KeyCite Yellow Flag - Negative Treatment
Overruling Recognized by Baskin v. State, Miss.App., September 9, 2008

733 So.2d 214
Supreme Court of Mississippi.

James Earnest WATTS a/k/a "Squirrel"
v.
STATE of Mississippi.

No. 96–DP–01030–SCT
|
Jan. 28, 1999.
|
Rehearing Denied May 6, 1999.

Synopsis
Defendant was convicted in the Circuit Court, Marion County, R.I. Pritchard, III, J., of capital murder and was sentenced to death. Defendant appealed. The Supreme Court, McRae, J., held that: (1) evidence of polymerase chain reaction (PCR) testing of deoxyribonucleic acid (DNA) was reliable; (2) evidence supported conviction for murder while in commission of sexual battery; (3) new trial was not warranted on *Batson* issue, which was waived by defendant; (4) defendant's right to speedy trial was not violated despite delay of 959 days; (5) failure to instruct jury regarding third sentencing option of life imprisonment without the possibility of parole required resentencing; and (6) allowing jurors to disperse briefly to pack, after they were sworn in but before introduction of any evidence, did not warrant reversal.

Conviction affirmed, sentence reversed and remanded.

Banks, J., filed a concurring opinion in which Sullivan and Pittman, P.JJ., and Waller, J., joined.

Smith, J., filed a dissenting opinion in which James L. Roberts, Jr., J., joined.

West Headnotes (38)

[1] **Criminal Law**➔Foundation or authentication in general

Evidence of polymerase chain reaction (PCR) testing of deoxyribonucleic acid (DNA) was sufficiently reliable to be admitted in homicide case, although defendant claimed that there had been possibility of contamination, in light of testimony regarding controls in laboratory process designed to identify and minimize instances of contamination.

3 Cases that cite this headnote

[2] **Criminal Law**➔Particular tests or experiments

State could introduce deoxyribonucleic acid (DNA) polymerase chain reaction (PCR) evidence regarding stains found on inside of murder defendant's undershorts, which contained mixture of DNA evidence consistent both with his genetic profile and that of victim, even though statistical data was introduced about DNA evidence on defendant's jacket and no corresponding statistical data on mixed sample found on underwear, given that population statistics or lack thereof went to credibility of DNA matching evidence.

5 Cases that cite this headnote

[3] **Criminal Law**➔Particular tests or experiments

Trial court should allow introduction when population frequency statistics are offered in conjunction with evidence of a deoxyribonucleic acid (DNA) match made on the basis of either polymerase chain reaction (PCR) or restriction fragment length polymorphism (RFLP) analysis.

4 Cases that cite this headnote

[4] **Criminal Law**➔Experiments and results thereof

State's expert could use product rule to calculate

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population frequency statistics based on polymerase chain reaction (PCR) testing of deoxyribonucleic acid (DNA), as product rule had been established as a generally accepted technique in the scientific community.

7 Cases that cite this headnote

[5] **Criminal Law**—Particular statements, arguments, and comments

Failure to object to prosecution's closing arguments, allegedly mischaracterizing testimony of statistical expert and misleading jury as to significance of deoxyribonucleic acid (DNA) evidence, barred consideration of issue on appeal.

1 Cases that cite this headnote

[6] **Criminal Law**—Foundation or authentication in general
Criminal Law—Immaterial or incompetent evidence in general

Defendant was not prejudiced by lack of proficiency test data from laboratory that performed tests on deoxyribonucleic acid (DNA) evidence, although better practice would have been for state and laboratory to have turned over data, as such evidence went to credibility, defendant did not raise objection at trial or seek continuance to procure data, and defendant's expert witness used absence of data to his benefit to discredit reliability of laboratory's testing procedures as well as expert's analysis of evidence.

1 Cases that cite this headnote

[7] **Criminal Law**—Opinion evidence

Defendant's claim that prosecution failed to advise him that expert would present statistical evidence regarding deoxyribonucleic acid (DNA) testing based on product rule frequency calculations, rather than ceiling principle used in expert's report, was procedurally barred on appeal, where defendant did not object at trial and cross-examined expert extensively about results obtained by using the two different statistical approaches.

