No. _____
CAPITAL CASE

IN THE

Supreme Court of the United States

LESLIE GALLOWAY III,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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April 5, 2024

Index to Petitioner's Appendix

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-DR-01796-SCT

LESLIE GALLOWAY, III a/k/a LESLIE GALLOWAY a/k/a LESLIE "BO" GALLOWAY, III

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	09/24/2010
TRIAL JUDGE:	HON. ROGER T. CLARK
COURT FROM WHICH APPEALED:	HARRISON COUNTY CIRCUIT COURT
ATTORNEYS FOR PETITIONER:	OFFICE OF CAPITAL POST-CONVICTION COUNSEL BY: MARY JO WOODS KRISSY CASEY NOBILE HENDERSON HILL CLAUDIA VAN WYK
ATTORNEY FOR RESPONDENT:	OFFICE OF THE ATTORNEY GENERAL BY: PARKER ALAN PROCTOR, JR.
DISTRICT ATTORNEY:	WILLIAM CROSBY PARKER
NATURE OF THE CASE:	CRIMINAL - DEATH PENALTY - POST CONVICTION
DISPOSITION:	POST-CONVICTION RELIEF DENIED - 10/05/2023
MOTION FOR REHEARING FILED:	

EN BANC.

BEAM, JUSTICE, FOR THE COURT:

¶1. A Harrison County jury of Leslie "Bo" Galloway's peers found Galloway to be guilty of the capital murder of Shakeylia Anderson. The four aggravating factors the jury found were: (1) that Galloway was engaged in sexual battery; (2) that Galloway was a person under sentence of imprisonment at the time; (3) that Galloway was a felon previously convicted of an offense involving the use of threat of violence to another person; and (4) that the murder

was especially heinous, atrocious, or cruel. The jury subsequently determined that Galloway should be sentenced to death by lethal injection.

¶2. Galloway's conviction and sentence were affirmed by this Court on direct appeal. ***Galloway v. State***, 122 So. 3d 614 (Miss. 2013). His motion for rehearing was subsequently denied, and he sought relief in the United States Supreme Court by way of a petition for writ of certiorari, which was denied on May 27, 2014. ***Galloway v. Mississippi***, 572 U.S. 1134, 134 S. Ct. 2661, 189 L. Ed. 2d 209 (2014). Galloway now comes before this Court with his Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and his subsequently filed Motion for Leave to Proceed in the Trial Court with Amended Petition for Post-Conviction Relief. We treat both filings together as one and refer to it as Galloway's amended petition for post-conviction relief. Finding no error, we deny his amended petition.

FACTS AND PROCEDURAL HISTORY

¶3. The following factual and procedural background are gleaned from this Court's opinion on direct appeal:

> On the evening of Friday, December 5, 2008, seventeen-year-old Shakeylia Anderson and her cousin Dixie Brimage were at their grandmother's house in Gulfport, Mississippi, talking and doing each other's hair. Their uncle, Alan Graham, stopped by briefly. When Graham entered the house, he heard a phone ringing in the living room. He looked at the phone and saw the incoming call was from "Bo." Graham walked through the house and found Anderson and Brimage hanging out in a bedroom. Graham mentioned that someone's phone was ringing, and Anderson said it was hers. Graham overheard Anderson on the phone and got the impression that she was getting ready to go out and meet someone.

At approximately 10:00 that evening, Anderson walked out of her grandmother's house. She was wearing a jacket, blue jeans, and brown boots and carried her book bag with her. Brimage watched Anderson through her grandmother's glass front door as Anderson walked toward a white Ford Taurus parked in the driveway. Brimage saw Anderson stand by the car for a moment and talk to a man. After about five minutes, Anderson got in the white Ford Taurus with the man, and the vehicle drove away.

The following evening, Martin Smith was hunting with dogs in a secluded, wooded area located west of Highway 15 in northern Harrison County. Smith was searching for one of his dogs that had strayed from the pack when he came across an unclothed dead body lying on a dirt logging road. Smith then called law-enforcement personnel.

Shortly before midnight that same evening, Investigator Michelle Carbine of the Harrison County Sheriff's Department received a call that a body had been found in a wooded area. Carbine arrived at the scene in the early morning hours of December 7, 2008. It was too dark to begin processing the body, so Carbine decided to secure the crime scene and wait until daylight. Carbine returned to the scene around 6:30 a.m. that morning with evidence technician Nancy Kurowski and medical examiner Dr. Paul McGarry. They found the naked body of a black female lying in the middle of a logging path. Carbine said that the deceased female had a red tint to her body, missing hair, and blood underneath the facial area. The body was smeared with blood and dirt, partially burned, and mangled with scrapes, gouges, and lacerations. The body bore at least three tire marks.

Near the scene of the body, investigators found a burned patch of grass and drag marks indicating that something or someone had been dragged from this area to the spot where the body lay. As they walked back toward the body, officials found broken glass from a bottle of New Amsterdam gin and a burned piece of cloth. Pieces of glass were recovered. Numerous tire tracks were near and in a turning pattern around the female's body. Photographs and impressions of the tracks were made and measurements were taken. Based on the condition of the body and the crime scene, Dr. McGarry theorized that the female had been run over by a vehicle, most likely a car.

After some investigation, Carbine determined that the deceased female was Anderson. Based on Brimage's description of the man with whom Anderson had left that Friday evening, and Graham's recollection of "Bo"

calling Anderson's phone, as well as information from friends and family, Carbine began looking for a light-skinned black male, approximately five feet, five inches tall, from the Moss Point area, nicknamed "Bo," who drove a white Ford Taurus.

On the evening of December 9, 2008, Lieutenant Ken McClenic of the Jackson County Sheriff's Department received information that Harrison County was looking for a black man with the nickname "Bo" who drove a white Ford Taurus. Through his investigation, McClenic identified Leslie Galloway as a possible suspect. Having obtained a residential address for Galloway, McClenic drove by and observed a white Ford Taurus in the driveway. McClenic and other deputies began conducting surveillance of the residence. Later that same evening, the white Ford Taurus was reported leaving the residence. Officers stopped the vehicle a short distance away. Galloway and Cornelius Triplett, a friend of Galloway's, were inside the vehicle. Galloway was placed under arrest.

Carbine responded to the scene. Carbine walked around the Taurus and noticed a small piece of possible evidence flapping underneath the passenger side. Since the vehicle was going to be towed and Carbine feared the substance might be lost, she collected the item. Officers also noticed some broken glass on the lip of the trunk. The vehicle was then towed and secured at Bob's Garage. A search warrant for the car was obtained and executed by Kurowski and two other investigators. When the vehicle was raised on a lift, officers noted that one side of the undercarriage appeared to be wiped cleaner than the other. Pursuant to a second search warrant, the car was turned over to the Harrison County Sheriff's Department and taken to a work center for processing.

Kurowski processed the car. For comparison to the tire impressions taken from the crime scene, Kurowski made tread impressions of the white Ford Taurus. The tire tracks at the crime scene matched the type of tire on the white Ford Taurus Galloway was driving when he was arrested. From the interior of the car, Kurowski collected blood located just above the trunk-release latch and blood from the left rear passenger door near the door handle. From different places underneath the car, Kurowski collected several pieces of a stringy tissue-like substance. Both the blood and the tissue substances were matched to Anderson's DNA.

A search warrant was obtained and executed for Galloway's residence.

There, officers seized a pair of Nike shoes, an Atlanta Braves baseball hat, a Burger King shirt with the name tag "Bo," and an empty bottle of New Amsterdam gin. DNA testing revealed the presence of Anderson's DNA on the shoes and on the baseball hat.

During the autopsy, Dr. McGarry collected additional physical and biological evidence from Anderson's body, including swabs of her anal and vaginal cavities. Analysis of the vaginal swab indicated the presence of DNA from Anderson, Galloway, and James Futch. Futch was Anderson's boyfriend, who admitted that he had sexual intercourse with her days prior to her disappearance and death. As part of his examination, Dr. McGarry noted that Anderson had a dilated vagina—indicative of sexual activity—and her anus had stretching injuries including abrasions, rubbing of the lining, and a fresh tear—three quarters of an inch by one quarter of an inch—characteristic of forceful anal penetration. Dr. McGarry concluded that the anal tear had been caused by forceful sexual penetration. He reasoned that the tear could not have been caused by being run over or crushed by the automobile, because Anderson's rectum was intact—or had not been penetrated by any broken bones—but was naturally in a protected area of the body. Dr. McGarry also explained that the tear was not caused by some foreign object, such as a metal or wooden instrument, because the rubbing and stretching injuries to the rectum were not consistent with jamming, ripping, or irregular injuries that would be associated with penetration by that type of object. The injury to her anus involved much more subtle characteristics.

Days after his arrest, on December 10, 2008, Galloway spoke with Carbine. Galloway admitted that he went by the nickname "Bo." Galloway stated that he had been seeing Anderson since November 2008, and he said that he had sex with Anderson on Thanksgiving Day. Galloway admitted that he spoke with Anderson on December 5 and picked her up that evening in a white Ford Taurus.

Also, as part of the criminal investigation, Carbine obtained cell-phone records for Galloway from November 1, 2008, to December 21, 2008. The records indicated that Galloway and Anderson had been in contact beginning as early as November 11, 2008, and every day in December leading up to her disappearance and murder. They were in contact as many as fourteen times on Friday, December 5, 2008, the last time being 11:12 p.m.

Galloway was indicted and tried for the capital murder of Anderson. A

> jury found him guilty of capital murder based upon sexual assault. During the penalty phase, the jury heard testimony from Galloway's friends and family members, who testified that he was a good father and that they would visit him if he was given life imprisonment. The jury also heard testimony from corrections officers explaining that Galloway had not caused any trouble during his prior incarceration. The State introduced a "pen pack" which included Galloway's prior conviction for carjacking and demonstrated that Galloway was under supervision of the Mississippi Department of Corrections (MDOC) when he murdered Anderson. Unpersuaded by Galloway's mitigating proof and finding four aggravating factors, the jury returned a sentence of death.

Galloway, 122 So. 3d at 625-27.

¶4. On direct appeal, Galloway presented thirty assignments of error. Finding no merit to the claims, the Court affirmed Galloway's conviction and sentence of death. ***Id.*** at 682. Galloway then filed a petition for writ of certiorari in the United States Supreme Court, which was denied. ***Galloway***, 572 U.S. 1134.

¶5. Galloway filed a Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief (Capital PCR) on October 3, 2014. On October 22, 2015, the Court granted a stay of the Capital PCR proceeding to allow Galloway to pursue a separate PCR matter related to his 2007 carjacking conviction in Jackson County, which was used as an aggravating factor during the sentencing phase of Galloway's capital murder trial. The Court simultaneously granted a stay of the Capital PCR proceedings and remanded the case to the Circuit Court of the First Judicial District of Harrison County for resolution of various outstanding discovery matters, which were resolved as of June 26, 2017.

¶6. On September 5, 2018, the Circuit Court of Jackson County denied Galloway's PCR

pertaining to his carjacking conviction. This Court affirmed on appeal, and rehearing was denied. ***Galloway v. State***, 298 So. 3d 966 (Miss. 2020). With the Harrison County and Jackson County collateral matters concluded, the stay in this Capital PCR matter was lifted. Galloway was granted permission to file an amended Capital PCR, which is now before the Court, and all briefing has been completed.

ANALYSIS

¶7. "Direct appeal [is] the principal means of reviewing all criminal convictions and sentences[.]" Miss. Code Ann. § 99-39-3(2) (Rev. 2020). "The Post-Conviction Collateral Relief Act provides a procedure limited in nature to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal." ***Wilcher v. State***, 863 So. 2d 776, 795 (Miss. 2003) (citing ***Turner v. State***, 590 So. 2d 871, 874–75 (Miss. 1991). "This Court has recognized that post-conviction-relief actions have become part of the death-penalty appeal process." ***Wilson v. State***, 81 So. 3d 1067, 1074 (Miss. 2012) (quoting ***Chamberlin v. State***, 55 So. 3d 1046, 1049-50 (Miss. 2010)). Because Galloway's conviction and sentence have been affirmed on appeal, he must seek and obtain leave from this Court before seeking relief in the trial court. Miss. Code Ann. § 99-39-7 (Rev. 2020).

¶8. The Court's standard of review is well established. "Leave is granted only if the application, motion, exhibits, and prior record show that the claims are not procedurally barred and that they 'present a substantial showing of the denial of a state or federal right.'"

Ronk v. State, 267 So. 3d 1239, 1247 (Miss. 2019) (quoting Miss. Code Ann. § 99-37-27(5) (Rev. 2015)); *see also* Miss. Code. Ann. § 99-39-27(5) (Rev. 2020).

¶9. Because this is a capital case, non-procedurally barred claims are reviewed using "'heightened scrutiny' under which all bona fide doubts are resolved in favor of the accused." ***Id.*** (internal quotation marks omitted) (quoting ***Crawford v. State***, 218 So. 3d 1142, 1150 (Miss. 2016)). "This Court recognizes that 'what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.'" ***Flowers v. State***, 773 So. 2d 309, 317 (Miss. 2000) (internal quotation marks omitted) (quoting ***Porter v. State***, 732 So. 2d 899, 902 (Miss. 1999)).

I. Ineffective Assistance of Counsel

¶10. The test for claims of ineffective assistance of counsel is well-settled. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Strickland v. Washington,*** 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to prevail on this claim, Galloway must demonstrate to this Court that his attorneys' performance was deficient and that the deficiency prejudiced the defense of the case. ***Id.*** at 687. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." ***Stringer v. State***, 454 So. 2d 468, 477 (Miss. 1984) (quoting ***Strickland***, 466 U.S. at 687).

¶11. This Court "strongly presume[s] that counsel's conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy. In other words, defense counsel is presumed competent." ***Grayson v. State***, 118 So. 3d 118, 127 (Miss. 2013) (internal quotation marks omitted) (quoting ***Chamberlin***, 55 So. 3d at 1050). Even when professional error is shown, however, this Court must determine whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Mohr v. State***, 584 So. 2d 426, 430 (Miss. 1991) (internal quotation mark omitted). When reviewing a case involving the death penalty, the most important inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." ***Strickland***, 466 U.S. at 695. If Galloway's ineffective assistance of counsel claims fail on either of the ***Strickland*** prongs, his claims fail. ***Foster v. State***, 687 So. 2d 1124, 1129-30 (Miss. 1996).

¶12. Galloway raises numerous claims of ineffective assistance of counsel. Before addressing the substance of each claim, the Court must first determine if the claim is procedurally barred. ***Ronk***, 267 So. 3d at 1249. Galloway's counsel on direct appeal differed from his counsel at trial. In such instances, a defendant's failure to raise issues of ineffective assistance of counsel on direct appeal that are "based on facts fully apparent from the record" " shall constitute a waiver barring consideration of the issues in post-conviction

proceedings." Miss. R. App. P. 22(b). "The procedural bars of waiver, different theories, and res judicata as well as the exceptions thereto contained in Miss. Code Ann. § 99-39-21(1)-(5) are clearly applicable to death penalty post-conviction relief applications." ***Moffett v. State***, 351 So. 3d 936, 942 (Miss. 2022) (internal quotation mark omitted) (quoting ***Powers v. State***, 945 So. 2d 386, 395 (Miss. 2006)). "Post-conviction relief is not granted upon facts and issues which could or should have been litigated at trial and on appeal." ***Wilcher***, 863 So. 2d at 796 (quoting ***Foster***, 687 So. 2d at 1129); Miss. Code Ann. § 99-39-21(1) (Rev. 2020). "We must caution that other issues which were either presented through direct appeal or could have been presented on direct appeal or at trial are procedurally barred and cannot be relitigated under the guise of poor representation by counsel." ***Wilcher***, 863 So. 2d at 796 (quoting ***Foster***, 687 So. 2d at 1129). It is Galloway's burden to demonstrate that his claims are not procedurally barred. ***Moffett***, 351 So. 3d at 943; Miss. Code Ann. § 99-39-21(6) (Rev. 2020).

A. Whether Galloway's counsel were ineffective in failing to conduct an adequate investigation and present available mitigating evidence during the penalty phase of trial.

¶13. This issue is not procedurally barred.

1. Failure to Tell Galloway's "True-Life Story"

¶14. Galloway asserts that his trial counsel were ineffective in their investigation and presentation of mitigating evidence during the sentencing phase. He argues that the jury was deprived of consequential evidence pertaining to his: 1) difficult childhood history, 2) mental

illness, 3) desire for love and happiness and to be a good father, 4) parents' difficult upbringings, and 5) carjacking conviction used as an aggravating circumstance. It is Galloway's position that his attorneys failed to conduct a reasonable investigation, present all relevant and mitigating facts, and tell Galloway's "true-life story." But for these failings, Galloway contends that the jury would have sentenced him to life in prison rather than death.

¶15. With regard to claims of ineffective assistance of counsel based upon the alleged failure to investigate and/or effectively present mitigation evidence, this Court has stated:

> "[w]hile counsel is not required to exhaust every conceivable avenue of investigation," [***Ross v. State***, 954 So. 2d 968, 1005 (Miss. 2007)] (citing ***State v. Tokman***, 564 So. 2d 1339, 1343 (Miss. 1990)), there is "a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" ***Id.*** at 1005 (quoting ***Strickland v. Washington***, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also* ***Ronk***, 267 So. 3d at 1257 ("In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (quoting [***Wiggins v. Smith***, 539 U.S. 510, 521-22, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)]). "The assessment . . . includes not only what counsel discovered, but also whether that evidence would have led a reasonable attorney to investigate further." ***Ronk***, 267 So. 3d at 1257-58 (citing ***Wiggins***, 539 U.S. at 527, 123 S. Ct. 2527).

Evans v. State, 294 So. 3d 1152, 1158 (Miss. 2020) (first and fourth alterations in original).

a) Childhood History

¶16. Galloway has provided affidavits from his family members, friends, and childhood girlfriends, all purporting to have first hand knowledge of Galloway's traumatic upbringing, which included poverty, trauma, family dysfunction, abandonment, neglect, domestic

violence, and the sexual abuse of his sister by their step-father. Some of the affiants discuss Galloway's ability to cope despite his childhood difficulties. Some of the affidavits report of Galloway's positive characteristics and the love he has for his children. The affiants all state that they were willing and able to testify on Galloway's behalf had defense counsel contacted them.

b) Mental Illness

¶17. Galloway's alleged mental illness will be discussed in further detail below. Here, however, Galloway asserts that his counsels' failure to conduct an adequate mitigation investigation deprived the jury from hearing from family members about what they describe as violent and traumatic chaos in Galloway's childhood home, which they purport took a toll on his mental health.

¶18. In some of the affidavits, it was asserted that Galloway suffered from panic attacks and did not want to be alone. He was taken to the hospital at the age of eight for a panic attack after an altercation with his siblings. He was again taken to the hospital at age fourteen because his heart was beating heavy and fast, and he was shaking.

¶19. Others recall Galloway being sad and/or depressed and that it was hard for him to "manage his emotions." It was also expressed that Galloway, once upset, would turn red and that it took a long time for him to calm down. One of Galloway's childhood friends remembered a time when Galloway threatened to kill himself and locked himself in a room. Another friend recalled Galloway blacking out during a fight at the high school, not

remembering what had happened. In a separate, similar incident, a friend of Galloway's remembers Galloway blacked out when he was attacked by multiple men, and he was confused when the police arrived, not knowing why he was being placed in the police car.

