ct. 2242.

Dickerson now seeks to have this Court extend *Atkins* and *Roper* to preclude the death penalty for the mentally ill. The Fifth Circuit has rejected this argument repeatedly. *See Ripkowski v. Thaler*, 438 Fed.Appx. 296, 303 (5th Cir. 2011) ("[T]he Fifth Circuit has recognized the distinction between the mentally ill and the mentally retarded and has held that Atkins only protects the latter."); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (Defendant claimed that *Atkins* and *Roper* "created a new rule of constitutional law ... making the execution of mentally ill persons unconstitutional." The Fifth Circuit held that "[n]o such rule of constitutional law was created, however, by either *Atkins* or *Roper*."); *In re Woods*, 155 Fed.Appx. 132, 136 (5th Cir. 2005) ("*Atkins* did not cover mental illness separate and apart from mental retardation[.]").

Roper exempted juvenile offenders from the death penalty, and *Atkins* exempted the mentally retarded. Dickerson is neither under eighteen nor mentally retarded. Therefore, he is not exempt from the death penalty under *Atkin*s or *Roper*. We will not extend those cases to apply to the mentally ill when "[t]he Supreme Court has never held that mental illness removes a defendant from the class of persons who are constitutionally eligible for a death sentence." *Ripkowski*, 438 Fed.Appx. at 303. We cannot take the *Atkins* opinion-which was so specific to mental retardation that the Court cited and discussed the clinical definition of mental retardation-and apply it to all other mental disorders. To do so would be no different than taking *Roper* and expanding it to preclude execution of criminals under age twenty-one, rather than age eighteen as the Supreme Court explicitly held. Dickerson's alternative argument that the death penalty cannot be imposed on the mentally ill is without merit.

Id. at 17-18.

The Court also called attention to the fact that Dickerson was allowed to present evidence

of personality disorders and mental illness during the penalty phase of trial. In doing so, It noted that:

> the jury heard testimony from a psychologist and a social work professor about Dickerson's personality disorders and deficits in adaptive functioning; former DHS employees about Dickerson's living conditions as a child; and family, friends, and employers about Dickerson's childhood and work abilities. The jury was able to consider all of that evidence in mitigation during sentencing deliberations.

Id. at 34.

This case is like *Dickerson*. Like *Dickerson*, the jury in this case found the aggravating circumstances outweighed the mitigating circumstances. (C.P. 1132; 1134.). Like *Dickerson*, "[t]he jury was able to consider all of that evidence in mitigation during sentencing deliberations." *Id.* And like *Dickerson*, there is no evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.

Finally, the Court will also find Appellant's sentence is not excessive or disproportionate when compared with other cases. This Court has consistently upheld the death penalty in cases where the defendant contends his mental health renders his sentence disproportionate and excessive. *See e.g., id.*; *Goff v. State*, 14 So.3d 625, 669 (Miss. 2009); *Berry v. State*, 703 So.2d 269, 293-94 (Miss. 1997); *Lanier v. State*, 533 So.2d 473, 492 (Miss. 1988). And, It has repeatedly upheld the death penalty for capital murders committed during the commission of felonious child abuse. *See e.g., Moffett*, 49 So.3d at 1117-18 (finding death sentence was not imposed under influence of passion, prejudice, or other arbitrary factor; aggravators were valid; and, death penalty imposed in similar cases); *Bennett v. State*, 933 So.2d at 950-51; *Brawner v. State*, 872 So.2d 1, 16-17 (Miss. 2004); *Stevens*, 806 So.2d at 1064; *Brown v. State*,690 So.2d 276, 298 (Miss. 1996); *Jackson*, 684 So.2d at 1240; *Faraga*, 514 So.2d at 309 (1987); *see also Havard v. State*, 928 So.2d 771, 803-04

(Miss. 2006) (affirming death sentence for capital murder committed during the sexual battery of a child) (citing *Evans v. State,* 725 So.2d 613 (Miss. 1997); *Walker v. State*, 671 So.2d 581 (Miss. 1995)).

Appellant's eleventh claim for relief is without merit. Mississippi's capital punishment scheme does not permit the imposition of mandatory death sentences for any offense. The record in this case shows "[t]here is no evidence that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor." *Dickerson*, 175 So.3d at 34. And, the Court has upheld the death sentences imposed in cases where a defendant claimed his sentence "was disproportionate in light of the defendant's claims about his own mental health." *Id.* at 35 (citing *Goff*, 14 So.3d at 669-72; *Berry*, 703 So.2d at 293-94). Appellant's sentence is not disproportionate to his crime. This claim entitles Appellant to no relief. Therefore, the State respectfully requests that it be denied.

XII
No error exits, cumulative or otherwise.

In his twelfth and final assignment of error, Appellant claims the cumulative effect of errors committed during both phases of trial warrants reversal of his conviction and sentence. (Appellant's Br. at 176). " 'The question ... is whether the cumulative effect of all errors committed during the trial deprived [Appellant] of a fundamentally fair and impartial trial.' " *Moffett v. State*, 49 So.3d 1073, 1116 (Miss. 2010) (quoting *Byrom v. State*, 863 So.2d 836, 847 (Miss. 2003)). The Court reviews an assignment of cumulative error in:

> cases in which we find harmless error or any error that is not specifically found to be reversible in and of itself, ... on a case-by-case basis, as to whether such error or errors, although not reversible when standing alone, may when considered cumulatively require reversal because of the resulting

cumulative prejudicial effect.

Moffett, 49 So.3d at 1116-17 (internal brackets omitted) (quoting *Byrom*, 863 So.2d at 847). In doing so, "[t]he factors to be considered 'include the issue of innocence or guilt is close ..., the quantity and character of the error ..., and the gravity of the crime charged....' " *Id.* (quoting *Ross v. State*, 954 So.2d 968, 1018 (Miss. 2007)).

There are no errors, conceivable or actual, which would warrant granting Appellant's request for relief. "Where there is no reversible error in any part, ... there is no error to the whole." *Brewer v. State*, 725 So.2d 106, 134 (Miss. 1998) (citations and quotation marks omitted). The Court should deny Appellant's cumulative error claim . "Here there are simply no errors, hence 'twenty times zero equals zero.' " *Holland v. State*, 705 So.2d 307, 356-57 (Miss. 1997) (internal brackets omitted) (quoting *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987)).

But even if the Court finds error actually exists, then the State submits that error is harmless beyond a reasonable doubt and does not warrant reversal of Appellant's conviction or sentence. " 'Even where error has occurred, we will not reverse a conviction when the overwhelming weight of the evidence supports the guilty verdict.' " *Kolberg v. State*, 829 So.2d 29, 90 (Miss. 2002) (quoting *Lentz v. State*, 604 So.2d 243, 249 (Miss. 1992)), *overruled by Rowsey v. State*, 188 So.3d 486, 494 (Miss. 2015). Appellant received all the State and Federal Constitutions guarantee: "a fundamentally fair and impartial trial.' " *Wilson v. State*, 21 So.3d 572, 591 (Miss. 2009) (quoting *Byrom*, 863 So.2d at 847). This claim is entirely without merit and should be denied.

CONCLUSION

Appellant's conviction and sentence should be affirmed for the reasons above. The claims raised in this appeal have no merit, and entitle Appellant to no relief. Therefore, the State respectfully requests the Court deny Appellant's claims for relief, and affirm his conviction and sentence.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Appellee's Brief with the Clerk of the Court using the appellate e-filing system, which sent notification of such filing to the following:

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This, the 27th day of January, 2017.

Further, I hereby certify that I mail will by United States Postal Service the Appellee's Brief to the following:

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