4 Cases that cite this headnote

[8] **Criminal Law**—Cross-examination and redirect examination

Prosecution did not improperly question defendant's deoxyribonucleic acid (DNA) expert about his failure to run tests on the same evidence tested by state's laboratory, where defense on re-direct did not pursue issue, and it was defendant's expert who pointed out that his was not an unbiased laboratory for re-testing evidence but that there were some good laboratories that could and should have been utilized.

1 Cases that cite this headnote

[9] **Criminal Law**—Other offenses and character of accused
Criminal Law—Opinion evidence

Murder defendant's failure to object at trial to testimony regarding victim's father's belief that defendant should be questioned and to testimony from witness that defendant had purchased drugs barred review of issues on appeal.

[10] **Criminal Law**—Conclusiveness of Verdict

Any review by Supreme Court of the sufficiency of the evidence upon which the defendant was convicted is made in deference to the verdict

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returned by the jury.

[11] **Criminal Law**⇨Construction of Evidence
Criminal Law⇨Inferences or deductions from evidence

In reviewing the sufficiency of evidence in capital cases, court looks at all of the evidence in a light most favorable to the verdict, giving the prosecution the benefit of all favorable inferences that may be drawn therefrom.

[12] **Homicide**⇨Predicate offenses or conduct
Homicide⇨Miscellaneous particular circumstances

Evidence supported conviction for murder while in commission of sexual battery; deoxyribonucleic acid (DNA) present in bloodstain on defendant's jacket matched that of victim, there was evidence that defendant had not worn jacket before night victim disappeared, DNA samples on inside of defendant's undershorts matched defendant and victim, and state medical examiner testified that victim sustained severe bruising in perineal area and tear in vaginal wall. Code 1972, §§ 97–3–19(2)(e), 97–3–95(1)(c).

[13] **Criminal Law**⇨Necessity of objections at trial

New trial was not warranted on *Batson* issue, as it was waived by defendant, even if prosecution and defense engaged in race-based and gender-based jury selection.

1 Cases that cite this headnote

[14] **Criminal Law**⇨Remarks and Conduct of Judge

Issue of whether trial court improperly assisted prosecution in presentation of its case was procedurally barred by defendant's failure to raise contemporaneous objections to comments assigned as error.

4 Cases that cite this headnote

[15] **Searches and Seizures**⇨Knowledge of rights; warnings and advice

Collection of clothing worn by defendant at time of arrest was not the result of an illegal search or seizure, where police had sufficient grounds for questioning and detaining defendant, and he had been advised of his rights, consulted with an attorney, and twice given his consent before turning his clothing over to the authorities.

3 Cases that cite this headnote

[16] **Criminal Law**⇨Particular statements, arguments, and comments
Criminal Law⇨Proceedings at trial in general

Issue of alleged prosecutorial misconduct, arising from comments made during closing arguments of guilt and sentencing phases of capital murder trial, was procedurally barred by defendant's failure to object to comments at trial and failure to raise issue of prosecutorial misconduct in motion for a new trial.

9 Cases that cite this headnote

[17] **Criminal Law**⇨Opinion evidence
Criminal Law⇨Admission of evidence

Objections to testimony by county coroner, that

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marks appeared to be ligature marks, that victim appeared to have been sexually abused, that there was no way to tell whether alleged strangulation or air embolism came first, and that sexual assault could have come after victim's death, were procedurally barred, where defendant failed to raise objection at trial, and some of the testimony was in response to question posed on cross-examination by defense.

2 Cases that cite this headnote

[18] **Criminal Law**⟜Depiction of Injuries or Dead Bodies

Photographs of murder victim, including autopsy pictures, were admissible even though some were enlarged, as all had significant evidentiary value, photographs were not gruesome or inflammatory, and photographs were not overdramatized by enlargement since without enlargement much of the relevant detail would not be easily discernible.

1 Cases that cite this headnote

[19] **Criminal Law**⟜Photographs and Other Pictures
Criminal Law⟜Documentary evidence

Admissibility of photographs rests within the sound discretion of the trial judge, whose decision will be upheld absent abuse of that discretion.

1 Cases that cite this headnote

[20] **Criminal Law**⟜Photographs arousing passion or prejudice; gruesomeness

Photographs which are gruesome or inflammatory and lack an evidentiary purpose are always inadmissible as evidence.