¶20. Galloway is described as having isolated himself when something bothered him, staying inside his room day and night and refusing food. Other times, he would drive, without a destination, until his car ran out of gas. After Galloway's brother Marcus was sent to prison for murder, Galloway stayed in the house and would not do anything with his close friend. His mother stated that Galloway spent a lot of time alone playing video games. Some friends stated that they could tell something was wrong with Galloway in the days leading up to his arrest.

¶21. Galloway is described as coping with his troubled environment by smoking marijuana on a daily basis when he was sixteen years old. One affiant stated that Galloway passed out from the consumption of alcohol on his twenty-sixth birthday. Galloway's mother, Ollie Varghese, stated that she found ten empty liquor bottles in Galloway's room following his arrest. Galloway claims all of this was evidence of his mental distress and was easily obtainable.

c) Resilience, Search for Love and Happiness, and Efforts to be a Good Father

¶22. Galloway claims that his trial counsel failed to uncover and present evidence that he was resilient, that he was in search of love and happiness, and that he strived to be a good father. Despite his purported violent environment, drugs, trauma, and poverty, Galloway,

again, offers affidavits to demonstrate that he had hobbies, played games with friends, fished, and participated in school athletics. He is described by the affiants as being talented at football, writing, and drawing.

¶23. Affidavits from Galloway's fourth and tenth grade teachers state that he was quiet, respectful, and never caused problems. His high school football coach stated in his affidavit that Galloway was hardworking, quiet, and never caused problems. Varghese stated that Galloway was her only child to graduate from high school. Some of the affiants described Galloway as fun-loving, wanting to make people laugh. Galloway's friends and family described him as hardworking and always looking for work. He is also said to be respectful of the adults in his life.

¶24. Through the affidavits, we are told that Galloway was protective of his family. One instance was when Galloway's mother was working at a convenience store when it was robbed. It is told that Galloway watched the surveillance tape, found out who the robber was, and fought the man for endangering his mother. Galloway also "got upset" with his sister's gym teacher for making her run during class when she was fifteen years old and eight months pregnant.

¶25. Galloway had "many girlfriends" over the years. One of his first girlfriends stated in her affidavit that the two were involved during junior high and high school. She stated that Galloway was a year ahead of her and that they became sexually active when she was in the eighth grade. She stated that Galloway never hurt her or asked her to do anything sexually

that made her uncomfortable. She described him as attentive, sensitive, and everything she wanted in a boyfriend. She further stated that they were in love, but her mother put a stop to the relationship when she "walked in on us" one night.

¶26. Another girlfriend of Galloway's stated in her affidavit that the two started dating when she was in the seventh grade and Galloway was in the ninth grade. She described him as caring and sensitive and said he liked to take care of people and protect them. She stated that Galloway got along well with everybody, and she was always comfortable having Galloway at her home with her family.

¶27. Galloway provided the affidavit of another girlfriend who stated that the two met in the spring of 2008. They worked together at a fast food restaurant. They dated for several months, including right up to the time of Galloway's December 9, 2008, arrest for Anderson's murder. That girlfriend stated that Galloway never hit or hurt her, and he never asked her to do anything sexually that she was not comfortable doing.

¶28. According to the affidavits, Galloway's one true love was the mother of his two oldest children, Shamekia Moore. Galloway has a third child with another woman. Galloway's relationship with Moore was described as a turbulent and trying on-and-off relationship. At the age of twenty-four, Galloway was convicted of carjacking. One affiant stated that Galloway's only focus was getting out of jail and returning to his children. One of the affiants stated that Galloway wanted to provide a home for Moore and his children and to have a stable family, while another affiant stated that Galloway's three children meant the

world to him and that Galloway did not want to repeat the same mistakes that his father had made, wanting to be a better father.

d) Difficulties of Galloway's Parents' Upbringings

¶29. Galloway asserts that, beyond his own life, his trial counsel failed to uncover and present evidence related to his parents' backgrounds, which he asserts inherently affected they manner and environment in which they reared their children.

¶30. Galloway's mother, Varghese, stated in her affidavit that she learned the man she grew up thinking was her father, Otis Taylor, may not have actually been her father due to Galloway's maternal grandmother's alleged affair with a neighbor. Much of the information provided on this aspect of Galloway's petition also focuses on his maternal grandmother, Marie, who is purportedly full Choctaw and was born on indigenous land near Philadelphia, Mississippi.

¶31. According to affidavits, Marie grew up in extreme poverty. Before Varghese was born, Marie had four children, all by different fathers, at a young age. Marie left the reservation and joined the Army during World War II, leaving her children behind on the reservation. Marie began dating Taylor. While pregnant with Varghese, Marie temporarily left Taylor due to his alleged philandering, and she moved to Moss Point, Mississippi. It is stated that Marie had three children while married to Taylor, and Taylor may not have been the father of all of them. It is also stated that Varghese had a difficult time growing up, as the other children would call her and her sisters "half-breeds." Varghese grew up knowing

nothing of her other siblings back on the reservation until one of them attempted to reunite with Marie in Moss Point. Varghese did not meet her grandmother until she was twenty years old.

¶32. Varghese stated in her affidavit that Taylor related to her, her sisters, and Marie through violence. She stated that Taylor was a jealous man and had a volatile temper. Just as Galloway's father would later do, Taylor beat Varghese. She also states that she witnessed Taylor raping her sister. Further, Varghese stated that she was raped by Taylor twice while Marie was in the hospital for a leg amputation. Varghese was later sexually assaulted as a teenager by her sister's male companion.

¶33. Galloway's father, Leslie Galloway, Jr., known as "Red," also grew up in poverty. He struggled in school, being held back several times before he ultimately dropped out in the ninth grade. Red was described as being quiet as a child and as a young man, which the school saw as a "defect needing correction." It is stated that Red had a reputation for getting into fights. At age eighteen, Red beat a man over a woman. The second time they fought, the man was waiting for Red and shot him multiple times in the head and shoulders. According to affidavits, one of the bullets remained in Red's body near his spinal cord, leaving him physically disabled and causing periodic seizures.

e) Failure to Investigate Galloway's Carjacking Conviction

¶34. As stated earlier, Galloway had been convicted of carjacking, a crime of violence, in Jackson County prior to committing the capital murder. Galloway pleaded guilty. That prior

conviction was used as an aggravating factor during sentencing. Galloway was also under the custody of the MDOC on supervised release when he murdered Anderson, which was an additional aggravating factor.

¶35. Galloway first asserts that his capital murder trial counsel were ineffective for failing to investigate his carjacking conviction, claiming that if they had done so, they could have timely filed a PCR in Jackson County to have the carjacking conviction overturned. As stated above, during the pendency of the instant matter, the Court allowed Galloway to file his carjacking-related PCR in Jackson County. The trial court found the PCR to be barred by time and, notwithstanding the time bar, *without merit*. *See* ***Galloway***, 298 So. 3d at 968. On appeal, this Court agreed in *both* regards. ***Id.*** We find Galloway's assertion that his trial attorneys could have fared better had they filed a PCR prior to expiration of the statute of limitation to be unfounded, since both the trial court and this Court found Galloway's claims to be meritless. Thus, Galloway can show no deficiency or prejudice.

¶36. Galloway also asserts that trial counsel should have investigated and presented the jury with the circumstances of his carjacking, claiming it would have decreased the weight of aggravation afforded that conviction by the jury. Galloway asserts that the carjacking record shows a favorable description of the facts, as provided by his attorney at the plea hearing in that matter, as follows:

> Mr. Galloway was -- just turned 18 when this carjacking happened. He was in high school. Basically, Your Honor, what happened is they had been drinking a little, they had gotten in the car with the girls. They had been riding around. The girls decided that they wanted them to get out. Mr. Galloway agreed to put

> $5 worth of gas in the car. They drove around a little more, and they got into an argument. He pulled the girl out of the car and drove home, because he didn't want to walk. This is what the argument started over, about him getting out of the car and walking. He was very young.

Galloway also calls into question the veracity of the female complainant and her initial identification of the boys who took her car. Of note, while Galloway contends that circumstances surrounding his carjacking should have been used in mitigation to show that it was really a nonviolent offense, the prosecutor in that case explained at the plea hearing that Galloway forcefully dragged the female victim from the car, and she suffered bruises to her legs and a black eye. Carjacking is *per se* a crime of violence. *See* ***Galloway***, 122 So. 3d at 645. The hearing transcript also reveals that, when the judge asked Galloway to describe why he thought he was guilty, Galloway stated: "I had possession of a controlled substance in my pocket, and I took a car by force." The remainder of the circumstances as provided by Galloway's attorney included Galloway's experimentation with crack cocaine, as Galloway had also been charged with possession of drugs. Galloway asserts that because his trial counsel failed to investigate the circumstances of his carjacking conviction "and learn of these favorable facts, they could not determine whether to present them." Galloway concludes that his trial counsel were ineffective for failing to conduct a meaningful investigation, which he asserts would have led to the discovery of all of the above facts.

¶37. Galloway was represented by three attorneys at trial, Harrison County Public Defender Glen Rishel and two assistant public defenders, Charlie Stewart and Dana Christensen. All three attorneys agree that Attorney Rishel was responsible for mitigation and the penalty

phase of the trial. Attorney Rishel stated in his affidavit that his office employs an investigator, Damon Reese. Reese has a bachelor's degree in Criminal Justice and, if he were to complete his thesis, he would receive his master's degree in Sociology. Reese is said to have attended the same capital case seminars as Attorney Rishel, and he has many years of experience in law enforcement with the Harrison County Sheriff's Office.

¶38. Defense Counsel retained psychologist Dr. Beverly Smallwood, and she evaluated Galloway. Attorney Rishel states that defense counsel provided Dr. Smallwood with everything she requested and what was in their possession. He attests that he is unaware of any information that Dr. Smallwood needed that she did not have in order to make her evaluation pursuant to the ***M'Naghten*** test. *See* ***M'Naghten's Case*** (1843) 8 Eng. Rep. 718, 10 Clark and F. 200. The ***M'Naghten*** test is used to determine whether the accused knew right from wrong at the time the act was committed. ***Woodham v. State***, 779 So. 2d 158, 163 (Miss. 2001). In Dr. Smallwood's report of Galloway's evaluation, she stated:

> Leslie maintained good eye contact which was appropriate to the interview. His motor behavior was normal. His speech was clear, concise, and comprehensible. His voice tone was relatively soft.
>
> Leslie's thought processes were normal and coherent, with no evidence of flight of ideas, circumstantialities, or loose associations. There was no evidence of delusional thought content. He denied particular fears or phobias except the fear of heights. He says that he has had periods of low self-esteem and self-reproach. He denies feeling that others are out to get him. He denies suicidal thoughts. However, he said that every now and then in the past he would think of suicide, like if he were driving and wondered what it would be like to run off the road. He denies any chronic feelings of resentment.
>
> With respect to somatic functions and concern, Leslie said that his appetite is

good. He does not sleep well. He tosses and turns and has trouble going to sleep. His energy level is "so so." He has no history of seizures. He does not appear to be particularly preoccupied with his physical health.

Leslie's orientation was assessed. When he was asked the date of today, he said correctly that it is the seventh of November, 2009. He knew that he was in the Harrison County Adult Detention Center. When asked the name of the examiner, he did not know her name. He thought that the examiner "evaluates people through the mind."

There was no evidence of clouded consciousness or dissociation. He said that he has "a little" memory problems. He said, "I can remember long ago, but sometimes not last week." He reads, but sometimes has trouble concentrating.

When asked about any past traumas in his life, Leslie talked about when his brother "caught his charge" in '97 or '98. He denies any abuse or trauma in his childhood. He said that his mother loved him and tried to raise him right. "She tried to keep me away from wrong activities. If there was something I needed or wanted, she'd try to get it for me," he explained.

Leslie denied any significant problems with depression in his past. He said that sometimes he gets depressed when his "baby mama" gets mad at him and says he can't see his kids. He says he is depressed now "in ways, yeah." He tearfully stated, "I think of my family out there and being away. I really miss my children." He has both gained and lost weight. He has sleep disturbance. There is no evidence of psychomotor retardation. He is no more tired than usual. He denies current feelings of worthlessness. He denies current suicidal ideation or intent.

There is no evidence of periods of mania. There are no signs of obsessive-compulsive disorder. Leslie denies any significant anxiety.

When asked about hearing things others didn't hear (auditory hallucinations), he said that he has heard people calling his name when he was out in the free world. He has never seen things that others didn't see (visual hallucinations). No delusional thought content is present. There is no evidence of disordered thought or speech. His affect is normal.

When he was "outside," Leslie was doing marijuana before he got convicted on the first charge. Since released in February, he claims he does no drugs at

all.

> Leslie says, "I like to drink, but I don't get drunk." When asked about how much he might drink on a given occasion, he said that he might drink about three drinks, because, "at the club they are high (expensive.)" He says he drank mostly liquor on weekends or "whenever I could afford it." He denied that alcohol has even gotten him in trouble. He denies any family history of alcoholism.

¶39. With regard to Galloway's mental state at the time of the offense, Dr. Smallwood concluded that "[t]here is no indication that Leslie was experiencing any mental problems that would have rendered him unable to distinguish between right and wrong. He was functioning normally during this period of time." Dr. Smallwood conducted the Wechsler Adult Intelligence Scale-IV (WAIS-IV), to determine Leslie's overall intellectual functioning, as well as his ability to perform specific types of tasks. Galloway's composite score (Full Scale IQ) was 106, with 90 - 109 being "Average" range.

¶40. Dr. Smallwood stated her forensic opinion as follows:

> It is my opinion, to a reasonable degree of psychological certainty, that Leslie Galloway:
>
> A) did not have a mental disorder at the time of the alleged crimes which prevented him from knowing right from wrong;
>
> B) is competent to assist counsel in his defense,
>
> C) is not impaired intellectually; his scores and performance are not indicative of mental retardation.

It was Dr. Smallwood's opinion that "[n]o further forensic evaluation is needed to determine competency or legal sanity at the time of the alleged crimes." She did state that conducting

a full mitigation study was outside the scope of her forensic practice, and she recommended that a qualified forensic psychiatrist conduct a mitigation study or that the defense enlist the mitigation services of the Office of Capital Defense.

¶41. Attorney Rishel stated in his affidavit that he was advised by Dr. Smallwood that putting her on the witness stand during the penalty phase would not help Galloway. And although Attorney Rishel told the jury during opening statements of the sentencing phase that they would hear from Dr. Smallwood, she ultimately was not called as a witness.

¶42. Also in his affidavit, Attorney Rishel stated that the defense team would usually meet with Galloway at the jail or at the courthouse. He stated that Galloway usually sat with his head down and was quiet. Between Attorney Rishel and Reese, they met with Galloway's mother seven or eight times. They also talked to other members of Galloway's family and called several of them as witnesses in mitigation. Attorney Rishel stated that they wanted as many witnesses as they could find to testify that Galloway would have visitors if he went to prison and that he would be a good prisoner.

¶43. From the interviews, defense counsel learned that Galloway's family loved him, that they would visit Galloway in prison, and that Galloway could still have a positive impact on his family and on his children. Defense counsel learned that Galloway was a quiet person who spent most of his time playing video games and that he had a couple of friends. Attorney Rishel stated in his affidavit that the defense learned of Galloway's brother being in prison for murder and that "We did not want the jury to know this."

¶44. Attorney Rishel added:

> [t]hat the only records that we knew of were school records from Greene County. We obtained copies of these records and would have obtained any other records if we had known of their existence. I do not recall being told about any other records regarding Mr. Galloway. We relied on Mr. Galloway and his family to give us a history of Mr. Galloway's life. Based on what we were told, there were no other records.
>
> That from our investigation, we determined there was nothing in Mr. Galloway's history that would shock the conscience of the jury in terms of mitigation. There was no indication that he suffered from any kind of disability or mental health problems. Mr. Galloway had average or above average intellectual functioning and no psychosis. Mr. Galloway nor any one in his family ever told us about any domestic violence issues.

¶45. Attorney Rishel stated that the defense team was led to believe by Galloway and his mother that Galloway had no remarkable history of any kind, and when he spoke with Galloway about a possible plea, Galloway said, "I just don't feel like I did it" as opposed to "I didn't do it."

¶46. Finally, Attorney Rishel stated that he was aware that Galloway had a carjacking conviction and two drug convictions. He was also aware that Galloway was indicted on February 6, 2009, for two counts of sexual battery and one count of burglary. Those charges were pending at the time of Galloway's capital murder trial.

¶47. In mitigation during the sentencing phase, the defense called Deborah Whittle, the officer in charge of the Offender Services Department at the Harrison County Adult Detention Center. She testified that she had known Galloway for approximately two years and "reviewed" him approximately every thirty days. She described Galloway as "very

quiet" and "never . . . disrespectful in anyway." Deputy Whittle testified that Galloway had only one rule violation for being in an unauthorized area talking to another inmate, which she agreed was "very minor."

¶48. Next, the defense called Dawn Denise Catchings, a corrections officer at the Harrison County Adult Detention Center. Catchings testified that she interacted with Galloway every day for a year while at the detention center and that Galloway never lost his temper with her and never got in trouble.

¶49. Galloway's sister, Jeles Galloway, was thirteen years old at the time of trial. Jeles testified that she loved Galloway and that it would be good for her to go visit him in prison as often as she could.

¶50. Vincent Bishop, Galloway's brother-in law, testified that Galloway has three children and is "an excellent father." Bishop testified that he visits Galloway once every three to four months and would continue to do so if Galloway were sentenced to life without parole.

¶51. Angelo Ash, Galloway's friend since grade school, testified that he and Galloway were like brothers. Ash testified that Galloway loves his children and treats them with respect and kindness. Ash testified that he would go visit Galloway in prison.

¶52. Red testified that he loves his son and wants to see Galloway stay alive. Red also testified that it was important to him to be able to visit Galloway in prison. He added that Galloway's children love their father, and they have good relationships with Galloway.

¶53. Next, Mary Taylor, Galloway's older sister by one year, testified that she is close to

Galloway and they love one another. She testified that they were close while growing up. Taylor told the jury that Galloway helps her with her four children and kept them at times. She also testified that she and her children had been visiting Galloway while he was in prison prior to trial and would continue to do so. She agreed that Galloway had something to contribute to the family and wanted him to live.

¶54. Finally, the defense called Varghese, who testified that she loves her son, and that he has been kind, generous, and polite. She testified to Galloway's being a good father and the mutual love that he and his children share. Varghese testified that she wanted the jury to let her son live and that she would visit him in prison as often as she could.

¶55. While Galloway argues that his attorneys were ineffective for failing to investigate and present evidence of his "life story," the State maintains Galloway cannot prove that trial counsel's mitigation investigation or presentation of mitigation evidence was objectively deficient and unreasonable. Galloway's burden is considerable.

> Judicial scrutiny of counsel's performance must be highly deferential. (citation omitted) . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

Stringer at 477; ***Strickland***, 466 U.S. at 689, 104 S. Ct. at 2065. In short,

> defense counsel is presumed competent. ***Johnson v. State***, 476 So. 2d 1195, 1204 (Miss. 1985); ***Washington v. State***, 620 So. 2d 966 (Miss. 1993).

Foster, 687 So. 2d at 1130 (alteration in original). "Surmounting ***Strickland***'s high bar is never an easy task." ***Harrington v. Richter***, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (internal quotation marks omitted) (quoting ***Padilla v. Kentucky***, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)).