[21] **Criminal Law**⟜Photographs and Other Pictures

When considering admissibility of photographs, court must consider (1) whether the proof is absolute or in doubt as to identity of the guilty party, and (2) whether the photographs are necessary evidence or simply a ploy on the part of the prosecutor to arouse the passion and prejudice of the jury. Rules of Evid., Rule 403.

[22] **Criminal Law**⟜Delay caused by accused
Criminal Law⟜Demand for trial
Criminal Law⟜Subsequent to arrest
Criminal Law⟜Prejudice or absence of prejudice

Defendant's right to speedy trial was not violated despite delay of 959 days between time he was taken into custody and date of trial, given that delays were not attributable to the state but to defendant's first three motions for continuances, that defendant made no effort to assert his speedy trial rights prior to trial, and that he had not alleged any prejudice. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

7 Cases that cite this headnote

[23] **Criminal Law**⟜Accrual of right to time restraints

Constitutional right to a speedy trial attaches at the time a person is effectively accused of a crime. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

1 Cases that cite this headnote

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[24] **Criminal Law**➔In general; balancing test
Criminal Law➔Time for trial

Alleged violation of right to speedy trial is subject to scrutiny under the four-prong *Barker* analysis involving (1) length of delay, (2) reason for delay, (3) defendant's assertion of his right to a speedy trial, and (4) prejudice to defendant by delay; no single factor is dispositive, but rather, Supreme Court looks at totality of circumstances in determining whether defendant's rights have been violated. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

15 Cases that cite this headnote

[25] **Criminal Law**➔Presumptions and burden of proof

When length of delay is presumptively prejudicial for purposes of speedy trial claim, burden shifts to prosecutor to produce evidence justifying delay and to persuade trier of fact of legitimacy of reasons. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

2 Cases that cite this headnote

[26] **Criminal Law**➔Successive, amended, or reinstated charges; successive trials

Where a mistrial has been declared, the *Barker* factors are utilized to determine whether the discretionary time between trials violated the defendant's right to a speedy trial. U.S.C.A. Const.Amend. 6; Const. Art. 3, § 26.

1 Cases that cite this headnote

[27] **Criminal Law**➔Particular Instructions

Criminal Law➔Instructions

Defendant's assignments of error that instructions to the jury during both the guilt and sentencing phases of his trial were constitutionally deficient were procedurally barred, where defendant failed to object to the complained of instructions at trial or even raise them in his motion for a new trial and failed to cite any authority or provide any meaningful argument in support of most objections.

2 Cases that cite this headnote

[28] **Sentencing and Punishment**➔Effect of amendment or other modification
Sentencing and Punishment➔Validity of particular retroactive applications
Sentencing and Punishment➔Instructions

Despite procedural bar, failure to instruct jury of third sentencing option besides life in prison or the death penalty, that of life imprisonment without the possibility of parole, required resentencing, although crime was committed before statute allowing life imprisonment with parole was enacted, as trial was held after effective date of statute. [15] Code 1972, §§ 97–3–21, [16] 99–19–101.

1 Cases that cite this headnote

[29] **Sentencing and Punishment**➔Vileness, heinousness, or atrocity

Aggravated circumstance of 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 murders, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

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[30] **Sentencing and Punishment**←Manner and effect of weighing or considering factors

In punishment phase of capital murder trial, procedure jury has to follow is not a mere counting process of a certain number of aggravating circumstances versus the number of mitigating circumstances, but rather, jurors have to apply reasoned judgment as to whether situation calls for life imprisonment or whether it requires the imposition of death, in light of the totality of the circumstances present.

[31] **Sentencing and Punishment**←Instructions

In punishment phase of capital murder trial, jury should consider and weigh any mitigating circumstances as set forth in instructions, but jury should be cautioned not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.

2 Cases that cite this headnote

[32] **Sentencing and Punishment**←Instructions

Jury instruction in penalty phase of capital murder trial that "any matter, any other aspect of the defendant's character or record, and any other circumstance ... which you, the Jury deem to be mitigating on behalf of the defendant" did not foreclose jury from considering any and all mitigating factors, including non-statutory mitigating circumstances.