> "Prevailing norms of practice as reflected in American Bar Association [(ABA)] standards and the like . . . are guides to determining what is reasonable." ***Strickland***, 466 U.S. at 688, 104 S. Ct. 2052. But those standards are only guides. ***Bobby v. Van Hook***, 558 U.S. 4, 8, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009) (quoting ***Strickland***, 466 U.S. at 688, 104 S. Ct. 2052) (" '[ABA] standards and the like' are 'only guides' to what reasonableness means, not its definition."). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." ***Strickland***, 466 U.S. at 688-89, 104 S. Ct. 2052.

Ronk, 267 So. 3d at 1248 (alterations in original).

¶56. The State's position on this issue is that defense counsel was aware of Galloway's history of criminal convictions and pending criminal charges, as well as the fact that Galloway's brother was serving a life sentence for murder. The State maintains that defense counsels' decision to "humanize" Galloway was strategic. This Court has recognized that the decision to humanize a defendant is reasonable. ***Walker v. State***, 303 So. 3d 720, 728 (Miss. 2020).

¶57. In ***Walker***, which presented a similar scenario, Randy Dale Walker was convicted of capital murder during the commission of sexual battery, and he was sentenced to death. ***Id.***

at 723. The Court remanded the case to the trial court for a hearing on Walker's claim that trial counsel had rendered ineffective assistance in searching for and presenting mitigating evidence during the penalty phase. ***Id.*** "The crux of Walker's argument concerning [his attorney's] alleged deficient performance and its relation to the testimony of his mitigation witnesses is that had [his attorney] asked them to testify at trial, they could have told the jury that Walker had a less than ideal childhood." ***Id.*** at 727. The circuit court found that Walker's trial counsel's strategy of seeking to humanize Walker before the jury had been reasonable. ***Id.*** at 725. On appeal, this Court affirmed and noted that in an effort to humanize Walker, his attorney "called witnesses in mitigation to testify, among other things, that Walker had a supportive family, loved his daughter, and risked his own life to save the life of a child." ***Id.*** at 727. Walker's attorney testified at the post-conviction hearing that he would not have wanted evidence of bad and criminal conduct to be introduced as Walker's post-conviction attorneys may have wanted to introduce. ***Id.*** On rehearing to this Court, Walker argued that the Court "misapprehended ***Strickland***'s standard that counsel's strategic decision must be based on an adequate investigation." ***Id.*** at 728. This Court found that Walker's counsel did not "disregard[] . . . multiple red flags." ***Id.*** (internal quotation marks omitted) (quoting ***Andrus v. Texas***, 140 S. Ct. 1875, 207 L. Ed. 2d 335 (2020)). "Rather, he made very clear that he pursued a tactical decision to humanize Walker." ***Id.***

¶58. The Supreme Court has explained:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic

> choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.* In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Wiggins, 539 U.S. at 521-22 (alteration in original) (emphasis added) (quoting ***Strickland***, 466 U.S. at 690-91).

¶59. In today's case, Galloway had not only a prior conviction for carjacking, of which the jury was aware, he had two drug-related convictions stemming from the carjacking. Further, Galloway was indicted on February 9, 2009, for burglary and two counts of sexual battery, and he was awaiting trial on those charges during his capital murder trial. Galloway's defense counsel was fully aware that Galloway's brother was serving a life sentence for murder. Attorney Rishel stated in his affidavit that "[w]e did not want the jury to know this." As the State points out, "[W]hen the defendant puts mitigating evidence before the jury during the penalty phase, the prosecution is allowed a counter-attack." ***Corrothers v. State***, 255 So. 3d 99, 109 (Miss. 2017) (alteration in original) (internal quotation marks omitted) (quoting ***Finley v. State***, 725 So. 2d 226, 239 (Miss. 1998)). The State argues that Galloway's defense team was forced to consider "each potential landmine" while planning their trial and mitigation strategy. "Mitigation evidence can be double-edged – so much so that counsel, following a constitutionally adequate investigation, may reasonably choose to offer none." ***Ronk***, 267 So. 3d at 1274 (citing ***Burger v. Kemp***, 483 U.S. 776, 788-95, 107

S. Ct. 3114, 97 L. Ed. 2d 638 (1987)). Galloway's attorneys made a strategic choice to humanize Galloway rather than risk harmful evidence being presented to the jury on cross-examination of mitigation witnesses. "Defense counsel is not required to pursue an investigation that would be fruitless, much less one that might be harmful to the defense." ***Garza v. Stephens***. 738 F.3d 669, 680 (5th Cir. 2013) (citing ***Harrington***, 562 U.S. at 108). "[C]ounsel has a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary*." ***Strickland***, 466 U.S. at 691 (emphasis added).

¶60. Further, some of the affidavits presented by Galloway in support of his ineffective assistance of counsel argument were from witnesses who were interviewed by his defense counsel and were called to testify during the sentencing phase. Attorney Rishel stated in his affidavit that the defense team "relied on Mr. Galloway and his family to give us a history of Mr. Galloway's life." When meeting with Galloway, "Mr. Galloway usually sat with his head down and was quiet." And despite the seven or eight times they met with Varghese, they "were [led] to believe by Mr. Galloway and his mother that Mr. Galloway had no remarkable history of any kind."

> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated

altogether.

Strickland, 466 U.S. at 691.

¶61. We find that Galloway has failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Strickland***, 466 U.S. at 689. "If a post-conviction claim fails on either of the ***Strickland*** prongs, the inquiry ends. ***Foster***, 687 So. 2d at 1130 (citing ***Neal v. State***, 525 So. 2d 1279, 1281 (Miss. 1987))." ***Williams v. State***, 722 So. 2d 447, 451 (Miss. 1998).

2. Prejudice

¶62. Assuming, *arguendo*, that counsel's investigation and presentation of mitigation evidence was deficient, Galloway cannot show prejudice. Prejudice is evaluated by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." ***Wiggins***, 539 U.S. at 534. "[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker, ***Strickland***, 466 U.S., at 700, 104 S. Ct. 2052." ***Sears v. Upton***, 561 U.S. 945, 954, 130 S. Ct. 3259, 177 L. Ed. 2d 1025 (2010). "***Strickland*** asks whether it is 'reasonably likely' the result would have been different." ***Harrington***, 562 U.S. at 111 (quoting ***Strickland***, 466 U.S. at 696). "The likelihood of a different result must be substantial, not just conceivable." ***Id.*** at 112 (citing ***Strickland***, 466 U.S. at 693).

¶63. To the extent the new evidence Galloway provides may have benefitted him, it was also damaging. Pointing to just a few instances, while Galloway sought to express how

protective he was of his family, Galloway tracked down and beat the man that robbed the store where his mother worked. While Galloway may see this as being protective of his family, it could have also portrayed Galloway as a vigilante, engaging in violence to exact revenge. While trying to explain the circumstances surrounding the carjacking conviction as nonviolent, or less violent than the jury may have perceived, it would have opened the door to the fact that the victim was dragged from the car and suffered bruises and a black eye. In Galloway's own words, "I took the car by force because I didn't want to walk home."

¶64. While Galloway's new evidence would show that he loves his children, it is cumulative to what the jury heard. Telling Galloway's "life story" and sharing his difficult childhood dealing with violence, extreme poverty, as well as all of his life experiences are certainly mitigating circumstances. They may well have exposed, however, his prior felony drug convictions and the pending burglary and sexual assault charges. It also would have exposed to the jury that Galloway's brother was serving a life sentence for murder, which Attorney Rishel specifically did not want the jury to hear.

¶65. Further, Galloway's affidavits from childhood girlfriends, who purportedly would have testified that Galloway was sensitive and everything that a girl could want in a boyfriend, is starkly contrasted by the circumstances surrounding the capital murder conviction. While those past girlfriends stated that Galloway never asked them to do anything sexually that made them uncomfortable, Galloway was found by the jury to have anally raped seventeen-year-old Anderson, cut her throat, and burned her before ultimately

ending her life by repeatedly running her over with an automobile.

¶66. The jury in this case found each of the following aggravating circumstances, unanimously, beyond a reasonable doubt:

1. The capital offense was committed while Galloway was under sentence of imprisonment.

2. The defendant was previously convicted of a felony involving the use of threat of violence to another person.

3. The capital offense was committed when the defendant was engaged in the commission of committing sexual battery.

4. The capital offense was especially heinous atrocious or cruel.

Again, assuming only for the sake of argument that Galloway's counsel were deficient in their investigation of mitigating evidence, reweighing the aggravating evidence against the totality of the new mitigating evidence Galloway now presents is not reasonably likely to reach a different result. This issue is without merit.

3. Investigation and Presentation of Galloway's Mental Health Mitigation by Available Experts

¶67. Galloway contends that his trial attorneys were ineffective for failing to investigate, retain experts, and present available expert testimony about Galloway's mental health. Galloway asserts experts Dr. Frederic Sautter and Dr. Beverly Smallwood would have testified that he suffers from Post-Traumatic Stress Disorder (PTSD) and complex PTSD, consistent with his documented extensive trauma history. He maintains that they would have explained that Galloway has other serious mental illnesses, including Depressive Disorder

and Psychotic Disorder. Further, Galloway demonstrates through affidavits abnormalities indicating mild traumatic brain injury.

¶68. To be sure, as was discussed above, Galloway's defense counsel did contact Dr. Smallwood in an attempt to evaluate Galloway's mental health. Without repeating all of her findings here, it is important to add that Dr. Smallwood stated in her report to defense counsel that Galloway denied any significant medical history, other than a work-related hand burn that required outpatient therapy. Further, Dr. Smallwood reported that "[Galloway] denies any abuse or trauma in his childhood. He said that his mother loved him and tried to raise him right. 'She tried to keep me away from wrong activities. If there was something I needed or wanted, she'd try to get it for me,' he explained." In that report, Dr. Smallwood also stated that Galloway was taking no medications and had "never received treatment for any mental health issues." Further, "[t]here was no evidence of clouded consciousness or dissociation." She stated that "[Galloway] denied any significant problems with depression in his past" and that "[t]here is no evidence of periods of mania." Dr. Smallwood concluded that "[a]dditionally, he does not have mental retardation. *No further forensic evaluation is needed to determine competency or legal sanity at the time of the alleged crimes.*" (Emphasis added.)

¶69. Now, having been provided by PCR counsel with the affidavits and records describing Galloway's childhood and social history, Dr. Smallwood has changed her position. She stated in her affidavit that she is now aware that Galloway had severe symptoms of

depression before and leading up to his arrest, symptoms she previously had attributed to his situational circumstances, such as the difficulties he had been experiencing with the mother of his children. Further, she stated that she would have testified that Galloway "met the criteria for Major Depressive Disorder, a serious psychological disorder that involves disturbances in mood that can result in significant withdrawal, that can be expressed as severe irritability, and that can affect cognitive function. Dr. Smallwood attests that, had she been provided Galloway's medical records from the Harrison County Adult Detention Center, she could have corroborated Galloway's reported trouble with sleeping, and it would have contributed to a diagnosis of PTSD and Major Depressive Disorder. She also stated that Galloway's underreporting of his trauma history and early life adversity is symptomatic of PTSD. Dr. Smallwood admits that when she evaluated Galloway, she did not see a need for neuropsychological testing, but having learned that such testing had since been performed by Dale Watson, Ph.D., a licensed psychologist, which indicated that Galloway has significant attention deficits and that his pattern on the neuropsychological testing was most similar to that of people with mild Traumatic Brain Injury (mTBI), she stated such testing would have been appropriate and should have been employed. Dr. Smallwood concluded her affidavit with the following comments:

> Had I been provided with the details of [Galloway's] social history to which I am now privileged, my evaluation and conclusions would have been very different, and I would have had mitigating information to share to the jury at the penalty phase. I would have been able to testify to the negative psychological impacts of Leslie's extensive trauma history, the poverty, abuse, and neglect that marked his childhood, and the history of mental illness,

> substance abuse, and sexual abuse in his family. My testimony could have been woven into his penalty phase mitigation case in an effective manner.
>
> I did the best I could with what was available to me at the time of [Galloway's] trial, but am disappointed that I had only a fraction of this powerful and compelling story with which to work.

¶70. In further support of his argument, Galloway provides the affidavit of Frederic J. Sautter, Ph.D., a licensed clinical psychologist specializing in psychotic disorders and PTSD. In preparation for Galloway's post-conviction motion, Dr. Sautter performed psychological evaluations of Galloway. An important aspect of his assessment of Galloway focused on identifying psychological problems through the administration of psychological assessment instruments. Dr. Sautter determined that Galloway had been exposed to "traumatic events." Dr. Sautter states that much of the information from the Life Events Interview was corroborated by social history documents, including affidavits of family members and friends as discussed above, as well as medical and court records, and they indicated that Galloway had significant exposure to traumatic events such as:

> (1) domestic violence perpetrated by Mr. Galloway's father against his mother, and later against his father's girlfriend; (2) physical violence against Mr. Galloway by his father, including being beaten with a belt at a very young age; (3) witnessing physical violence by his father against his brother Melvin and sister Mary; (4) physical violence against Mr. Galloway by his maternal grandfather, including one incident in which Mr. Galloway had to go to the Emergency Department in fear that his grandfather had broken his arm; (5) additional fights that led to other visits to the Emergency Department, at 12, 15, 17, and 23 years old; and (6) Melvin's threats to kill himself, which were especially traumatic to Mr. Galloway because he looked up to his older brother.

Dr. Sautter also stated that an assessment of Galloway's early life adversity indicates that

"Galloway was exposed to sufficient adversity as to increase his vulnerability to psychological problems as an adult." Dr. Sautter concluded:

> It is my opinion to a high degree of clinical certainty that at the time of the offense Mr. Leslie Galloway's thinking and behavior were strongly influenced by his PTSD, complex posttraumatic stress, depression, and psychosis. It is also my opinion that the influence of complex trauma processes would decrease his ability to exercise conscious control over his own behavior and increase his perceptions of threat while rendering him less capable of controlling his trauma-related emotions and anger.

¶71. Prior to reaching his conclusion, Dr. Sautter stated that it was important to ensure that an expert in neuropsychology administer neuropsychological testing of Galloway, which was performed by Dr. Watson. Dr. Watson also completed the Wechsler Adult Intelligence Scale - IV (WAIS IV) to determine Galloway's intellectual functioning, which was placed at an overall level of 101, which was within the Average range.[1] Galloway's Full Scale IQ, a measure of general intellectual ability, was 101. Dr. Sautter states that the results indicated that Galloway does not show evidence of memory problems, thus his memory failure is most likely the result of dissociative processes.

¶72. Bhushan S. Agharkar, M.D., stated in his affidavit that Galloway reported "severe sleep disturbances" and that he "exhibited slow processing speed whenever he had to call something from memory, indicating impaired verbal recall and fluency." Dr. Agharkar opined that "[t]hese symptoms could indicate that Mr. Galloway suffers from serious mental

[1] Dr. Watson stated he found multiple errors in Dr. Smallwood's scoring of Galloway's Full Scale IQ, which was found to be 106 – still within the Average range.

health problems, including brain damage."

¶73. Post-conviction expert, Ruben Gur, Ph.D., states in his affidavit that he analyzed the results of the neuropsychological testing by Dr. Watson and completed a behavioral imagining analysis, a method he developed that utilizes a computer algorithm to conduct an interpretation of standardized neuropsychological test results. Dr. Gur found the results of the test suggested "left hemisphere dysfunction" and recommended an MRI and PET scan to "assess the structural and functional bases for brain abnormalities." Further, Dr. Gur found abnormalities that "implicate brain systems that are important for regulating behavior" and noted that "individuals with such abnormalities are not capable of using normative means for regulating behavior." Dr. Gur determined that "the abnormalities observed are consistent with several causes, including traumatic brain injury."

¶74. Galloway maintains that his counsels' failure to provide Dr. Smallwood with sufficient information to conduct a comprehensive analysis stemmed from their failure to conduct an adequate mitigation investigation or retain a qualified mitigation investigator to do it for them.

¶75. Again, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." ***Wiggins***, 539 U.S. at 528 (internal quotation mark omitted) (quoting ***Strickland***, 466 U.S. at 690-91). As with Galloway's other arguments, this argument turns on the proposition of an alternative strategy. In reaching his conclusion that defense counsel

was ineffective, Galloway asserts that counsel should have presented Dr. Smallwood with a complete history of his life. As discussed above, defense counsel's decision to humanize Galloway in mitigation rather than delve into his "life story" and present mitigating evidence that would potentially expose damaging evidence the defense knew it did not want the jury to hear, was reasonable and strategic performance, not deficient performance. "The fact that an attorney's strategic choices did not result in a good outcome is not in and of itself definitive evidence of ineffective assistance of counsel. 'The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." ***Yarborough v. Gentry***, 540 U.S. 1, 124 S. Ct. 1, 4, 157 L. Ed. 2d 1 (2003) (collecting cases)." ***Turner v. State***, 953 So. 2d 1063, 1073 (Miss. 2007).

¶76. In ***Ronk***, defense counsel moved, pretrial, for the trial court's authorization to hire Dr. Smallwood to conduct a psychiatric/psychological evaluation of Timothy Robert Ronk. 267 So. 3d at 1261. Pursuant to the trial court's order, as in this case, Dr. Smallwood was retained, in part, "to prepare a mitigation study." ***Id.*** (internal quotation marks omitted) An important difference between Dr. Smallwood's evaluations of Ronk and Galloway is that, in Ronk's evaluation, she concluded as follows:

> It is my opinion, to a reasonable degree of psychological certainty, that:
>
> a) . . . Ronk knew right from wrong at the time of the alleged crimes;
>
> b) [Ronk] is competent to assist counsel in his defense;
>
> c) the level of intelligence of [Ronk] is in the High Average range,

with a Full Scale IQ of 114.

> In addition to the above findings, it must be noted that *many variables which may provide mitigation are reportedly found in this man's psychological and medical history. However, I do not have the benefit of those medical records.* It is highly recommended that these and other relevant records be secured and that collateral witnesses be interviewed. The present examination is not a mitigation study, which is outside the scope of my current practice.
>
> . . .
>
> With respect to the above questions posed by the [c]ourt and addressed in the previous section, no further evaluation is needed.

Id. at 1265 (alterations in original) (emphasis added). Dr. Smallwood had discovered and testified that, in addition to bipolar disorder and ADHD, Ronk appeared to have a "conduct disorder" in his childhood. ***Id.*** at 1262 (internal quotation marks omitted). This Court held that:

> Dr. Smallwood's report and the records that were obtained arguably would have led a reasonable attorney to investigate further. *Her report clearly signaled that more was needed.* She said "many variables which may provide mitigation are reportedly found in [Ronk's] psychological and medical history. However, I do not have the benefit of those medical records."

Id. at 1272 (alteration in original) (emphasis added).

¶77. As for Galloway's evaluation, there was nothing in Dr. Smallwood's report that signals an incomplete medical diagnosis, as did Ronk's. In ***Segundo v. Davis***, 831 F.3d 345, 352 (5th Cir. 2016) (alteration in original) (footnote omitted), the United States Court of Appeals for the Fifth Circuit stated:

> The record makes clear that Segundo's trial counsel obtained the services of a mitigation specialist, fact investigator, and two mental-health experts. These

> experts and specialists conducted multiple interviews with Segundo and his family, performed psychological evaluations, and reviewed medical records. Segundo claims that trial counsel failed to provide necessary social history, which would have changed the experts' conclusions that he is not intellectually disabled. But none of the experts retained by trial counsel indicated that they were missing information needed to form an accurate conclusion that Segundo is not intellectually disabled. "Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." ***Smith v. Cockrell***, 311 F.3d 661, 676–77 (5th Cir. 2002), *overruled on other grounds by* ***Tennard v. Dretke***, 542 U.S. 274, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004); *see* ***Turner v. Epps***, 412 Fed. Appx. 696, 704 (5th Cir. 2011) ("While counsel cannot completely abdicate a responsibility to conduct a pre-trial investigation simply by hiring an expert, counsel should be able to rely on that expert to alert counsel to additional needed information . . . .").

Attorney Rishel attests that he provided Dr. Smallwood with everything she requested from the defense team. Dr. Smallwood also advised that "putting her on the witness stand during the penalty phase would not help Mr. Galloway." Because counsel were not deficient for failing to further develop Galloway's childhood and social history in mitigation after tactically deciding to humanize Galloway instead, they should not be found to have performed deficiently here when the argument hinges on the same potential evidence counsel chose to forgo.

¶78. Galloway also argues that his attorneys should have taken Dr. Smallwood's advice and hired a mitigation expert, which defense counsel did not do. This Court has held:

> [W]e disagree that the *requirement* of a mitigation specialist is well settled. That is untrue. ***Hill v. Mitchell***, 842 F.3d 910, 945 n.15 (6th Cir. 2016) (stating ABA Guidelines do not establish a constitutional right to a mitigation specialist for the sentencing phase); ***Honie v. State***, 342 P. 3d 182, 194 (Utah

> 2014) ("[T]rial counsel is not required to hire a mitigation specialist in order to comply with his Sixth Amendment obligations."); ***State v. McGuire***, 80 Ohio St. 3d 390, 686 N. E. 2d 1112, 1120 (1997) (holding that hiring a mitigation specialist is not a requirement for effective assistance). There is no "per se rule that trial counsel is ineffective at mitigation unless a particular type of expert is retained." ***Carter v. Mitchell***, 443 F.3d 517, 527 (6th Cir. 2006).

Ronk, 267 So. 3d 1272 (Miss. 2019) (alterations in original). Galloway has failed to show that counsel were deficient for failing to hire a mitigation specialist as recommended by Dr. Smallwood. As the State points out, it is up to Galloway's attorneys to decide how to defend his case, not Dr. Smallwood. Again, Dr. Smallwood did not signal to defense counsel that further medical diagnosis was necessary, and the strategic decision to humanize Galloway in mitigation had been made. Reese was the fact investigator on the defense team. Attorney Rishel stated in his affidavit that:

> Mr. Reese and I worked on the mitigation. Mr. Reese has a Bachelor's Degree in Criminal Justice and if he were to complete his thesis, he would receive his Master's Degree in Sociology. He has attended the same capital case seminars as me and has many years of experience in law enforcement with the Harrison County Sheriff's Office.

Attorney Rishel has exhibited his confidence in Reese, and the decision not to hire a mitigation specialist was a tactical decision. Galloway's argument is without merit.

¶79. Finally, Galloway claims that Attorney Rishel provided ineffective assistance of counsel when he announced to the jury during opening statement in the penalty phase that Dr. Smallwood would testify and, ultimately, he did not call her as a witness. No reason is given for why Dr. Smallwood was not called. Attorney Stewart stated in his affidavit that

he primarily worked on the guilt phase of Galloway's trial. Attorney Stewart "recall[s] Mr. Rishel had subpoenaed Dr. Smallwood and a number of family members for the sentencing phase." He further stated: "I don't know why Mr. Rishel said that he was going to call [Dr. Smallwood] to testify in his opening statement at the penalty phase, but then didn't call her, *except that she was going to say something hurtful*. We decided not to call her." (Emphasis added.)

¶80. The trial court's order approving the hiring of Dr. Smallwood stated that "the defendant shall not be required to disclose any of the results of the said evaluations unless he chooses to raise an issue regarding such psychological evaluation at the trial of this matter or at the sentencing phase." In her evaluation of Galloway, Dr. Smallwood stated that "[w]hen asked about any past trauma in his life, [Galloway] talked about when his brother 'caught his charge' in '97 or '98." Perhaps Attorney Rishel was going to call Dr. Smallwood as backup in the event he felt the planned strategy of humanizing Galloway failed. Regardless, Attorney Stewart's affidavit establishes that it was a strategic decision to not call Dr. Smallwood in the end. Counsel is presumed competent. ***Foster***, 687 So. 2d at 1130. Galloway has failed to overcome that presumption, and his argument here is without merit.

B. Whether trial counsel provided ineffective assistance during jury selection.

1. Failure to Raise any *Batson* Challenge

¶81. In ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Supreme Court of the United States held that, when exercising peremptory challenges against

prospective jurors in a criminal trial, a State may not discriminate on the basis of race. ***Flowers v. Mississippi***, 139 S. Ct. 2228, 2234, 2014 L. Ed. 2d 638 (2019). Galloway contends that his defense counsel were ineffective for failing to object and otherwise levy a challenge against the prosecution's use of three out of four of its peremptory strikes against black potential jurors, resulting in Galloway, a black man, being convicted by an all-white jury.

¶82. This issue was capable of being raised on direct appeal.

> Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

Miss. Code Ann. § 99-39-21(1) (Rev. 2020). We agree with the State that this ineffective assistance of counsel claim was capable of being raised on direct appeal, as it is a record-based challenge. In fact, on direct appeal, Galloway alleged his trial counsel were ineffective for failing to challenge two potential jurors for cause. ***Galloway***, 122 So. 3d at 672. The Court found both claims to be without merit. "Moreover, 'a party who fails to object to the jury's composition before it is empaneled waives any right to complain thereafter.'" ***Keller v. State***, 138 So. 3d 817, 842 (Miss. 2014) (internal quotation marks omitted) (quoting ***Duplntis v. State***, 644 So. 2d 1235, 1245 (Miss. 1994)). Notwithstanding the procedural bar, this claim is also without merit.

¶83. Galloway asserts that the State used two of three peremptory strikes to remove two

black females from the jury. In the first round of names presented to the State to produce twelve jurors, the State utilized only one peremptory strike, removing a black female, Annie Marie Taylor. What Galloway does not mention is that the State accepted a black male, Willie C. Sims, to be the twelfth juror. As the selection process continued, the State utilized two more peremptory strikes, removing a black female and a white male. It was the defense, using its third peremptory strike, that removed Sims, resulting in an all-white jury.

¶84. Next, alternates were selected. The trial court allowed the prosecution and the defense one peremptory strike each in the selection of alternates. The State used its one peremptory strike to remove a black male. The next juror, a white female, was accepted by the defense. The defense then exercised its one peremptory strike to remove the next juror, a white female. The trial court was left to select the next alternate in line, a black female. Neither of the alternates ultimately served.

¶85. In support of his claim that defense counsel were ineffective for failing to raise a ***Batson*** challenge at trial, Galloway relies on ***Flowers***, in which the Supreme Court stated that "[o]ur precedents allow criminal defendants raising ***Batson*** challenges to present a variety of evidence to support a claim that the prosecutor's peremptory strikes were made on the basis of race." 139 S. Ct. at 2243. The following factors were identified as:

- statistical evidence about the prosecutor's use of peremptory strikes against black prospective jurors as compared to white prospective jurors in the case;

- evidence of a prosecutor's disparate questioning and investigation of black and white prospective jurors in the case;

- side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not struck in the case;
- a prosecutor's misrepresentations of the record when defending the strikes during the ***Batson*** hearing;
- relevant history of the State's peremptory strikes in past cases; or
- other relevant circumstances that bear upon the issue of racial discrimination.

Id. Galloway goes to great lengths in providing his analysis of the first, third, fifth and sixth factors listed above. But, as the Court stated in ***Clark v. State***, 343 So. 3d 943, 962 (Miss. 2022), ***Flowers*** reiterated factors that a defendant may present "to the trial court in support of the claim that a peremptory challenge was racially motivated." 343 So. 3d at 962. Here, there was no challenge to the State's peremptory strikes, and Galloway's reliance on the above referenced ***Flowers*** factors are not relevant here. There is no record and no opportunity given for the State to provide a race-neutral reason for striking jurors. In ***Flowers***, the defense had made an on-the-record ***Batson*** challenge to the State's use of peremptory strikes during jury selection, and the trial judge was given an opportunity to access the matter. 139 S. Ct. at 2237. That did not happen here.

¶86. In ***Wilcher***, 863 So. 2d 776, the Court was faced with the same issue Galloway raises here. Wilcher claimed that he was provided ineffective assistance of counsel when his attorney failed to make a ***Batson*** challenge. ***Id.*** at 819. The Court noted that "Wilcher's attorneys filed a motion prior to the beginning of trial that would preclude the prosecution from using peremptory challenges to exclude black jurors and members of other groups,

which evidences their awareness of the potential ***Batson*** issues." ***Id.*** This Court found:

> that the decision to make a ***Batson*** challenge falls within counsel's trial strategy and the wide latitude given to him. *See* ***Strickland***, 466 U.S. at 686, 104 S. Ct. 2052; ***Hiter v. State***, 660 So. 2d 961, 965 (Miss. 1995). For example, the defense may find it strategic to forego a ***Batson*** challenge and allow the State to exercise one of its peremptory challenges on a juror that the defense finds less favorable than a juror further down the list when, by all accounts, the defense attorney could have actually prevailed on a ***Batson*** challenge. Defense counsel is presumed competent. ***Johnson v. State***, 476 So. 2d at 1204 (Miss. 1985).

Id.

¶87. The Court also found "that the record before this Court is silent on the racial composition of the venire members" save one potential juror, and the jury was empaneled before he was selected. ***Id.*** Wilcher provided an affidavit from one of his attorneys who stated that he made notes next to panel member's names on a list of venire members indicating if he or she was black. ***Id.*** That list was attached as an exhibit to the affidavit. ***Id.*** This Court found the list to be inaccurate. ***Id.*** at 820.

¶88. In Galloway's case, Attorney Rishel stated in his affidavit that he kept notes regarding the sex and race of each juror during voir dire. The list was not attached to Attorney Rishel's affidavit, but it was provided as a separate exhibit, purportedly from defense counsels' files. It is important to note that Attorney Rishel also stated in his affidavit: "Had a ***Batson*** challenge been appropriate, we would have made one." This evidences defense counsels' awareness of the potential ***Batson*** issues and their decision to not raise such a claim.

¶89. Further, it matters not whether the Court finds that Attorney Rishel's list of potential

jurors' names accurately identified the black and white jurors. In ***Wilcher***, the Court held that, "[e]ven if it is assumed that the five jurors at issue were black" as Wilcher contended,

> Wilcher has not proven that he was prejudiced in any fashion by his attorneys' decision not to assert a ***Batson*** challenge. Wilcher only complains that his attorneys' "failure to raise a ***Batson*** objection prejudiced [him] because it led to the exclusion of all African Americans from the jury, which was unrepresentative of the community." This Court has held that, "[a]lthough the defendant does have a right to be tried by a jury whose members were selected pursuant to a nondiscriminatory criteria, the ***Batson*** court noted that the Sixth Amendment to the Constitution of the United States has never been held to require that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the populations." ***Simon v. State***, 688 So. 2d 791, 806 (Miss. 1997).

Wilcher, 863 So. 2d at 820 (alterations in original). Because of this, the Court concluded that Wilcher failed to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" ***Id.*** (internal quotation marks omitted) (quoting ***Stringer***, 454 So. 2d at 477).

¶90. In ***Ronk***, a more recent capital PCR proceeding discussing this same issue, the Court held:

> We find this issue is waived. A trial objection is required to preserve a ***Batson*** claim for appeal. ***Thomas v. State***, 517 So. 2d 1285, 1287 (Miss. 1987). Even in capital cases, "a party who fails to object to the jury's composition before it is empaneled waives any right to complain thereafter." ***Keller v. State***, 138 So. 3d 817, 842 (Miss. 2014) (quoting ***Duplantis v. State***, 644 So. 2d 1235, 1245 (Miss. 1994)); *see also* ***Shaw v. State***, 540 So. 2d 26, 27 (Miss. 1989) (holding that any challenge to the jury's racial composition was waived when ***Batson*** was not raised during the jury-selection process and the record was silent on the venire's racial composition). While not binding here, several federal circuit courts of appeals have held a ***Batson*** claim cannot be asserted in a habeas petition if the petitioner did not object to the peremptory challenges at trial. ***Haney v. Adams***, 641 F.3d 1168, 1171, 1171

> n.6 (9th Cir. 2011) (citing ***McCrory v. Henderson***, 82 F.3d 1243, 1247 (2d Cir. 1996); ***Abu-Jamal v. Horn***, 520 F.3d 272 (3d Cir. 2008), *vacated on other grounds* by ***Beard v. Abu-Jamal***, 558 U.S. 1143, 130 S. Ct. 1134, 175 L. Ed. 2d 967 (2010); ***Allen v. Lee***, 366 F.3d 319, 327-28 (4th Cir. 2004); ***Thomas v. Moore***, 866 F.2d 803, 804 (5th Cir. 1989); ***Carter v. Hopkins***, 151 F. 3d 872, 875-76 (8th Cir. 1998); ***Sledd v. McKune***, 71 F.3d 797, 799 (10th Cir. 1995)).

267 So. 3d at 1290. The Court in ***Ronk*** also relied on ***Wilcher***, stating:

> ***Wilcher v. State***, 863 So. 2d 776 (Miss. 2003), is especially insightful. There, we rejected Wilcher's claim that counsel was ineffective for failing to object to the State's use of peremptory challenges to exclude all five African-American venire members. ***Wilcher***, 863 So.2d at 819. We noted the record was silent on the racial composition of the venire, making it impossible for us to determine if a ***Batson*** challenge was warranted, and if so, whether counsel's failure to make such challenge caused prejudice. ***Id.*** But we said even if the State had indeed struck all five African-American venire members, Wilcher still failed to show prejudice. ***Id.*** at 820. We explained that while defendants have a right to be tried by a jury selected based on nondiscriminatory criteria, the Constitution does not require the jury to "mirror the community and reflect the various distinctive groups in the populations." ***Id.*** (quoting ***Simon v. State***, 688 So. 2d 791, 806 (Miss. 1997)).

267 So. 3d at 1291.

¶91. Notwithstanding the procedural bar of waiver, Galloway cannot show that his counsels' performance was deficient. And even if the Court were to assume, for the sake of argument, that counsel's performance was deficient, the fact that an all-white jury was empaneled is not evidence of prejudice. ***Wilcher***, 863 So. 2d at 820.

2. Whether defense counsel failed to conduct constitutionally adequate voir dire.

¶92. Galloway claims that defense counsel failed to probe jurors about their ability to consider "a life verdict" if the case proceeded from the guilt phase to the penalty phase.

Galloway also contends that defense counsel asked no questions "about the jurors' ability to consider the alleged aggravating factors and the alleged mitigating factors impartially." And defense counsel "inexplicably failed to use tools routinely available to defense counsel in Harrison County capital cases, like jury questionnaires and individual, sequestered voir dire." Galloway submits that at least one juror (Juror Number 23), who ultimately sat on the jury, believed there could be no verdict other than death if Galloway was convicted and that death was the "only sentence it could be." Because defense counsel did not ask Juror Number 23 any individual questions, defense counsel did not know that she believes it is wrong for taxpayers to pay to incarcerate a defendant convicted of such a horrible crime.

¶93. This issue is procedurally barred. Galloway raised a voir dire challenge on direct appeal that there was a constitutionally inadequate voir dire because the trial court administered a petit juror oath before voir dire, which could have affected juror candor. This Court rejected the claim because a thorough voir dire was conducted, with approval from the trial court, along with questioning from trial court and counsel for both parties. ***Galloway***, 122 So. 3d at 677-78. Galloway attempts to "relitigate the issue under a new heading." ***Wiley v. State***, 750 So. 2d 1193, 1200 (Miss. 1999) (internal quotation mark omittted) (quoting ***Foster***, 687 So. 2d at 1136). Procedural bar notwithstanding, there is no merit to claim.

¶94. First, Galloway's assertions as to what Juror Number 23 believed or said comes solely from an affidavit filed by an out-of-state attorney in August 2021, who assisted Galloway's

PCR attorney in 2014. Both interviewed Juror Number 23 in July 2014, asking her questions about her jury service in Galloway's case. There is no affidavit from Juror Number 23.

¶95. Further, PCR counsels' post-trial contact with Juror Number 23 may have violated the requirements set forth in ***Gladney v. Clarksdale Beverage Co.***, 625 So. 2d 407 (Miss. 1993). This Court recently addressed ***Gladney*** in a death-penalty PCR. ***Batiste v. State*** (***Batiste IV***), 337 So. 3d 1013, 1024-26 (Miss. 2022). ***Gladney*** recognized "a 'general reluctance' to reconvene and question jurors 'for potential instances of bias, misconduct[,] or extraneous influences' after a verdict has been reached, and such inquiries should not be entertained where it is a 'mere fishing expedition.'" ***Batiste IV***, 337 So. 3d at 1024 (alterations in original) (internal quotation marks omitted) (quoting ***Roach v. State***, 116 So. 3d 126, 131 (Miss. 2013)).

> In light of this concern, the Court established a procedure for trial courts to utilize when allegations of juror misconduct or extraneous information improperly brought to the jury's attention are made." [***Roach***, 116 So. 3d] at 132 (citing ***Gladney***, 625 So. 2d at 418). First, after a party informs the trial court of potential improper influence on the jury or juror misconduct, the court must determine if an investigation is warranted. ***Id.*** (citing ***Gladney***, 625 So. 2d at 418). "An investigation is warranted if the trial judge finds that 'good cause exists to believe that there was in fact an improper outside influence or extraneous prejudicial information.'" ***Id.*** (quoting ***Gladney***, 625 So. 2d at 419). Without a "threshold showing of external influences," the inquiry ceases. ***Id.*** (internal quotation marks omitted) (quoting ***Gladney***, 625 So. 2d at 419).

Batiste IV, 337 So. 3d at 1024.

¶96. Ultimately, the trial court in ***Batiste IV*** found that the Mississippi Office of Post-Conviction Counsel had unlawfully obtained post-trial affidavits from certain jurors in the

case. ***Id.*** at 1025-26. And the trial court excluded their use in Batiste's claim that these jurors were subject to improper outside influence or had received extraneous prejudicial information during trial. ***Id.*** at 1025. This Court affirmed, stating:

> This Court has yet to recognize a blanket exclusion of evidence obtained in violation of ***Gladney***. We do not choose to do so now. Rather, we leave such decisions to the sound discretion of the trial court. "A trial judge enjoys a great deal of discretion as to the relevancy and admissibility of evidence. Unless the judge abuses this discretion so as to be prejudicial to the accused, the Court will not reverse this ruling." [***Gore v. State***, 37 So. 3d 1178, 1183 (Miss. 2010)] (internal quotation marks omitted) (quoting [***Price v. State***, 898 So. 2d 641, 653 (Miss. 2005)].

Id. at 1026.

¶97. ***Batiste IV*** commented in a footnote that "[i]t does not appear that this Court had been made aware of these violations when it handed down [***Batiste v. State*** (***Batiste II***), 184 So. 3d 290 (Miss. 2016)]." ***Batiste IV***, 337 So. 3d at 1016 n.1.