1 Cases that cite this headnote

[33] **Homicide**←Validity
Sentencing and Punishment←Murder

Defendant's constitutional rights were not violated by conviction for capital murder, although elements for capital murder were the same as those set out for manslaughter at time of crime. U.S.C.A. Const.Amends. 5, 8, 14; Const. Art. 3, §§ 14, 26, 28; Code 1972, §§ 97–3–19(2)(e), 97–3–27.

[34] **Sentencing and Punishment**←Instructions

Separate instruction regarding presumption of no aggravating circumstances was not required, where jury was properly instructed that it could consider only those aggravating factors presented by the court which it found to exist beyond a reasonable doubt.

2 Cases that cite this headnote

[35] **Sentencing and Punishment**←Instructions

Defendant was not entitled to sentencing instruction on presumption of life imprisonment in penalty phase of capital murder prosecution.

5 Cases that cite this headnote

[36] **Sentencing and Punishment**←Instructions

Defendant was not entitled to a mercy instruction in penalty phase of capital murder trial. U.S.C.A. Const.Amends. 8, 14.

32 Cases that cite this headnote

[37] **Sentencing and Punishment**←Dual use of evidence or aggravating factor

Defendant could be sentenced to death based on finding that defendant actually killed victim, and jury did not have to make any further finding that defendant attempted to kill, intended to kill,

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or contemplated use of lethal force. Code 1972, § 99–19–101(7).

1 Cases that cite this headnote

[38] **Criminal Law**—Separation pending proceedings
Criminal Law—Separation of jury

Allowing jurors, with consent of both parties, to go home and quickly pack their bags after they were sworn in but before they were sequestered and before introduction of any evidence in capital murder trial did not warrant reversal for new trial, where jurors were advised that both sides had agreed that they could have a few minutes to pack and consent was obtained by both parties outside of presence of jury, although better practice would have been for trial court to advise venire members the night before final jury selection and swearing in to come to court with packed suitcases. Uniform Circuit and County Court Rules 10.02.

3 Cases that cite this headnote

Attorneys and Law Firms

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Office of the Attorney General by Leslie S. Lee, Attorney for Appellee.

EN BANC.

Opinion

McRAE, Justice, for the Court:

¶ 1. James Earnest Watts was found guilty of capital murder and sentenced to death in the Circuit Court of Marion County on August 9, 1996, by a jury impaneled in the Circuit Court of Lincoln County. He now appeals to this Court, raising twenty assignments of error. Most of the issues he raises are procedurally barred or otherwise waived. We find that the circuit court failed to properly instruct the jury regarding the three sentencing options available in capital murder cases pursuant to Miss.Code Ann. § 97–3–21(1994), and therefore reverse as to the sentencing phase. There is no merit to the remaining issues raised. Accordingly, we affirm the jury's finding that Watts was guilty of capital murder and reverse and remand for re-sentencing proceedings, consistent with this opinion.

I.

¶ 2. The semi-nude body of ten-year-old Vanessa Nicole Lumpkin was found stuffed in the roots of a tree along a creek bank in Columbia, Mississippi around noon on December 20, 1993. Alex Fairley discovered the body while taking a short cut home from the nearby Hendricks Street Apartments, known as "the projects." He ran back to the apartments, showed his friends what he had seen, and Ruby Lewis called the police. Just a few minutes earlier, police had received a report that the child was missing.

¶ 3. Officers Tim Singley and Doug Brewton of the Columbia Police Department were the first to arrive at the scene. They immediately roped off the area around the body. Detective Carroll Bryant, along with Detective James Carney, next arrived. Detective Bryant indicated that the ground was scuffled, but there was nothing from which a footprint could be cast. There was very little blood on or around the body. A little green shirt that the child had been wearing when she went to bed the night before was found about thirty yards away, west of the projects and the creek, near the Rest Haven Cemetery.

¶ 4. Anthony Lumpkin identified his daughter's body at the scene. Marion County Coroner Norma Williamson took measures to protect the body from contamination, wrapping it in a sheet before she moved it. Rigor mortis had set in. Both Williamson and Mississippi State Highway Patrol Crime Scene Specialist Don Sumrall indicated that there was a bloody discharge in the genital and rectal areas. Based on the vaginal drainage, Williamson determined that the child appeared to have been sexually abused. She observed marks on the child's neck and what appeared to be ligature marks on her wrists. There was an abrasion on the right side of her chin, and blood on her tongue where she had bitten it.