¶98. In ***Batiste II***, this Court granted Batiste leave to file his PCR petition in the trial court based on his claim that certain statements, alleged to have been made by bailiffs to jurors, violated Batiste's constitutional right to an impartial jury. ***Batiste II***, 184 So. 3d at 291. ***Batiste II*** noted that two juror affidavits were attached to Batiste's PCR petition. ***Id.*** According to this Court's docket, both affidavits were signed by those jurors, respectively, on May 1, 2014 (Exhibits 26 and 27). Since this Court had handed down Batiste's direct appeal in 2013, (***Batiste v. State (Batiste I)***, 121 So. 3d 808, 823 (Miss. 2013)), this Court had jurisdiction over the matter—at least when the affidavits were signed.

¶99. Because ***Batiste II*** granted leave to proceed in the trial court, the trial court had

jurisdiction to consider whether there had been a ***Gladney*** violation. There are no cases from this Court that explain or instruct how the ***Gladney*** framework should operate when the petitioner is seeking leave in this Court based on alleged juror misconduct that may entail a ***Gladney*** violation.

¶100. As the Court in ***Batiste IV*** pointed out, ***Carr v. State***, 873 So. 2d 991, 1005-07 (Miss. 2004), applied ***Gladney*** in a death-penalty PCR involving allegations of conduct occurring years before. ***Batiste IV***, 337 So. 3d at 1024. The Court in ***Carr*** found that jurors who had signed affidavits in support of the petitioner's claim of juror misconduct had been deceived, and it denied the petitioner's application for leave to proceed in the trial court on that particular PCR claim. ***Carr***, 873 So. 2d at 1005-06.

¶101. That said, and irrespective of whether a ***Gladney*** violation occurred here or not, what Juror Number 23 purportedly told PCR counsel according to PCR counsel's affidavit is hearsay and should not be considered. ***Spicer v. State***, 973 So. 2d 184, 205 (Miss. 2007) (affidavit from private investigator who interviewed four jurors post-trial and reported what they told him amounted "to nothing more than hearsay"). Juror Number 23's purported statements to PCR counsel clearly could have been taken out of context. And even if Juror Number 23 actually said what she purportedly told PCR counsel, this does not mean that Juror Number 23 failed in "the performance of [her] duties as a juror in accordance with [the trial court's] instructions and [her] oath." ***Wilcher***, 863 So. 2d at 814 (alterations in original) (internal quotation marks omitted) (quoting ***Wainwright v. Witt***, 469 U.S. 412, 424, 105 S.

Ct. 844, 83 L. Ed. 2d 841 (1985)).

¶102. This Court presumes that jurors follow the trial court's instructions. ***Johnson v. State***, 475 So. 2d 1136, 1142 (Miss. 1985). "To presume otherwise would render the jury system inoperable." ***Id.*** Nothing that Galloway submits with regard to Juror Number 23 overcomes this presumption, particularly when predicated on third-party hearsay.

¶103. As to Galloway's other contentions, this Court has held that "[a]n attorney's actions during voir dire are considered to be a matter of trial strategy and as such, cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be 'so ill chosen that it permeates the entire trial with obvious unfairness.'" ***Bell v. State***, 879 So. 2d 423, 436 (Miss. 2004) (quoting ***Burns v. State***, 813 So. 2d 668, 676 (Miss. 2001)). There is no such showing from the record.

¶104. Contrary to Galloway's assertions, the record shows that numerous prospective jurors who had indicated that they could not consider the death penalty or that they may automatically apply it were individually voir dired to determine whether or not they actually had an inability to follow the law. And defense counsel thoroughly participated throughout the examinations.

¶105. Specifically, as the record shows and as this Court found on direct on appeal in this case, eleven prospective jurors indicated that they could not impose the death penalty under any circumstances. ***Galloway***, 122 So. 3d at 678. Ten prospective jurors indicated that they would automatically impose the death penalty. ***Id.*** Upon further examination during

individual voir dire by the trial court and attorneys from both sides, one of the eleven prospective jurors, who had initially indicated that he absolutely opposed the death penalty, withdrew his original response. ***Id.*** This prospective juror stated that he could consider the death penalty under appropriate circumstances. ***Id.*** And four of the ten prospective jurors who initially indicated they would automatically impose the death penalty changed their responses and stated that they would not indiscriminately impose it. ***Id.*** "They told the court they would consider [any] aggravating and mitigating circumstance and could make a determination whether life in prison without parole should be imposed." ***Id.***

¶106. The record contravenes Galloway's claim that defense counsel (or the trial court) failed to conduct constitutionally adequate voir dire. This issue is without merit.

C. Whether trial counsel provided ineffective assistance during the guilt-innocence phase.

1. Whether trial counsel was ineffective for failing to investigate and challenge the expert testimony of Dr. McGarry.[2]

¶107. Galloway's capital murder conviction was based on the underlying felony of sexual

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[2] The record shows that Dr. McGarry is a forensic pathologist, licensed in Mississippi and Louisiana. He has been licensed for fifty years. He is board-certified in general pathology, forensic pathology, and neuropathology. He is a professor at LSU School of Medicine. He has performed more than 13,000 autopsies, and he has testified as an expert hundreds of times in both state and federal courts.

Galloway, 122 So. 3d at 630 n.1.

battery by anal penetration, and Dr. McGarry's testimony was the only evidence of anal sexual battery presented to the jury. It was Dr. McGarry's testimony that the injuries to Anderson's anus were caused from penetration by a penis. Galloway now asserts that his trial counsel failed to adequately investigate and challenge Dr. McGarry's forensic testimony.

¶108. As to the failure to investigate, Galloway maintains that his attorneys would have discovered that Dr. McGarry had been fired by the New Orleans Parish Coroner purportedly six months prior to Galloway's trial. Galloway also describes several autopsies performed by Dr. McGarry that are alleged to have been inaccurate, false, and/or unreliable. The crux of Galloway's argument is, had counsel investigated Dr. McGarry's background, they could have challenged his expertise.

¶109. Galloway also claims that if his counsel had conducted even a cursory search of prior legal challenges to Dr. McGarry's testimony, they would have discovered ***Harrison v. State***, 635 So. 2d 894 (Miss. 1994). Galloway claims that case is "a notorious capital murder case along the Gulf Coast, [in which] a defendant received a new trial due to the prosecution's 'ambush' of the defense with the undisclosed expert opinion of Dr. McGarry."[3] Notably,

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[3] In ***Harrison v. State***, Dr. McGarry was permitted to give his opinions on the possible causes of certain injuries and their temporal relationship to the victim's death. 635 So. 2d at 898. It was clear, however, that the State had failed to provide this evidence to the defense. ***Id.*** Dr. McGarry also stated that the victim was conscious when certain injuries were inflicted. ***Id.*** at 898-99. "Most significantly, the undisclosed opinion of McGarry that April Turner was raped was the only evidence offered to prove this critical aspect of the State's case." ***Id.*** at 899.

Defense counsel was aware that Dr. McGarry was going to testify as an expert for the

however, that case was not reversed and remanded due to the content of Dr. McGarry's testimony but because of the trial court's "disregard of the remedial measures established in ***Box***. ***Harrison***, 635 So. 2d at 899.

¶110. Galloway also offers the April 30, 1992, affidavit of Dr. Gerald Liuzza, M.D., who at the time attested to being an Assistant Professor of Pathology at Louisiana State University Medical Center. Notably, the affidavit predates Galloway's offense by nearly sixteen and a half years. The affidavit was submitted as part of the direct appeal in ***Harrison***. *See* ***id.*** at 902 n.2. Dr. Liuzza stated that "[i]t is generally held that a forensic pathologist cannot reach a valid conclusion within a reasonable degree of medical certainty based on autopsy findings

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prosecution. ***Id.*** The defense objected, however, claiming that it was not aware "Dr. McGarry was going to render these types of opinion." ***Id.*** "[T]he trial court overruled all objections based on inadequate discovery responses and denied defense counsel's attempts to invoke the procedures set out in ***Box*** [***v. State***, 437 So. 2d 19, 22-26 (Miss. 1983)]." ***Harrison***, 635 So. 2d at 899. This Court reversed and rendered, stating:

> In ***Holland*** [***v. State***, 587 So. 2d 848, 867 (Miss. 1991),] the trial Judge afforded the defense an "unlimited opportunity" to interview the State's expert. ***Id.*** No such opportunity was given to Harrison, as no attempt was made to comply with ***Box***. This Court cannot countenance or condone the willful withholding of crucial evidence during discovery nor the flagrant disregard of the remedial measures established in ***Box***. Accordingly, Harrison's conviction and sentence must be reversed. This is not to say that we are blind to the fact that Harrison's counsel exploited the prosecution's mistake by not using every means at his disposal to obtain the opinions of Dr. McGarry. This is especially true in light of the content of the autopsy report furnished to the defense well in advance of trial. Had the lower court complied with the requirements of ***Box***, we would no doubt reach the same conclusion as we did in ***Holland***.

Harrison, 635 So. 2d at 900.

and laboratory results that a particular wound was caused by a penis." These argument are aimed at attacking the scope of the testimony given by Dr. McGarry at Galloway's trial, which is barred.

¶111. Galloway's first issue on direct appeal was a direct attack on Dr. McGarry's testimony, referring to its use in support of the State's allegation of anal sexual battery as being based on "junk science." ***Galloway***, 122 So. 3d at 628-33. After a thorough analysis of the issue, including Mississippi's modified ***Daubert*** [4] analysis, the Court found no merit. ***Galloway***, 122 So. 3d at 632. It noted that Galloway was afforded his own expert to rebut Dr. McGarry's opinion. ***Id.*** at 633. Further, the Court said it "cannot say Dr. McGarry's opinion that the anal tear was evidence of 'anal rape' went beyond his scope of expertise or improperly invaded the province of the jury. For these reasons, we find no reversible error in this issue." ***Id.***

¶112. In his fourth issue on direct appeal, Galloway charged that his trial counsel were "ineffective for failing to object to critical aspects of Dr. McGarry's testimony." ***Id.*** at 628, 638-42. The Court addressed the issue on the merits and found it lacking. ***Id.*** at 642.

¶113. The eighth issue raised by Galloway alleged prosecutorial misconduct for, in part, "present[ing] and rel[ying] heavily on Dr. McGarry's scientifically unreliable and, therefore, false and highly misleading testimony." ***Id.*** at 642. The Court held that "Dr. McGarry's

[4] ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

testimony presented no reversible error, and the State was permitted to rely on it during its summation of the evidence." ***Id.*** at 643.

¶114. Galloway's nineteenth claim on direct appeal challenged the sufficiency of the evidence of the predicated felony of sexual battery. ***Id.*** at 664. His argument was premised, in part, on the assertion that, "if Dr. McGarry had given scientifically valid testimony that the injury was consistent with nonconsensual, anal penetration, the evidence would have been insufficient to support a finding of guilt beyond a reasonable doubt as to the predicate felony of anal sexual battery." ***Id.*** at 664-65. As it had previously found in the first issue, the Court again found that "Dr. McGarry's opinion that the anal tear was evidence of 'anal rape' did not go beyond his scope of expertise and did not improperly invade the province of the jury." ***Id.*** at 667.

¶115. In today's petition, Galloway claims that counsel failed to conduct a reasonable investigation of Dr. McGarry and his testimony, failed to interview Dr. McGarry, failed to object to his "unreliable and prejudicial" testimony, and failed to file a pretrial ***Daubert*** challenge to Dr. McGarry's testimony. He also asserts that defense counsel should have interviewed other attorneys who have had the opportunity to cross-examine Dr. McGarry in other trials. This ineffective assistance of counsel claim is barred. It is a repackaged attack on the testimony of Dr. McGarry. "Issues presented through direct appeal are procedurally barred and cannot be relitigated under the guise of poor representation by counsel." ***Wilcher***, 863 So. 2d at 807 (citing ***Foster***, 687 So. 2d at 1129). It is Galloway's burden to demonstrate

that his claims are not procedurally barred. ***Moffett***, 351 So. 3d at 942; Miss. Code Ann. § 99-39-21(6) (Rev. 2020).

¶116. The Court found on direct appeal that Dr. McGarry's testimony was permissible. It also noted that Galloway was afforded an expert to rebut Dr. McGarry's testimony, and the Court addressed Mississippi's modified ***Daubert*** test.

> Thus, this issue is *res adjudicata*. That is, [the petitioner] unsuccessfully argued the merits of the issue on appeal, and now 'is attempting to relitigate this issue under a new heading.' See ***Foster***, 687 So. 2d at 1136. Where the merits of the issue have been considered and rejected on direct appeal, and the appellant 'has merely camouflaged the issue by couching the claim as ineffective assistance of counsel', the doctrine of *res adjudicata* applies. *See* ***id.*** at 1135–37. If the merits of the underlying issue have been considered and rejected on direct appeal, then the appellant cannot show deficiency or prejudice in counsel's performance with regard to that issue. See ***id.*** Therefore, [the petitioner's] argument is res adjudicata and without merit.

Wilcher, 863 So. 2d at 805 (alterations in original) (quoting ***Wiley***, 750 So. 2d at 1200).

¶117. Notwithstanding the bar, Galloway cannot show that counsel's performance was deficient. "Complaints concerning counsel's failure to file certain motions, call certain witnesses, ask certain questions, and make certain objections fall within the ambit of trial strategy." ***Cole v. State***, 666 So. 2d 767, 777 (Miss. 1995) (citing ***Murray v. Maggio***, 736 F.2d 279 (5th Cir. 1984)). The defense attorneys in this case were familiar with Dr. McGarry. For instance, Attorney Stewart stated: "The case at the guilt phase was a battle of the experts. Our strategy was to get [Dr. McGarry] off the stand as quickly as possible."

> It's hard to challenge him on a lot of things. He's the expert of all experts. Because Dr. McGarry is so experienced, we don't generally challenge the substance of his testimony under Mississippi Rule of Evidence 702. It's hard

> to challenge him because he's done tens of thousands of autopsies.

Further, Attorney Christensen stated in her affidavit:

> Our strategy with him is always to get him off the stand as quickly as possible. We did not consider challenging him under Mississippi Rule of Evidence 702. We did not consider talking to Dr. McGarry before trial about his opinions because we knew what he was going to say[.] We have tried to talk to him before trial on another case, and he did not speak with us.
>
> I did know at the time of Leslie's trial that Dr. McGarry had been terminated from the Orleans Parish Coroner's Office.

Both of these attorneys' statements demonstrate their familiarity with Dr. McGarry, his testimony, and that there was a strategy in dealing with Dr. McGarry. Counsel is presumed competent, and the failure to file certain motions falls within the ambit of trial strategy. ***Cole***, 666 So. 2d at 777. "Our review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance." ***Garcia v. State***, 356 So. 3d 101, 111 (Miss. 2023) (internal quotation marks omitted) (quoting ***Ross***, 954 So. 2d at 1004).

¶118. Further still, at least one of Galloway's counsel knew that Dr. McGarry had been terminated from his employment with the Orleans Parish Coroner.[5] Counsel cannot be found to be deficient for failing to discover what was already known. Despite Dr. McGarry's termination from the Orleans Parish Coroner's Office, he was still employed by the Harrison

[5] Attorney Stewart stated that he knew Dr. McGarry had been terminated, but he could not recall how he learned of the information. Attorney Rishel stated that he did not know.

County Coroner's Office at the time of Galloway's trial. According to Attorney Rishel's affidavit (at the time he signed it in preparation for this PCR), Dr. McGarry was still employed by the Harrison County Coroner's Office, and Attorney Rishel had cross-examined him several times since Galloway's trial. We find that this issue is barred. Notwithstanding the bar, Galloway cannot show that counsel's performance was deficient.

2. Whether trial counsel were ineffective for limiting the review of Galloway's forensic expert, Dr. LeRoy Riddick, and failing to consult with and prepare him.

¶119. Dr. LeRoy Riddick, a board-certified pathologist, had served as the state medical examiner for Alabama from 1979-2006, among several other notable positions. Dr. Riddick was also the recipient of prestigious national awards in the forensic sciences. Galloway claims that defense counsel were ineffective for limiting the scope of Dr. Riddick's review to just the sexual battery aspect of his capital murder charge. He also asserts that his trial counsel failed to adequately interview, prepare, and present the testimony of Dr. Riddick. He specifically asserts that defense counsel never met with Dr. Riddick, by which they could have learned of Dr. Riddick's prior experiences with Dr. McGarry's testimonies, and never asked Dr. Riddick for his opinion on the adequacy and accuracy of Dr. McGarry's autopsy. Galloway argues that these failures constitute ineffective assistance of counsel.

¶120. Regarding defense counsels' failure to meet with Dr. Riddick prior to trial, Galloway cites ***Hinton v. Alabama***, 571 U.S. 263, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014). It is Galloway's assertion that the Supreme Court of the United States vacated the judgment of

the Alabama Criminal Court of Appeals and remanded the case, finding ineffective assistance of counsel because defense counsel failed to obtain sufficient expert assistance to rebut the state's expert and recognizing that, in some criminal cases, "the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." ***Hinton***, 571 U.S. at 273 (internal quotation mark omitted) (citing ***Harrington***, 562 U.S. at 106).

¶121. Galloway's case was a case in which an expert was arguably necessary. Defense counsel knew from past experience that "Dr. McGarry is very convincing to juries. The jury believes everything out of his mouth." The defense retained Dr. Riddick and called him to testify at trial. The question Galloway posits is whether trial counsel were ineffective for failing to meet with and prepare Dr. Riddick prior to trial. ***Hinton*** does not answer that question.[6]

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[6] In ***Hinton***, six bullets had been recovered from three separate crime scenes. "The State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." 571 U.S. at 265. Defense counsel and the trial court were under the mistaken belief that the defense was only allowed a total of $1,000 to hire an expert for rebuttal of the State's experts. ***Id.*** at 268. Defense counsel recognized that Payne was not a good expert, at least with respect to toolmark evidence. ***Id.*** at 273. "Nonetheless, he felt he was 'stuck' with Payne because he could not find a better expert willing to work for $1,000 and he believed that he was unable to obtain more than $1,000 to cover expert fees." ***Id.*** The Supreme Court held that "it was unreasonable for Hinton's lawyer to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000." ***Id.*** "We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough." ***Id.*** at 274-75. "The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state

¶122. Galloway also cites ***Isham v. State***, 161 So. 3d 1076, 1089 (Miss. 2015) (Randolph, P.J., concurring in result only), asserting that trial counsel's failure to prepare its own expert witness "cannot be deemed tactical." Galloway's reliance on that case is misplaced. In ***Isham***, the defendant was convicted in the Circuit Court of DeSoto County of one count of felonious child abuse. ***Id.*** at 1077. Isham raised only one issue on appeal – whether the "trial court erred in refusing to provide him with the funds to hire an expert witness with regard to the nature of and cause of [the child's] injuries." ***Id.*** at 1080. The trial court denied the motion, finding that defense counsel had not shown a concrete reason for requiring an expert and because the motion was untimely. ***Id.*** at 1079. The Court stated that, "although Isham filed the motion eleven days before trial was set to begin, the interest in providing a fair trial to the accused far outweighs the interest of the trial court in keeping a timely docket." ***Id.*** at 1084. The Court held:

> [t]he trial court's denial of funds for the procurement of expert witnesses denied Jason Isham his due process rights under the Fourteenth Amendment to the United States Constitution and Article 3, Section 14, of the Mississippi Constitution and denied him his right to a fair trial. Accordingly, we reverse Isham's conviction and remand the case for a new trial.

Id. at 1085.

¶123. In an opinion concurring in result only, Presiding Justice Randolph found, that the trial judge did not misapply the law or abuse his discretion. ***Id.*** at 1085. "Here, the record reveals

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law made available to him—that caused counsel to employ an expert that he himself deemed inadequate." ***Id.*** at 275.

that deprivation was due to the actions or inactions of Isham's counsel, not trial-court error, for Isham's counsel failed to *timely* seek funding and/or to *timely* seek a continuance." ***Id.*** Isham was denied a fair trial due to the failure of defense counsel to consult expert witnesses and to schedule their appearances, and if funds were necessary for further consultation and their appearances, to *timely* seek same." ***Id.*** (emphasis added). In Galloway's case, defense counsels' procurement of Dr. Riddick as an expert and the timeliness in which he was retained are not in issue.

¶124. This case does not present an instance in which defense counsel failed to identify witnesses or failed to interview and call a witness to testify that the defendant identified as being important to the defense. *See* ***Johns v. State***, 926 So. 2d 188, 196 (Miss. 2006) (trial counsel ineffective for failing to interview alibi witness the defendant provided to counsel prior to trial); ***Payton v. State***, 708 So. 2d 559, 561 (Miss. 1998) ("[A]t a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." (alteration in original) (internal quotation marks omitted) (quoting ***Ferguson v. State***, 507 So. 2d 94, 96 (Miss. 1987))). The argument here is that counsel failed to interview a retained expert witness prior to trial. Dr. Riddick, however, had already informed the defense in writing of his opinion.

¶125. At trial, Dr. Riddick testified that he had testified as an expert in forensic pathology "all [totaled] about 500 times plus or minus. Primarily in Mobile County, but also Washington D. C. , the [S]tate of Florida, State of Mississippi, State of Louisiana, State of

Tennessee, State of Virginia, and I testified in this courtroom I believe in both Harrison County, Jackson County, Greene County and George County." Dr. Riddick also stated in his affidavit that he has been called as a witness for the prosecution in four Mississippi homicide cases, including capital murder.[7] He has listed three other cases, aside from Galloway's, in which he gave expert testimony for the defense in Mississippi capital murder cases.[8] In at least two of those, ***Evans v. State***, 725 So. 2d 613 (Miss. 1997), and ***Holland v. State***, 705 So. 2d 307 (Miss. 1997), Dr. Riddick was retained to refute Dr. McGarry's expert testimony. He also identified two civil cases in Mississippi in which he testified as an expert.[9] Dr. Riddick identified seven capital murder cases and one murder case outside of Mississippi in which he testified as an expert for the prosecution.[10]

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[7] ***James v. State***, 777 So. 2d 682, 690 (Miss. Ct. App. 2000) (capital murder); ***Fisher v. State***, 481 So. 2d 203, 208 (Miss. 1985) (capital murder); ***Simpson v. State***, 993 So. 2d 400, 404 (Miss. Ct. App. 2008) (manslaughter), and ***Starns v. State***, 867 So. 2d 227, 229, 234 (Miss. 2003) (murder).

[8] ***Jordan v. State***, 912 So. 2d 800 (Miss. 2005) (retained by defense in capital murder prosecution); ***Shaffer v. State***, 740 So. 2d 273, 277 (Miss. 1998) (retained by defense in capital murder prosecution); ***Holland v. State***, 705 So. 2d 307, 322 (Miss. 1997) (testimony proffered by defense to challenge Dr. McGarry's testimony in capital murder prosecution); ***Evans v. State***, 725 So. 2d 671, 613, 673 (Miss. 1997) (called by defense in capital murder prosecution).

[9] ***Miss. Crime Lab'y v. Douglas***, 70 So. 3d 196, 200 (Miss. 2011) (Dr. Riddick performed a second autopsy on the child, concluding he had died of natural causes); ***Univ. of Miss. Med. Ctr. v. Johnson***, 977 So. 2d 1145, 1150, 1154, 1155-56 (Miss. App. 2007) (Dr. Riddick was retained by UMMC in medical malpractice action).

[10] ***Hutcherson v. State***, 677 So. 2d 1174, 1178 (Ala. Crim. App. 1994) (death sentence); ***Martin v. State***, 931 So. 2d 774, 781 (Ala. Crim. App. 2005) (death sentence); ***Peraita v. State***, 897 So. 2d 1161, 1178 (Ala. Crim. App. 2003) (death sentence); ***Ziegler v.***

¶126. One of the defense's primary strategies was to show the jury that there had been no sexual battery. Attorney Stewart stated in his affidavit that, "[i]f there was not a sexual battery, then [Galloway] obviously could not get the death penalty." According to Dr. Riddick, Attorney Christensen contacted him to render an opinion about the charge of sexual assault in Galloway's case. Attorney Christensen sent him materials to review during the spring of 2010. Those documents included the autopsy report of Anderson, a Mississippi Crime Laboratory Report, and multiple photographs of the autopsy and crime scene.

¶127. On August 16, 2010, Dr. Riddick wrote a letter to Attorney Christensen, explaining his findings based on the documents he had received and reviewed. In relevant part, in his letter to Attorney Christensen, Dr. Riddick stated:

> 1. With respect to the abrasions around the anus. The crushing injuries to the pelvis when the car ran over the victim while she was on the ground could have spread the buttocks apart and exposed the perianal region to the rough surface of the ground and/or caused friction between the buttocks while these crushing forces were inflicted. These injuries are described as abrasions, which are scrapes.
>
> 2. The analysis of the swabs taken from the vagina indicated that there were two sources of the spermatozoa with one fraction being greater than the other. It would be helpful to determine which donor supplied the greater amount
>
> 3. No swabs of the rectum were taken and none analyzed, thus *there was*

State, 886 So. 2d 127, 130 (Ala. Crim. App. 2003) (death sentence); ***Clark v. State***, 896 So. 2d 584, 599 (Ala. Crim. App. 2000) (death sentence); ***Thomas v. State***, 824 So. 2d 1, 40 (Ala. Crim. App. 1999) (death sentence); ***Lucas v. State***, 792 So. 2d 1161, 1164 (Ala. Crim. App. 1999) (death sentence); ***Williams v. Mosley***, No. Civ. A. 03-0050-CG-M, 2005 WL 1026742, *2 (S.D. Ala. 2005) (murder, life sentence).

no definitive physical evidence of anal penetration.

(Emphasis added.) From this letter, defense counsel received the answers to the questions they were seeking in order to achieve their strategy. The decision, at that point, not to expend further time and effort interviewing Dr. Riddick prior to trial is not deficient performance. "Our review is highly deferential to the attorney, with a strong presumption that the attorney's conduct fell within the wide range of reasonable professional assistance." ***Garcia***, 356 So. 3d at 111 (internal quotation marks omitted) (quoting ***Ross***, 954 So. 2d at 1004).

¶128. Galloway also faults his attorneys for limiting Dr. Riddick's expertise to just the sexual battery aspect of his capital murder charge. Galloway argues that Dr. Riddick has testified as an expert in numerous capital cases in Mississippi and, according to Dr. Riddick, it was unusual for trial counsel to ask only for an opinion about the sexual assault charge. Dr. Riddick stated in his affidavit:

> Trial counsel typically would ask me to consult about the whole case, beginning with whether or not there was a homicide. Defense counsel usually [would] ask me to review and form opinions about the adequacy and accuracy of the autopsy and the cause of death. Mr. Galloway's defense counsel did not ask me to conduct such a review.

¶129. As discussed above, it was clearly the strategy of Galloway's defense team to challenge the sexual battery charge and remove the threat of the death penalty. It is the trial attorneys who are in the best position to determine trial strategy, not their witnesses. Whether attorneys in other trials employ differing tactics does not render Galloway's counsel deficient in his.

¶130. Further, as the State points out, Galloway's counsel made a reasonably compelling case to rebut Dr. McGarry's testimony regarding anal sexual battery when examining Dr. Riddick:

> [Attorney Christensen]: Okay. Can you form an opinion as to the condition of the anus with respect to whether there was penetration?
>
> [Dr. Riddick]: Both the vagina and the anus were dilated, and when people are dying and when they're dead, all the sphincters dilate, they relax. And so that is just a process of dying. Moreover the victim in this case had decomposed, and so there is even more changes in the size of - or muscles relax because she was out of rigor mortis, and so it's going to be dilated on that account. There were also injuries to the anus. There was three quarter inch by one quarter inch of the anus at the posterior region and extended into the mucosa. Therefore several things about this. As Dr. McGarry described in his autopsy report, the body had rolling crushing injuries, and there was extensive injuries to the pelvis, chest, upper extremities, head. And having been run over by a car, there [were] actually tire marks there. *And in my opinion because she was run over and she was crushed, that the tear in the anus could be produced by the stretching of the buttocks, and you can make a small tear in that way.* There is a medical condition known as fissure in ano, in which you can get a fissure around the anus from just having strained at the stool or having large very difficult bowel movements. So there is evidence that you can get injury there from that sort of pressure.
>
> [Attorney Christensen]: And was there any other findings to indicate there was sexual penetration of the anus?
>
> [Dr. Riddick]: *One thing about the anus, there was no semen. There was no material that they could find any semen or any DNA from the anus.*

(Emphasis added.) With regard to the tear in Anderson's anus, Dr. Riddick testified on cross-examination "that the body on the ground being crushed, that the buttocks could spread apart and therefore produce a small tear." That testimony reasonably rebutted Dr. McGarry's testimony that the tear could only have been produced by a penis through nonconsensual sex.

¶131. Galloway's claim that his trial counsel necessarily failed in their duty to challenge the State's evidence by failing to prepare and consult with Dr. Riddick on anything but the narrow topic of sexual battery is without merit. Galloway has not shown that defense counsel's examination and the presentation of Dr. Riddick's testimony was deficient. Therefore, he has failed to satisfy the first prong of ***Strickland***, and the issue must fail.

3. Whether trial counsel were ineffective for failing to lodge a Mississippi Rule of Evidence 702 pretrial challenge to Dr. McGarry's testimony.

¶132. Galloway starts his argument by asserting:

> Dr. McGarry's opinions did not come close to meeting the standard set out in Mississippi Rule of Evidence 702 as construed by this Court. His testimony has not undergone peer review or publication, has no known error rate or standards of research, and there is no indication in the literature that the forensic pathologist community generally accepts the reliability or scientific bases of the methods, procedures, and theories, if any, that Dr. McGarry used in forming his opinions.

He maintains that trial counsel were ineffective for failing to file a pretrial motion for a ***Daubert*** hearing.

¶133. This issue was discussed above. As stated before, Galloway challenged Dr. McGarry's testimony, which Galloway described as "junk science," on direct appeal. This Court discussed Mississippi's modified ***Daubert*** standard, explaining that Dr. McGarry had given almost identical testimony in ***Holland v. State (Holland I)***, 587 So. 2d 848, 874-75 (Miss. 1991); ***Galloway***, 122 So. 3d at 632. In Galloway's recitation of ***Holland***, Dr. McGarry testified as to the autopsy findings as follows:

> The first injuries were of the face, over the sides of the face, over the center of the face, the lips, over the nose, the eyes, they were more swollen, they were the most advanced. About the same time frame, next in line, the injuries of the arms, forearms, wrists, knees, shins. In that same time pattern, the injuries to the genital region, the stretching and scraping and tearing of the vagina and rectal tissues . . . . These are produced by forceful penetration of the vagina and rectum by a structure that is able to distend and stretch and tear in a symmetrical pattern. In other words, a round—a roughly round structure penetrating and stretching the vagina and stretching the anus and rectum. . . . In order to produce these injuries all the [sic] around the edge, it has to be something not as firm and unyielding as a metal or wooden instrument. It has to be a part of a human body or something with that same texture consistency[—like a] male sex organ.

122 So. 3d at 632 (alterations in original) (quoting ***Holland***, 587 So. 2d at 874-75). The ***Galloway*** Court explained that, although Holland's conviction for capital murder was affirmed, his case was remanded for a new sentencing hearing due to the jury's having prematurely deliberated Holland's sentence. ***Id.***

¶134. Holland was resentenced to death following his second sentencing hearing. ***Holland v. State (Holland II),*** 705 So. 2d 307, 318 (Miss. 1997). On appeal, his counsel asserted that the trial court had erred by denying the defense's motion to enjoin Dr. McGarry's testimony. ***Id.*** at 341. The Court held that the issue was barred because Holland had failed to object to the testimony during the guilt phase. ***Id.*** Despite the procedural bar, the ***Holland II*** Court discussed the issue and found it to be without merit, finding that the State "had demonstrated that Dr. McGarry's testimony fell within the bounds of forensic pathology by demonstrating that his expertise dealt with wounds, suffering, and the means of infliction of injury." ***Id.***

¶135. In Galloway's appeal, the Court held: "We cannot say Dr. McGarry's opinion that the anal tear was evidence of 'anal rape' went beyond his scope of expertise or improperly invaded the province of the jury. For these reasons, we find no reversible error in this issue." ***Galloway***, 122 So. 3d at 633. The issue is procedurally barred by *res judicata*. Miss. Code Ann. § 99-39-21(3) (Rev. 2020). Galloway cannot relitigate this claim under the guise of ineffective assistance of counsel. ***Wilcher***, 863 So. 2d at 805.

4. Whether trial counsel were ineffective for failing to object to Dr. McGarry's testimony as beyond the scope of the disclosed nature of his testimony.

¶136. Very similar to the last issue, Galloway now asserts a discovery violation occurred: the State failed to disclose the nature of Dr. McGarry's testimony, specifically that the cause of Anderson's anal tear was from penetration by a penis. While the previously discussed issue pertained to whether such testimony went beyond the scope of Dr. McGarry's expertise, Galloway claims that such testimony went beyond what the State had disclosed would be Dr. McGarry's testimony at trial. Specifically, Galloway asserts that Dr. McGarry's testimony that Anderson "had the injury of forceful penetration by a penis" was outside of discovery.

¶137. This claim of ineffective assistance of counsel was capable of being raised on direct appeal. Had there been a discovery violation, and counsel did object, the matter could have been addressed by the trial court and reviewed on direct appeal. Galloway's claim that counsel were ineffective for failing to object was also capable of being raised on direct appeal. Both the underlying issue and the ineffective assistance of counsel claim have been

waived. Miss. Code Ann. § 99-39-21(1) (Rev. 2020); Miss. R. App. P. 22(b). Notwithstanding the procedural bar, the claim is without merit.

¶138. The prosecution sent Galloway's counsel a letter, dated March 25, 2010, [11] containing a list of potential witnesses, including four experts, to be called at trial. Dr. McGarry was one of the experts, and the letter provided a synopsis of his expected testimony, as follows:

> *Dr. Paul McGarry is expected to testify as an expert based upon his education, experience and training. He will testify based upon his observations, information received, autopsy procedures performed, and based upon his report. His testimony is expected to include the cause of death, the manner of death, and the type of injuries sustained and their effect on the body or the continuance of life, whether any weapon appeared to have been used and the type, and the method of infliction of the injuries.

¶139. In a subsequent letter sent to Galloway's counsel, dated April 16, 2010, the prosecution was more specific regarding Dr. McGarry's proposed testimony:

> In light of your recent concerns involving the underlying felony in this case, sexual battery, I would reiterate what was pointed out at the preliminary hearing and what is documented in Dr. McGarry's Autopsy Protocol. Specifically, when examined, the victim had a "dilated vagina and rectum, lacerated anal mucosa, abrasions of the anal edges." As noted during the preliminary hearing, *Dr. McGarry will testify that this is consistent with sexual battery. Specifically, the injuries caused to the victims rectum and anal area would cause a degree of pain that would not be tolerated or withstood during consensual sexual activities.*

(Emphasis added.) In relevant part, at the time of Galloway's crime sexual battery is defined, as "(1) A person is guilty of sexual battery if he or she engages in sexual penetration with: (a) Another person without his or her consent[.]" Miss. Code Ann. § 97-3-95 (Rev. 2006).

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[11] The letter was filed with the trial court clerk on March 26, 2010.

¶140. Dr. McGarry's testimony, which Galloway asserts was a discovery violation, was covered in the letter dated April 16, 2019. Further, the letter prompted Attorney Christensen to file a motion seeking funds to hire Dr. Riddick and a continuance of the trial date.[12] Because Dr. McGarry's testimony was not outside the scope of disclosed testimony, defense counsel was not deficient by failing to lodge an objection. ***Branch v. State***, 882 So. 2d 36, 60 (Miss. 2004) ("Failure to raise a meritless objection is not ineffective lawyering." (citing ***Brown v. State***, 798 So. 2d 481, 494 (Miss. 2001))).

5. Prejudice

¶141. Here, Galloway argues that he was prejudiced by each of the four previous alleged errors of counsel, i.e., failing to investigate and challenge the testimony of Dr. McGarry, limiting Dr. Riddick's review to the sexual battery charge, failing to file a Rule 702 challenge to Dr. McGarry's testimony, and failing to object to Dr. McGarry's testimony's being outside the scope of discovery.

¶142. If Galloway's ineffective assistance of counsel claims fail on either of the ***Strickland*** prongs, his claims must fail. ***Moffett***, 351 So. 3d at 945. As previously discussed, Galloway's claims fail to meet even the first prong in ***Strickland***. Therefore, Galloway's

[12] On April 23, 2010, Attorney Christensen filed a motion for funds to hire Dr. Riddick, acknowledged receipt of a letter on April 19, 2010, "from the State indicating Dr. McGarry's opinions," and she expressed the need for Dr. Riddick to review Dr. McGarry's findings and to assist in Galloway's defense. On May 4, 2010, Attorney Christensen filed a motion for a continuance of the trial, stating that more time was needed to consult with the defense's forensic expert.

claims of ineffective assistance of counsel must fail. ***Id.***

II. Whether the state corrupted the truth-seeking function of the trial by suppressing material impeachment evidence regarding Dr. McGarry, in violation of the petitioner's rights under the United States Constitution, the Mississippi Constitution, and Mississippi law.

¶143. Under this assignment of error, Galloway asserts that the State knew or should have a known that, just months prior to Galloway's trial, Dr. McGarry had been terminated from his twenty-five-year tenure at the Orleans Parish Coroner's Office. Dr. McGarry testified that he had been terminated from the office following his autopsy of Cayne Miceli in 2009. Galloway cites the transcript of the criminal trial in the United States District Court, Eastern District of Louisiana, in ***Williams v. United States*** Number 10-cr-213. Galloway provided portions of that transcript discussing the circumstances of Dr. McGarry's termination from employment with the Orleans Parish Coroner's Office. Interestingly, the trial in ***Williams*** took place on April 7, 2011. Galloway's trial predates ***Williams***, spanning September 21-24, 2010.

¶144. Galloway states that his defense counsel requested discovery of "any materials required by United S[t]ates Supreme Court Decisions or Mississippi Supreme Court decisions or other Rules of in [sic] the state of Mississippi or the United States or the United States Constitution." He argues that information pertaining to Dr. McGarry's termination would have been favorable to his defense and that the prosecution failed to reveal this information.

¶145. Under the Due Process Clause of the Fourteenth Amendment, the prosecution has a duty to disclose "evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment[.]" ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The Court adopted a four part test in ***King v. State***, 656 So. 2d 1168, 1174 (Miss. 1995), to assess whether a ***Brady*** violation had taken place. "Under the test, it is the defendant's burden to prove: '(a) that the State possessed evidence favorable to the defendant (including impeachment evidence); (b) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (c) that the prosecution suppressed the favorable evidence; and (d) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.'" ***Havard v. State***, 86 So. 3d 896, 900 (Miss. 2012) (quoting ***Manning v. State***, 929 So. 2d 885, 891 (Miss. 2006)).