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¶ 5. State Medical Examiner, Dr. Emily Ward, performed an autopsy on the child. Cause of death was found to be cardiorespiratory arrest due to strangulation, air embolism and a perineal laceration. Based on an external examination, Dr. Ward initially had thought the cause of death was strangulation, based on linear abrasions on the neck and petechial hemorrhages on the eyelids. However, an *219 internal examination revealed that bubbles in the arteries of her heart had caused a fatal air embolism. Tracing the path of bubbles in the bloodstream, Dr. Ward determined that a tear in the vaginal wall was the source of the embolism. Bruising in the perineal area indicated that penetration occurred while the child was still alive. Dr. Ward, however, was unable to determine whether penetration had involved a penis or some other object. She explained that there was very little blood because the child would not have lived long after the vaginal tear occurred. She confirmed Coroner Williamson's observation that the injuries on the child's wrists were caused by some binding.

¶ 6. Vanessa Nicole Lumpkin's grandfather, Joe Geeseton, had died at the VA Hospital in Jackson on December 19, 1993. Nicole, along with many other family members and friends, was staying with her grandmother, Ruthelle Geeseton, who lived just around the corner from the Lumpkins. Pauletta Baxter, a close friend of the family who was Watts' estranged girlfriend and mother of his child, had been staying at the Geeseton house because of problems she was having with him. She put Nicole, along with her daughter, Victoria, to bed between midnight and 1:00 a.m. in the back bedroom at the Geeseton house. Mrs. Geeseton awakened at 4:00 a.m. She testified that when she checked on the little girls, she noticed that the closet light, kept on for Baxter's and Watts' daughter, Victoria, was not on and that Nicole wasn't there, but assumed that she had gone home with her parents. Baxter, too, testified that everyone at the Geeseton house assumed that the child was at the Lumpkins' house. The Lumpkins thought she was still asleep at her grandmother's house, since she had been up very late the night before and Gwen Geeseton Lumpkin had left her there when she went home around 1:30 a.m. Anthony Lumpkin stated that when the child stayed at her grandparents, she usually awakened early and walked home, so she had not been missed there. Apparently, no one saw her leave the house. After Lumpkin called the Geeseton house, and it was determined that she was not at either house, Pauletta Baxter called the police to report the child missing.

¶ 7. Anthony Lumpkin suggested to authorities that they question Watts because of the way he watched the child when she danced and because he had seen Watts riding a bicycle that recently had been stolen from her. Detective Bryant testified that they interviewed several other people in addition to Watts, but never came up with any other suspects. David McDaniel, an investigator with the Columbia Police Department, obtained consent from Watts' mother to search Watts' room at her house. There they found the multi-colored jacket Watts reportedly had been wearing the evening before and which his mother identified as his, as well as some tennis shoes, a towel and a pillow case. Noting that there had been some rain in the early morning hours of December 20, McDaniel testified that the jacket was still damp.

¶ 8. Willy Carter testified that he had picked Watts up at his house and dropped him off at Hendricks Street, near "the projects" at around midnight and did not see him again until 1:00 or 1:30 p.m. the next day. He stated that it was drizzling and rainy at the time. Catherine Bullock heard Watts "bamming" on the door of her neighbor in "the projects," Pauletta Baxter, at around 12:00 or 12:30 a.m. He was wearing a multi-colored patchwork jacket. She testified that he was acting strange that night, but stayed around for awhile with a group of people who were drinking and shooting off fireworks. He wanted to talk with her about his relationship with Baxter. When he asked her where Baxter was, she told him that she was at the Geeseton's. She testified that he came back about two hours later, stating:

> Squirrel left. And when he came back, he was gone I say about two hours. He came back and he said, "Michelle," he *220 said, "I done something." I said, "What?" And he said, "I done something." He said, "And I need to tell somebody." I said, "Well, what have you did?" But he never told me. And he told me he was about to go home. And at that time Squirrel didn't have on the same clothes that he had on when he left.

He was no longer wearing the multi-colored jacket, and instead was wearing a T-shirt and some kind of jogging pants.