¶146. The issue here is similar to Galloway's earlier issue regarding whether his trial counsel were ineffective for failing to investigate Dr. McGarry and discover that he had been terminated. Here, Galloway faults the prosecutor for an alleged discovery violation. In the related issue previously discussed, Galloway claimed that attorneys along the Gulf Coast had long been aware of the deficiencies of Dr. McGarry's autopsies. Interestingly, the two publications he referenced to support that assertion were published or posted on February 1,

2011, after Galloway's trial ended.[13] Even assuming that sources of that nature were published prior to Galloway's trial, that would not aid Galloway's claim because they would have been equally discoverable by the defense as they would have been by the prosecution. Galloway's argument fails the second part of the ***Brady*** test. *See* ***Carr,*** 873 So. 2d at 1000 ("With reasonable diligence he could have obtained the information himself, thus his argument fails the second part of the four-part ***Brady*** test."). "***Brady*** does not obligate the State to furnish a defendant with exculpatory evidence that is fully available to the defendant through the exercise of reasonable diligence." ***Kutzner v. Cockrell***, 303 F.3d 333, 336 (5th Cir. 2002) (citing ***Rector v. Johnson***, 120 F.3d 551, 558 (5th Cir.1997). Therefore, the prosecution would have been under no obligation to provide the defense with that information.

¶147. Further, there can be no failure to disclose information to the defense if the defense already knew of the information. ***United States v. Brown***, 650 F.3d 581, 588 9 5th Cir. 2011). As discussed above, at least one of Galloway's attorneys was aware that Dr. McGarry had been terminated from the Orleans Parish Coroner's Office. Attorney Christensen stated: "I did know at the time of Leslie's trial that Dr. McGarry had been terminated from the Orleans Parish Coroner's Office."

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[13] *See* Transcript*, Post Mortem: Death Investigation in America*, Frontline (Feb. 1, 2011); *see also* A.C. Thompson, Mosi Secret, Lowell Bergman, Sandra Bartlett, *In New Orleans, Uncovering Errors and Oversights*, National Public Radio (Feb. 1, 2011), https://www.npr.org/2011/02/01/133301618/in-new-orleans-uncovering-errors-and-oversights.

¶148. This issue is without merit.

III. Whether the State corrupted the truth-seeking function of the trial by presenting false and misleading evidence, in violation of petitioner's Constitutional Rights under the United States and Mississippi Constitutions and Mississippi law.

¶149. This issue is barred by res judicata.

¶150. Galloway alleges that the prosecution in his case allowed the presentation of false and misleading evidence during its examination of Dr. McGarry. He further asserts that because the jury's guilty verdict on the essential allegation of anal sexual battery hinged on Dr. McGarry's "false and misleading testimony," this Court should vacate Galloway's conviction or order the circuit court to conduct an evidentiary hearing on this issue. The alleged falsehoods include:

1. That an anal tear is conclusive evidence of anal rape;

2. That penetration of the anus sufficient to cause the observed injuries would be so painful as to rule out consensual sexual activity;

3. That dilation of the anus was evidence of anal rape;

4. That the anal injuries must have been caused by a penis, rather than another foreign object;

5. That the anus is such a protected part of the human body that the observed injuries could not have been the result of an automobile rolling over Ms. Anderson's body;

6. That there were no injuries to the perianal area.

¶151. Galloway specifically asserts that (1) Dr. McGarry gave false and highly misleading testimony inconsistent with scientific principles; (2) the prosecution knew or should have

known that this testimony was false and highly misleading; and (3) the State cannot prove beyond a reasonable doubt that its failure to correct the testimony did not contribute to the jury's verdict. "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment[.]" ***Napue v. Illinois***, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (citing ***Mooney v. Holohan***, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935)). "To establish a claim under ***Napue***, a defendant must prove that the witness's testimony 'was (1) false, (2) known to be so by the state, and (3) material.' ***United States v. Dvorin***, 817 F.3d 438, 452 (5th Cir. 2016) (quoting ***Summers v. Dretke***, 431 F.3d 861, 872 (5th Cir. 2005)). This claim is another attack on Dr. McGarry's trial testimony.

¶152. On direct appeal, "[Galloway] claim[ed] that the certainty Dr. McGarry conveyed to the jury was *fictional* and constituted nothing more than *junk science*." ***Galloway***, 122 So. 3d at 629 (emphasis added). Under a plain error analysis, the Court determined that the testimony was within Dr. McGarry's scope of expertise, that Galloway had been provided an expert of his own to rebut Dr. McGarry's testimony and opinion, and that there was no reversible error. ***Id.*** at 633. In short, the testimony was found to be permissible. Galloway now attacks that same testimony under the theory that the prosecution either knew or should have known that it was false.

> [T]he procedural bars of waiver, different theories, and *res judicata* and the exception thereto as defined in Miss. Code Ann. § 99-39-21(1-5) are applicable in death penalty PCR Applications. Rephrasing direct appeal issues for post-conviction purposes will not defeat the procedural bar of *res judicata*.

> The Petitioner carries the burden of demonstrating that his claim is not procedurally barred.

Dickerson v. State, 357 So. 3d 1010, 1018 (Miss. 2021) (quoting ***Havard v. State***, 988 So. 2d 322, 333 (Miss. 2008)). This claim is merely another attack on Dr. McGarry's trial testimony, and it is barred by res judicata. Notwithstanding the procedural bar, the issue is also without merit.

¶153. In an attempt to show that the testimony was false, Galloway provided affidavits from six forensic pathologists and medical literature to establish that physical evidence of trauma to the anogenital area as observed at Anderson's autopsy implies nothing about consent. Galloway asserts that these affidavits establish that Dr. McGarry's testimony on the above enumerated points lack a basis in science, constituted false and highly misleading State's evidence, and should not have been admitted. As the State properly points out, however, the United State Court of Appeals for the Fifth Circuit has long acknowledged, and we find persuasive, that "the fact that other experts disagreed . . . is insufficient, by itself, to call [the expert's] testimony into question." ***Boyle v. Johnson***, 93 F.3d 180, 186 (5th Cir. 1996); *see also* ***Clark v. Johnson***, 202 F.3d 760, 767 (5th Cir. 2000) (holding that disagreement between experts was insufficient to overcome state habeas court's factual determination that the prosecution expert's testimony was not false or misleading).

¶154. In ***Boyle***, a federal habeas corpus proceeding on a capital murder/death sentence case, the petitioner attacked the State's expert's testimony based on the testimony of one expert at trial, and two experts who testified at Boyle's habeas hearing. 93 F.3d at 186. Those

experts disagreed with the State's expert's analysis and interpretation of the evidence presented in Boyle's case. ***Id.*** The court stated that the fact that other experts disagree with the State's expert "is insufficient, by itself, to call the [State's expert's] testimony into question." ***Id.***

¶155. The Court's prior determination that Dr. McGarry's testimony was within the scope of his expertise is a bar to a later claim that the testimony was false and that the prosecution knew it was false. Notwithstanding the bar, Galloway cannot establish that the prosecutor knew or should have known that Dr. McGarry's testimony was false because other experts disagree.

IV. Juror Misconduct

A. The death verdict was unconstitutionally coerced from a hold-out juror.

¶156. Galloway claims that his death sentence was the result of a group of jurors coercing a hold-out-for-life juror to abandon her convictions and vote for death. He asserts that Juror Tina Swanier did not want to vote for execution because, as a mother, she saw "loss from both sides." Galloway also asserts that Swanier ultimately voted for death not only after being exposed to media about the case, which will be discussed, but also after other jurors pressured her and told her that she would get prosecuted for contempt or perjury if she did not follow the oath she took. As support for these assertions, Galloway provided the affidavit of a paralegal who, along with post-conviction counsel, met with Swanier. According to the paralegal, Swanier later recounted that she "was threatened into agreeing

on that punishment that I didn't feel like was proper," and she "felt like that wasn't the sentencing that [she] agreed on," and she "felt like [her] voice meant nothing." No reason is given for why Swanier would not provide an affidavit.[14] The paralegal's affidavit is entirely hearsay. *See* Miss. R. Evid. 802.

¶157. Mississippi Code Section 99-39-9(e) states:

> *Affidavits of the witnesses who will testify* and copies of documents or records that will be offered shall be attached to the motion. The affidavits of other persons and the copies of documents and records may be excused upon a showing, which shall be specifically detailed in the motion, of good cause why they cannot be obtained.

Miss. Code Ann. § 99-39-9(e) (Rev. 2020) (emphasis added). In ***Smith v. State***, 877 So. 2d 369, 380 (Miss. 2004), the Court stated that "Miss. Code Ann. § 99-39-9(1)(e) allows the petitioner to present affidavits from witnesses who would testify at trial, not hearsay statements allegedly made by a juror to a third party."

¶158. To further support his argument, Galloway points to the record to show that Swanier raised her hand during jury selection when asked if any prospective jurors opposed the death penalty. According to the affidavit of Kathryn Gates, Juror Number 5, it surprised her and other jurors that "Tina" had been selected to serve.[15] Gates further stated that the judge later questioned "Tina" by herself. Gates also stated that two other jurors were "upset with Tina

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[14] Post-conviction counsel stated in the Petition that an attempt to obtain an affidavit directly from Swanier was unsuccessful, but they assure the Court that Swanier would be subpoenaed to testify.

[15] According to Gates's affidavit, she cannot remember Tina's last name.

for not wanting to vote for the death penalty." According to Gates, she "finally, turned to Tina and reminded her of her oath to consider the death penalty." Gates stated, however, in her affidavit that she "told [Tina] she had the choice to vote for death or life, but that we had said we could vote for the death penalty."

¶159. Relying on the affidavit of Galloway's father, Red, it is asserted that Swanier recounted that she "was threatened into agreeing on that punishment that I didn't feel like was proper," she "felt like that wasn't the sentencing that [she] agreed on," and she "felt like [her] voice meant nothing." With regard to this claim, Red's affidavit is also pure hearsay. *See* Miss. R. Evid. 802.

¶160. Galloway asserts that the jurors who coerced Swanier into changing her decision created a violation of fundamental constitutional and statutory rules. Galloway cites no authority to support his assertion. He does, however, assert that more than one appellate court has noted the coercive effect of a judge's suggestion that a juror could be prosecuted or held in contempt for failing to follow her oath. *See* ***Kelsey v. United States***, 47 F.2d 453, 454 (5th Cir. 1931); ***Strickland v. State***, 348 So. 2d 1105, 1112 (Ala. Crim. App. 1977) ("Threatening a jury with contempt for failure to return a verdict constitutes reversible error." (citing ***Meadows v. State***, 62 So. 737 (Ala. 1913))). Here, however, the judge did not make that threat. Galloway provides no authority to support his argument that a fellow juror's statements regarding contempt, even if a step removed from the judge, similarly intimidated Swanier. The only juror affidavit provided in support of this claim is that of Gates. The

other affidavits are pure hearsay. And the only statement in Gates's affidavit that comes close to validating Galloway's claim is when she stated: "I remember there were two women . . . being upset with Tina for not wanting to vote for the death penalty. I remember her crying."

¶161. Further, Mississippi Rules of Evidence 606(b)(1) states:

> **(1)** ***Prohibited Testimony or Other Evidence.*** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Miss. R. Evid. 606(b)(1). The State contends that Gates's affidavit reflects her recollection of the jury's process and how Swanier behaved during deliberations. "Rule 606(b) is designed to protect 'all components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other features of the process." Miss. R. Evid. 606 advisory comm. n. (alteration in original) (quoting Fed. R. Evid. 606 advisory comm. n.).

¶162. In rebuttal, Galloway points out that in ***Roach***, 116 So. 3d 126, Roach, who had been convicted on drug charges, was granted leave to proceed in the trial court on his claim that a juror had received outside information that influenced his verdict. ***Id.*** at 129. In that case, Juror Derrick Tate provided an affidavit stating that, during Roach's trial, Tate approached two police officers, who were witnesses for the State in Roach's trial, and asked them how much time Roach would receive if found guilty. ***Id.*** According to Tate's affidavit, the

officers informed him that "Roach would get five to eight years." ***Id.*** The trial court denied post-conviction relief, finding that Tate's testimony was unreliable. ***Id.*** at 130. The Court of Appeals affirmed, and this Court granted Roach's petition for writ of certiorari. ***Id.*** Ultimately, this Court affirmed, finding that the trial court's decision was not clearly erroneous. ***Id.*** at 135. But Galloway argues that Roach was granted leave to proceed in the trial court with his post-conviction relief claim based on the juror's affidavit.

¶163. Distinguishable from the today's case, ***Roach*** relied on extraneous information being presented to a juror. Rule 606(b)(2) of the Mississippi Rules of Evidence supplies the exception:

> **(2)** ***Exceptions.*** A juror may testify about whether:
>
> > **(A)** extraneous prejudicial information was improperly brought to the jury's attention; or
> >
> > **(B)** an outside influence was improperly brought to bear on any juror.

Miss. R. Evid. 606(b)(2). The issue in ***Roach*** dealt with extraneous evidence; here, there is no such claim and, pursuant to Rule 606(b)(1), no exception.

¶164. As to Galloway's claim his death sentence was coerced from a hold-out juror, the petition is denied.

B. Whether a juror's exposure to media coverage portraying the beautiful, young victim violated Leslie Galloway's constitutional rights, injected improper victim-impact evidence, and requires reversal of his death sentence.

¶165. The jury in Galloway's trial were sequestered at the Beau Rivage Casino Hotel in

Biloxi, Mississippi. Galloway asserts that on the morning of the final day of trial, September 24, 2010, the court, at the State's request, asked the jurors whether they had abided by its admonitions to avoid all news accounts of the trial. He further asserts that no one admitted noncompliance. Galloway claims, however, that Juror Swanier had watched a television news telecast about the case, because "she had to see the victim," and in doing so, saw photographs not admitted at trial showing "how pretty [Anderson] was." Galloway argues that Swanier's conduct rendered his trial fundamentally unfair.

¶166. To support this assertion, Galloway, again, has provided the affidavit of a paralegal who states that he accompanied post-conviction counsel Anna Arceneaux,[16] and he attests to what Swanier told them. According to the affidavit of yet another paralegal, all telephones were removed from the room, and the jurors were prevented from having access to newspapers, but the televisions remained in the rooms because they could not be easily moved. Further, the jurors were explicitly held to an "honor code" not to watch the local news stations about the case. The principle behind sequestering a jury "is to [e]nsure a fair and impartial jury that will return a verdict beyond reproach." ***Simmons v. State***, 805 So. 2d 452, 506 (Miss. 2001).

¶167. The only affidavits Galloway provides to support his argument are from two paralegals attesting to what a juror said after trial. They are hearsay and not permitted. *See*

[16] On September 24, 2020, Attorney Arceneaux was permitted to withdraw as counsel for Galloway.

Miss. R. Evid. 802; ***Smith***, 877 So. 2d at 380; Miss. Code Ann. § 99-39-9(1)(e) (Rev. 2020). ¶168. Further, as discussed above, Rule 606(b)(2)(A) and (B) permit a juror to testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Miss. R. Evid. 606(b)(2)(A), (B). Here, however, Swanier's statement, if true, amounts to her testifying about her own misconduct. "Jurors generally may not impeach their own verdict by testifying about motives or influences affecting deliberations." ***Payton v. State***, 897 So. 2d 921, 954 (Miss. 2003). Such testimony is prohibited by Rule 606(b).[17]

[17] Galloway argues in that, even to the extent that Rule 606(b) could be interpreted as barring Swanier's testimony, the Court should allow it because the Supreme Court has repeatedly rejected proposed applications of evidentiary rules that violate a defendant's rights. *See, e.g.*, ***Rock v. Arkansas***, 483 U.S. 44, 62, 107 S. Ct. 2704, 97 L.Ed. 22 (1987) (addressing whether a criminal defendant's right to testify may be restricted by a state rule that excludes her posthypnosis testimony, the Supreme Court held that, in that case, "Arkansas' per se rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf"); ***Chambers v. Mississippi***, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The State's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. The Supreme Court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process.) ; ***Washington v. Texas***, 388 U.S. 14, 18, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (Texas defendant was denied his right to have compulsory process for obtaining witnesses by statutes providing that principals, accomplices, or accessories in same crime cannot be introduced as witnesses for each other, thus denying defendant right to place on stand witness who was physically and mentally capable of testifying to events that he had personally observed and whose testimony would have been relevant and material to defense.)

¶169. Because Galloway has failed to support his argument with anything more than hearsay, the issue fails.

C. Whether a juror's dishonest answer in voir dire created prejudicial error and requires reversal.

¶170. According to her juror information card, Gates responded by checking, "No" to the question of whether she had "ever served on a criminal jury." During voir dire, when Gates and other panelists were asked if any one of them had "ever served on a criminal jury before, raise your card," the record indicates that she did not.[18] According to her affidavit provided to Galloway, however, she stated: "I have served on many juries before, both civil and criminal, before I served on the jury in Mr. Galloway's case." Galloway asserts that Gates's lack of candor before the court denied him a fair and impartial capital jury and caused constitutional error that requires that Galloway's conviction and sentence be set aside.

¶171. In ***Odom v. State***, 355 So. 2d 1381 (Miss. 1978), John Odom appealed asserting that the trial court erred by overruling his motion for a new trial, which was based upon the failure of a juror to respond to a question asked during the voir dire examination of the panel. ***Id.*** at 1382. Defense counsel asked the panel whether any of them had a close relative who had worked in law enforcement. ***Id.*** Juror John B. Freshour did not raise his hand. ***Id.*** There was testimony to the effect that Pete Freshour (the juror's brother) participated in the

[18] By the prosecutor: "All right. Anyone here who has ever served on a criminal jury before, raise your card. All right, if you will please hold your cards up until I call your numbers out, 17,27, 36, 32, 46, 62, 80, 93." Gates was Juror Number 8.

investigation of the case. ***Id.*** The Court established a three-part procedure for deciding a claim of juror dishonesty in voir dire. ***Id.*** at 1383. The court must determine (1) whether the question incorrectly answered was relevant; (2) whether the question incorrectly answered was unambiguous; and (3) whether the juror had knowledge of the information sought in the question. ***Id.*** "If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond." ***Id.*** "[E]ach case must be decided on an ad hoc basis considering the facts then before the court." ***Id.*** The ***Odom*** Court held:

> On the facts presented in this case, there is a strong inference of prejudice to defendant in his selection of a jury as any astute lawyer would have examined the juror closely with reference to the juror being the brother of a police officer and his feelings in that regard. Such examination in this case would have, in all probability, established that the juror's brother was in fact a policeman in the area where the crime for which appellant was being tried occurred, thus giving him a rational basis upon which to challenge the juror peremptorily, if not for cause.

Id.; *see also* ***Magee v. State***, 124 So. 3d 64, 68 (Miss. 2013) ("Under the circumstances of this case, we cannot find that the trial judge clearly erred in concluding that [the juror] would not have been struck as a juror had the defense known she was a somewhat distant cousin of the arresting officer.").

¶172. Galloway argues that the question at issue here—"Anyone here who has ever served on a criminal jury before"— was relevant and unambiguous as the question prompted explicit answers from several panelists that they had served on prior juries. Galloway also argues that Gates proved by her sworn affidavit that she knew of her past jury service.