¶ 9. Tyrone Alexander had noticed Watts standing around the apartments that night, "looking kind of strange." Watts' second cousin, Travis Smith, likewise placed him at the projects, near Building D, after midnight, noting that Watts was wearing a multi-colored jacket he hadn't seen before.

¶ 10. Watts was picked up for questioning by police on December 20th. He was questioned by Officer Sumrall and consented to having his clothing examined for evidence. He was wearing stained black shorts, as well as

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a T-shirt, briefs, socks, sweat pants, sweat shirt, a regular shirt and some overalls. Sumrall did not notice whether any of the clothing touched the floor when Watts removed it. Watts put his underwear in a bag himself. He handed each of the other items as he removed them to Sumrall, who put them in the bags. Sumrall wore gloves while the evidence was being collected.

¶ 11. At the Mississippi State Crime Laboratory, Debbie Haller examined and tested Watts' clothing for blood, seminal fluid, hair, fibers and any other identifying material. Blood stains were identified on the back of the jacket. Stains on the inside front of Watt undershorts, a few inches below the left side of the waistband, tested positive for blood with the possible presence of feces.[1] Haller further testified at length about the precautions taken in the laboratory to prevent contamination of evidence being readied for DNA testing. Samples collected from Watts and the victim, as well as samples of stained areas from Watts' jacket and undershorts, were sent to GenTest Laboratories in Metairie, Louisiana for DNA testing. The lab used the **polymerase chain reaction** (PCR) method of amplifying DNA to type genetic material derived from the evidence submitted. From the test results, it was concluded that the victim could not be excluded as the source of the DNA obtained from the blood stain samples taken from Watts' jacket. Watts, however, was excluded as a possible "donor" of the stains on the jacket. As to the samples taken from blood stains on his undershorts, the results indicated a mixture of two types, one consistent with the genetic markers identified as belonging to Watts, and the other, consistent with those of the victim. Based on the product rule of determining the statistical probability "that another individual picked at random off the street could also produce the ten-test stain that was found on the jacket," the State's expert witness, Dr. Martin Tracey, calculated that one in a little over eight hundred thousand African Americans would match. Using the more conservative ceiling approach to calculating population frequency, he previously had calculated the likelihood of a match at one in forty thousand. Dr. Sinha, president of GenTest Labs, based on a testing for ten different genetic markers and applying the ceiling principle, calculated that there was a one in 876,000 chance in the black population group of finding another individual whose genetic profile would match, and a one in twelve million chance in the white population.

¶ 12. Watts was indicted by a grand jury in Marion County on April 19, 1994 for the *221 killing of Vanessa Nicole Lumpkin, a female child under the age of twelve years old, while in the commission of a sexual battery in violation of Miss.Code Ann. § 97–3–19(2)(e)(1994). After Watts was granted three motions for continuances, his trial was scheduled for August 29, 1995. A mistrial was declared, however, when the venire panel was exhausted before a jury was selected. Trial was reset for March 4, 1996. At that point, Watts was granted still another motion for a continuance, arising from the defense's *ore tenus* motion to quash the venire panel. As the circuit court further stated in his written opinion:

> On February 9, 1996, it was discovered that Lincoln County had exhausted the potential jurors in the jury box and on February 12, 1996, Delta Computer Company incorrectly advised the Lincoln County Circuit Clerk to fill the jury box with the first seven hundred (700) names from the jury wheel, and the venire panel for this case was chosen from those seven hundred (700) names.
>
> That the venire panel so drawn from the jury box was comprised only with persons with the name beginning "A", "B", or "C". That the State and the Defense is entitled to a venire that is a random selection of jurors in Lincoln County and the jury wheel should have keyed in a number to ensure enough jurors to make the jury box show a random sample.
>
> That the State and the defense agree that the methodology employed systematically excluded any qualified electors whose name began with the letters "E" through "Z", and that selection of this panel would have been reversible error.

The circuit court found that the delay in the proceedings was not chargeable to either party for purposes of the speedy trial rule. Trial, originally re-slated for June 24, 1996, was reset for August 5, 1996, because of a scheduling conflict with the defendant's DNA expert.

¶ 13. Trial was held on August 5–9, 1996. A jury was impaneled in Lincoln County and trial was held in Marion County. At the close of the State's case, Watts' motion for a directed verdict was denied by the circuit court. The jury found Watts guilty of capital murder.

¶ 14. During the sentencing phase of the trial, the jury heard only the testimony of Watts' mother, who briefly testified that he was raised by her and his grandmother, that he was the best of her eight children, and that he had been popular in high school, having been voted by his classmates as "best dressed" and receiving a standing

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ovation at his graduation. The jury then unanimously found that at the time of the commission of the capital murder:

> 1. That the defendant actually killed Vanessa Nicole Lumpkin;
>
> 4. That the defendant contemplated that lethal force would be employed.

The jury unanimously found further that the aggravating circumstances of:

> 1. The Capital Murder was committed while the defendant was engaged in the Commission of the Crime of Sexual Battery or in an attempt to Commit the Crime of Sexual Battery; [and]
>
> 2. The Capital Murder was especially heinous, atrocious or cruel;
>
> are sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances, and we further find unanimously that the defendant should suffer death.

The circuit court entered an Order of Conviction on August 9, 1996. Watts filed a motion for j.n.o.v., or in the alternative, for a new trial, on August 28, 1996. The motion was denied the same day. Aggrieved by his conviction and sentence, Watts now raises twenty assignments of error.

***222 III.**

DISCUSSION OF THE LAW

I. WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO PRECLUDE PCR EVIDENCE

[1] ¶ 15. Watts presented only one witness at trial, DNA expert Dr. Ronald Acton, whom he called upon to refute the DNA evidence introduced by the State. In this appeal, as well, Watts largely predicates his assertion that he was deprived of his constitutional rights upon various issues arising from the State's presentation of its DNA evidence. He first contends that the polymerase chain reaction (PCR) method of typing DNA evidence used by GenTest Labs to test the evidence in this case has not been accepted by this Court as a generally accepted forensic technique capable of producing reliable results, and thus, the circuit court should not have admitted the evidence.

¶ 16. Watts filed a motion in limine to preclude evidence of DNA testing based on the PCR method of genetic typing. At the hearing on the motion, the circuit court heard extensive testimony by Dr. Acton as well as by Dr. Sinha, who operates the laboratory where the tests were made and who analyzed the evidence in this case. Based on that testimony, using the analysis set out in *Polk v. State*, 612 So.2d 381 (Miss.1992), the circuit court found that evidence of DNA testing, regardless of whether the PCR or RFLP method was employed, was admissible.

¶ 17. This Court first found the Restriction Fragment Length Polymorphism (RFLP) method of typing DNA evidence to be admissible in *Polk*.

¶ 18. Watts emphasizes the third prong of the *Polk* test, looking for error in the preparation of the DNA samples used in his case. His expert, Dr. Acton, focused on the susceptibility to contamination inherent in the PCR amplification process. Dr. Sinha and Pat Wojtikieiac, however, explained the controls in the laboratory process which are designed to identify—and minimize any instances of contamination. Deborah Haller further demonstrated the precautions taken by the State Crime Lab to safeguard against contamination of the samples prepared for the genetic laboratory.

¶ 19. Watts, however, attempts to bolster his case by misconstruing evidence and mis-characterizing witness testimony in the record, speculating where contamination might have occurred. He suggests that Don Sumrall could have contaminated the evidence by not wearing protective coverings on his shoes while "traips[ing] about the crime scene" since the sort of rectal and vaginal injuries the child suffered "would have caused significant bleeding." Crime scene pictures show only a small trickle of blood coming from the perineal area; witness testimony indicated there was little blood at the scene and the State Medical Examiner testified that because death would have occurred swiftly after the injury, there would have been very little bleeding.

¶ 20. Watts further mis-characterizes Sumrall's testimony about Watts' removal of his clothes, stating that "He [Sumrall] further conceded that the undershorts might have dropped to and touched the floor of the small office during the collection." Rather, when asked, Sumrall testified that he didn't notice whether Watts' undershorts

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touched the floor before he put them in the bag.

¶ 21. He further suggests that the victim's blood may have been present on his jacket because Sam Howell, Chief of Toxicology at the Mississippi Crime Lab, assisted Dr. Ward with the autopsy one day and the next, collected three items of evidence, including the jacket! While this raises matters of Mr. Howell's personal hygiene that were not made part of the record, his contention is also refuted by Deborah Haller's testimony regarding the rigorous protocol followed to avoid contamination in the crime lab.

*223 ¶ 22. This Court has found that PCR testing of DNA samples produces reliable results in a forensic setting. The record contains no evidence of error in the process of collecting and testing the DNA evidence in this case. We therefore do not find the circuit court to be in error for denying Watts' motion to suppress the evidence.

II. WHETHER THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO STRIKE THE PROSECUTION'S DNA PCR EVIDENCE PERTAINING TO THE APPELLANT'S UNDERSHORTS

[2] ¶ 23. Watts asserts that circuit court erred in overruling his motion to strike the State's PCR evidence regarding stains found on the inside of his undershorts. At trial, evidence was presented that the undershorts Watts was wearing when he was taken in for questioning contained a mixture of DNA evidence that was consistent both with his genetic profile and that of the victim. Although statistical data was introduced about the DNA evidence which was identified as consistent with the victim's on Watts' jacket, no corresponding statistical data on the mixed sample found on the inside of Watts' underwear was offered by the State. While the circuit judge found that statistical data had probative value, he also found that because of the mixed sample on the shorts, Dr. Tracey could not generate any statistical data with the same certainty that he was able to achieve on the jacket. He further ruled that even without statistical data, evidence of DNA samples taken from Watts' undershorts still had probative value and thus denied the defendant's motion to strike. Based on *Hull v. State,* 687 So.2d 708 (Miss.1996), Watts now asserts that it was error to introduce the DNA evidence without any population frequency estimates on the mixed sample since it was introduced on the jacket. He raises this claim despite testimony by his own expert witness, Dr. Ronald Acton, that *any* evidence of mixed DNA samples needs to be viewed with great caution.

[3] ¶ 24. This Court has held that "where the trial court finds that evidence of a DNA match is admissible as relevant, the court should also allow scientific statistical evidence which shows the frequency with which the match might occur in the given population." *Hull,* 687 So.2d at 728. In *Crawford v. State,* 716 So.2d 1028 (Miss.1998), we found that it was "proper" for an expert to present statistical evidence as to the frequency with which a DNA match might occur within the general population. *Crawford,* 716 So.2d at 1046. Thus, where such evidence is offered in conjunction with evidence of a DNA match made on the basis of either PCR or RFLP analysis, the circuit court should allow its introduction. However, that does not mean that it is an abuse of discretion for the circuit court to allow evidence of DNA matching without also *requiring* statistical analysis of the match. *See Polk v. State,* 612 So.2d 381, 390 (Miss.1992)(where trial court allowed evidence of a DNA match but disallowed statistical analysis, this Court found expert testimony regarding DNA match admissible, but did not address admissibility of statistics or trial court's refusal to admit same). Indeed, in *Polk,* it was suggested that evidence that tends to go to the matter of the reliability of DNA testing goes only to the credibility of the evidence offered. *Polk,* 612 So.2d at 390 n. 2, 393.

¶ 25. Whether population frequency statistics are really helpful to the jury was discussed recently in *Hepner v. State,* 966 S.W.2d 153 (Tex.Ct.App.1998). There, the Texas court addressed the defendant's claim that he was unfairly prejudiced by the defense's introduction of the same statistical data Watts now claims should have been admitted. While the Court found that the probative value of the statistical evidence outweighed its prejudicial value, it noted the testimony of Dr. Jonathan *224 Koehler,[2] which highlighted the relative insignificance of the population statistical data in comparison to laboratory error rates, which usually are not presented to the jury. *Hepner,* 966 S.W.2d at 157–58.

¶ 26. Watts appears to want to have his cake and eat it, too, with regard to the DNA statistical evidence; While in Issue III, *infra,* he contends that statistical evidence should have provided along with the DNA evidence taken from his undershorts, he asserts in this assignment of error that statistical evidence regarding DNA samples taken from his jacket should *not* have been admitted. His own expert witness cautioned against extensive reliance upon mixed DNA samples and noted the variety of combinations that could be derived just from the material found on Watts' undershorts. Given that evidence, one would have to question the reliability of any statistical evidence that might be derived therefrom. Indeed, this Court's decision in *Crawford* calls into question the

EXHIBIT B