¶173. Galloway does not assert that he would have moved to strike Gates for cause. Even if he had, "a juror who may be removed on a challenge for cause is one against whom a cause for challenge exists that would likely [a]ffect his competency or his impartiality at trial." ***Evans***, 725 So. 2d at 653 (internal quotation marks omitted) (quoting ***Billiot v. State***, 454 So. 2d 445, 457 (Miss. 1984), *cert. denied*, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985), *reh'g denied*, 470 U.S. 1089, 105 S. Ct. 1858, 85 L. Ed. 2d 154 (1985). Neither competency nor impartiality can be inferred simply by one's past experience on a jury.

¶174. Galloway does assert that prejudice could be inferred because he absolutely would have exercised a peremptory strike to remove Gates had he known of her past experience as a juror. The record belies this assertion, however.

¶175. The record indicates that the jurors who acknowledged that they had served on previous juries, Juror Number 17, Lauren Hughes, was the first to come up on the list of panel members, and she was accepted by both the prosecution and the defense. The next to be called was Juror Number 27, Jack R. Bethea, and he was stuck by the prosecution utilizing its third peremptory strike. The third and final juror to be called that had indicated having prior service as a juror was Juror Number 32, Shawn Sims, who was forced on the prosecution, having already used its one and only peremptory strike for alternates, and accepted by Galloway. Therefore, if there is any pattern to be discerned, it is that the State and Galloway each accepted one juror with prior experience as a juror (Juror Number17), the State stuck one (Juror Number 27), and Galloway accepted one that he could have struck

(Juror Number 32). There is no way of knowing if the State would have used its peremptory strike on Juror Number 32 had it not already utilized it, but from this information, it appears that no deference was given by either side as to whether a juror had previously served as juror. And if there was, it appears that Galloway preferred jurors with past experience, as he accepted both that were presented to him during voir dire. Therefore, his assertion that he would have utilized a peremptory strike to remove Gates is dubious.

¶176. Further, despite the disparities between the information on Gates's juror information card and her silence during voir dire, as compared to her statements in her affidavit, Gates swore as a juror to "well and truly try the issue between the State of Mississippi and Leslie Galloway, the Third, and a true verdict render according to the evidence and the law, so help [her] God[.]" Further, it is presumed that Gates followed the instructions as they were given by the court. ***Robinson v. State***, 247 So. 3d 1212, 1233 (Miss. 2018) ("Generally speaking, our law presumes that jurors follow the trial judge's instructions, as upon their oaths they are obliged to do." (Internal quotation marks omitted) (quoting ***Parker v. Jones Cnty. Hosp.***, 549 So. 2d 443, 446 (Miss. 1989)).

¶177. We find that Galloway has failed to establish an inference of prejudiced in this case.

V. Whether forcing Galloway to wear an electronic restraint at trial violated his constitutional rights, warranting relief, or, at a minimum, an evidentiary hearing.

¶178. Galloway asserts that, without the State's having made a record of any security rationale or the trial court's having weighed such security needs against Galloway's rights

to counsel and a fair trial, the security officers who held Galloway in custody placed a "stun belt"[19] on him throughout his trial. He argues that the electronic restraint threatened to shock him at any moment if he was deemed to be engaging in threatening behavior. He argues that the use of an electronic restraint can affect an accused's ability to confer with counsel and the jury, possibly, inferring his dangerousness. Galloway also asserts that the State never placed on the record what the court officers were secretly doing behind the scenes, and his lawyers, who knew about the electronic restraint, ineffectively failed to object. He maintains that these facts only surfaced through post-trial interviews with defense counsel.

¶179. Both Attorneys Stewart and Christensen were aware Galloway wore an electronic restraint during at least some stages of his trial. Because Galloway's counsel knew at the time of trial that Galloway wore the electronic restraint, the underlying issue was capable of being raised at trial. Therefore, the underlying issue is waived. Miss. Code Ann. § 99-39-21(1).

¶180. Galloway also asserts that his attorneys were ineffective for failing to object to his being made to wear an electronic restraint and to the State's failure to make a record of specific findings of fact to justify the use of the electronic restraint. In order to prevail on this claim, Galloway must demonstrate to this Court that his attorneys' performance was both

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[19] The term "stun belt" comes from the affidavits provided by Attorneys Stewart and Christenesen. Galloway never describes how a "stun belt" is worn. In ***Clark v. State***, 233 So. 3d 832, 848 (Miss. Ct. App. 2017), the defendant wore an electronic restraint or "stun pack" that was "attached to the defendant's upper leg."

deficient and that the deficiency prejudiced the defense of the case. ***Strickland***, 466 U.S. at 687. "The benchmark for judging any claim of ineffectiveness [of counsel] must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ***Id.*** at 686. Galloway can show neither.

¶181. Galloway relies on ***Deck v. Missouri***, 544 U.S. 622, 633, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). In ***Deck***, the defendant had been convicted of capital murder and sentenced to death. ***Id.*** at 625. During the new sentencing proceedings, Deck was shackled with leg irons, handcuffs, and a belly chain that were visible to the jury. ***Id.*** Defense counsel's objections were overruled, and Deck was again sentenced to death. ***Id.*** The Missouri Supreme Court rejected Deck's claims that shackling him violated Missouri law and the United States Constitution because the presumption of innocence was undermined at the sentencing proceedings. ***Id.***

¶182. The Supreme Court granted certiorari on Deck's claim that his shackles violated the federal Constitution. ***Id.*** at 626. The Supreme Court first noted that "[t]he law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." The Supreme Court found the record to show that the jury saw the restraints, the trial court made no indisputable good reason for the shackles in the record, and the State failed to prove beyond a reasonable doubt

that shackling Deck did not contribute to the verdict. ***Id.*** at 634-35. In reaching its decision, the Supreme Court noted that:

> [T]he Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. The use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his lawyer. Indeed, they can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf.

Id. at 631 (citations omitted).

¶183. The facts in ***Deck*** are distinguishable from Galloway's case. Where Deck wore leg irons, handcuffs, and a belly chain that were plainly visible to the jury, Galloway wore an electronic restraint under his clothes. There is no evidence that the jury saw the electronic restraint. Attorney Christensen stated in her affidavit:

> I remember that [Galloway] wore a stun belt during the trial. He was the first criminal defendant to wear the belt. The Harrison County Sheriff's Office had just gotten the belt. I saw the remote control for it at one point during the trial when the jury was out, but other than that, I did not see it. Leslie may have also worn foot shackles, but they would have been covered up by his pants.

¶184. Galloway argues that, while electronic restraint devices are generally not visible to a jury, their use raises the same or greater constitutional concerns than the Supreme Court outlined in ***Deck*** barring the routine use of visible shackles without security justification. Galloway states that "[a]t least one of these concerns (Mr. Galloway's ability to confer with counsel) and possibly the second (the jury's inferring dangerousness) are at issue here, and must be addressed further at a hearing."

¶185. While this Court has never addressed the use of an electronic restraint during a criminal trial, the Court of Appeals has. In ***Clark v. State***, 233 So. 3d at 832, 843, the defendant was convicted of capital murder, and he was sentenced as a violent habitual offender to life imprisonment without the possibility of parole. On direct appeal, Clark was permitted to file a pro se brief in addition to the brief filed by his counsel. As his first issue, Clark alleged that the trial court erred by requiring him to wear an electronic restraint. Regarding this issue, the Court of Appeals opined:

> In ***Jones v. State***, 130 So. 3d 519, 525–26 (¶ 21) (Miss. Ct. App. 2013), we reiterated that a defendant has a right "to be free from all manner of shackles or bonds . . . when in court in the presence of the jury, unless in exceptional cases where there is evident danger of his escape or in order to protect others from an attack by the prisoner." (Quoting ***Jones v. State***, 20 So. 3d 57, 60 (¶ 10) (Miss. Ct. App. 2009)). However, a trial judge has "considerable discretion regarding the decision to restrain a defendant," "based upon reasonable grounds for apprehension." ***Id.*** at 525–26 (¶ 21). A defendant whose rights have been violated may only have his conviction overturned if there is a showing that he suffered prejudice. ***Id.*** at 526 (¶ 21).
>
> Clark argues that his right to a fair trial was denied and that he was prejudiced by the Court's decision to require him to wear an electronic restraint (i.e., a "stun pack") during courtroom appearances. The State, in response, argues that the stun pack has previously been used "in certain cases when the courtroom security and the sheriff actually notify the Court that they have a concern," and that such a concern was clearly present in this case, as courtroom security and the sheriff recommended that Clark wear the restraint. Further, the State argues that the stun pack, which is attached to a defendant's upper leg, is not visible to the public when he is wearing pants and that it in no way hinders the ability of the defendant to testify or move about freely. Given these facts, we do not find that the trial judge erred in requiring Clark to wear the electronic restraint.

Id. at 848. Although Clark filed a petition for writ of certiorari in this Court, which was denied, he did not raise this issue. The Court takes this opportunity to adopt the Court of Appeals' holding on that issue.

¶186. Unlike in ***Clark***, there is no indication in the record that the issue concerning the need for an electronic restraint was ever brought to the attention of the trial court by those responsible for securing Galloway during his trial. Galloway's counsel did not know why he was required to wear the electronic restraint. Neither ***Clark*** nor ***Deck*** addresses the need for adequate justification for using a restraint that a jury cannot see. The Court in ***Deck*** discussed the need for adequate justification for shackles seen by the jury. 544 U.S. at 634-35. The Court in ***Clark*** pointed out that there was a clear concern requiring the use of the device in that case. 233 So. 3d at 848. Regardless, even if we assume, for the sake of argument, that Galloway was unjustifiably retrained with the electronic device and his counsel were deficient for failing to protect his rights, Galloway has not shown prejudice. There is no proof, either in the record or by affidavit, that the jury ever saw his restraints. Further, Galloway provides no evidence that the device affectied his ability to communicate with his counsel, move freely, or participate in his trial in any way. To be sure, it has never been alleged that Galloway was ever shocked. Galloway states in his petition that "these errors were inherently prejudicial because of the *clear risk* of affecting Mr. Galloway's ability to communicate with counsel during his trial for his life." Galloway has not made a showing of prejudice, and this issue fails.

VI. Whether executing Leslie Galloway, III, would violate the Eighth and Fourteenth Amendments to the United States Constitution.

¶187. Galloway claims his execution would violate the Eighth and Fourteenth Amendments because Mississippi's method of execution is inhumane, its death penalty is unconstitutionally arbitrary against black men, and the standards of decency principle has evolved to the point when the death penalty is no longer acceptable.

¶188. We already addressed and rejected on direct appeal Galloway's claim that "Mississippi's death-penalty scheme is applied in a discriminatory and irrational manner in violation of" both our federal and state constitutions. ***Galloway***, 122 So. 3d at 680-81.

¶189. As to Galloway's contention that the death penalty is no longer acceptable under the evolving standards of decency principle, this is a policy argument for the legislature to consider. "Courts are not representative bodies. They are not designed to be a good reflex of a democratic society." ***Gregg v. Georgia***, 428 U.S. 153, 175, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (internal quotation mark omitted) (1976) (quoting ***Dennis v. United States***, 341 U.S. 494, 525, 71 S. Ct. 857, 95 L. Ed. 1137 (1951) (Frankfurter, J., concurring)). In applying the so-called evolving standards of decency principle in ***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), the Supreme Court categorically excluded mentally retarded individuals and juveniles from the death penalty. But the Supreme Court did not invalidate the death penalty itself. The Court subsequently and plainly reaffirmed "the principle, settled

by ***Gregg***, that capital punishment is constitutional." ***Baze v. Rees***, 553 U.S. 35, 47, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (citing ***Gregg***, 428 U.S. at 177 (plurality opinion).

¶190. Lastly, Galloway claims that the three-drug lethal injection protocol set forth in Mississippi Code Section 99-19-51(1) (Supp. 2023) poses an unacceptable risk of significant pain that would violate Galloway's right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments, as well as article 3, section 28, of the Mississippi Constitution. Galloway contends that the availability of the necessary drugs used for lethal injections has been seriously restricted in recent years because drug manufacturers "don't want their drugs used to kill people." And while the Mississippi Department of Corrections (MDOC) has recently disclosed that it has acquired substitutes,[20] the State has refused to disclose whether any of the drugs it has acquired are compounded. Galloway submits that compounded drugs are not FDA approved and have not been evaluated for effectiveness and safety.

¶191. The Supreme Court has made it unequivocally clear that "'a requirement of all Eighth Amendment method-of-execution claims' alleging cruel pain" is that the prisoner must identify an "available alternative" method of execution. ***Bucklew v. Precythe***, 139 S. Ct. 1112, 1121, 203 L. Ed. 2d 521 (2019) (quoting ***Glossip v. Gross***, 576 U.S. 863, 879, 135 S.

[20] In his PCR petition, Galloway says that in response to a federal lawsuit filed by Mississippi prisoners scheduled to be executed by the lethal injection, the State disclosed that MDOC "has acquired midazolam, in lieu of pentobarbital, as well as vecuronium bromide, and potassium chloride."

Ct. 2726, 192 L. Ed. 2d 761 (2015). "The death penalty is constitutional[,]" and "there must be a constitutional means of carrying it out." ***Corrothers***, 255 So. 3d at 113 (quoting ***Glossip***, 576 U.S. at 869).

¶192. Similar to the petitioner in ***Corrothers***, Galloway did not identify in his PCR petition an alternative method of execution that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." ***Id.*** at 113 (internal quotation marks omitted) (quoting ***Baze***, 553 U.S. at 52). In his reply argument in support of his amended PCR petition, Galloway acknowledges that the Legislature amended Section 99-19-51 in 2022, as follows:

> (1) At the discretion of the Commissioner, the Deputy Commissioner for Finance and Administration and the Deputy Commissioner for Institutions of the Mississippi Department of Corrections, the manner of inflicting the punishment of death shall be by one of the following: (a) intravenous injection of a substance or substances in a lethal quantity into the body; (b) nitrogen hypoxia; (c) electrocution; or (d) firing squad, until death is pronounced by the county coroner where the execution takes place or by a licensed physician according to accepted standards of medical practice. Upon receipt of the warrant of execution from the Mississippi Supreme Court, the Commissioner of Corrections shall, within seven (7) days, provide written notice to the condemned person of the manner of execution. It is the policy of the State of Mississippi that intravenous injection of a substance or substances in a lethal quantity into the body shall be the preferred method of execution.

Miss. Code Ann. § 99-19-51(1) (Supp. 2023).

¶193. But Galloway neither pleads nor proposes one of these alternatives. He simply says that "[t]he statute reflects the legislature's determination that nitrogen hypoxia, electrocution, and firing squad are feasible and readily implemented alternative to the State's use of

midazolam." This is facially insufficient to proceed on his constitutional claims under the Eighth Amendment and/or Mississippi's counterpart under article 3, section 28. As the Court in ***Glossip*** made clear, "the Eighth Amendment requires a prisoner to *plead* and prove a known and available alternative." ***Glossip***, 576 U.S. at 880 (emphasis added). Galloway does neither. And consistent with ***Corrothers***, his method-of-execution claim under our federal and state constitutions fails. ***Corrothers***, 255 So. 3d 113-14.

VII. Cumulative Error

¶194. Galloway asserts that each individual claim set forth above warrants post-conviction relief. He further asserts that the combined prejudicial effect of all these errors, taken together, requires reversal.

¶195. Galloway is entitled to a fair trial, not a perfect trial. ***Sand v. State***, 467 So. 2d 907, 911 (Miss. 1985). The cumulative-error doctrine holds that individual errors, which are not reversible in themselves, may combine with other errors to make up reversible error, where the cumulative effect of all errors deprives the defendant of a fundamentally fair trial." ***Ross v. State***, 954 So. 2d 968, 1018 (Miss. 2007) (citing ***Byrom v. State***, 863 So. 2d 836, 847 (Miss. 2003); ***Wilcher v. State***, 863 So. 2d at 836-37 ("It is true that in capital cases, although no error, standing alone, requires reversal, the aggregate effect of various errors may create an atmosphere of bias, passion and prejudice that they effectively deny the defendant a fundamentally fair trial." (internal quotations marks omitted) (quoting ***Conner v. State***, 632 So. 2d 1239, 1278 (Miss.1993) , *overruled on other grounds by* ***Weatherspoon***

v. State, 732 So. 2d 158 (Miss. 1999)). After reviewing the record, briefs, and arguments, no individual errors require reversal of Galloway's conviction or sentence, nor does an aggregation of errors mandate a reversal.

¶196. **POST-CONVICTION RELIEF DENIED.**

RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR.

Supreme Court of Mississippi

Court of Appeals of the State of Mississippi

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December 7, 2023

This is to advise you that the Mississippi Supreme Court rendered the following decision on the 7th day of December, 2023.

Supreme Court Case # 2013-DR-01796-SCT

Trial Court Case # B2401-09-00468

Leslie Galloway, III a/k/a Leslie Galloway a/k/a Leslie "Bo" Galloway, III v. State of Mississippi

Leslie Galloway's motion to stay mandate pending certiorari is denied. To Deny: Randolph, C.J., Coleman, Maxwell, Beam, Chamberlin, Ishee and Griffis, JJ. To Grant: Kitchens and King, P.JJ. Order entered.

The motion for rehearing filed by the petitioner is denied.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *

If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."

MANDATE

SUPREME COURT OF MISSISSIPPI

To the Harrison County Circuit Court - GREETINGS:

In proceedings held in the Courtroom, Carroll Gartin Justice Building, in the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a judgment as follows:

Leslie Galloway, III a/k/a Leslie Galloway a/k/a Leslie "Bo" Galloway, III v. State of Mississippi

Supreme Court Case # 2013-DR-01796-SCT

Trial Court Case #B2401-09-00468

Thursday, 5th day of October, 2023

Post-Conviction Relief Denied. Harrison County taxed with costs.

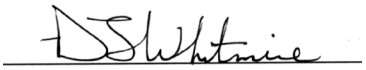
Thursday, 7th day of December, 2023

The motion for rehearing filed by the petitioner is denied.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, D. Jeremy Whitmire, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on December 14, 2023, A.D.



CLERK

122 So.3d 614

Supreme Court of Mississippi.

Leslie GALLOWAY, III a/k/a Leslie Galloway a/k/a Leslie "Bo" Galloway, III

v.

STATE of Mississippi.

No. 2010–DP–01927–SCT

|

June 6, 2013.

|

Rehearing Denied Sept. 26, 2013.

Opinion

PIERCE, Justice, for the Court:

¶ 1. Leslie "Bo" Galloway was convicted and sentenced to death by lethal injection by a jury of his peers after the jury determined he committed the murder of Shakeylia Anderson while he was (1) engaged in sexual battery; (2) a person under sentence of imprisonment at the time; (3) a felon previously convicted of an offense involving the use or threat of violence to another person; and (4) that the murder was especially heinous, atrocious, or cruel.

FACTS AND PROCEDURAL HISTORY

¶ 2. On the evening of Friday, December 5, 2008, seventeen-year-old Shakeylia Anderson and her cousin Dixie Brimage were at their grandmother's house in Gulfport, Mississippi, talking and doing each other's hair. Their uncle, Alan Graham, stopped by briefly. When Graham entered the house, he heard a phone ringing in the living room. He looked at the phone and saw the incoming call was from "Bo." Graham walked through the house and found Anderson and Brimage hanging out in a bedroom. Graham mentioned that someone's phone was ringing, and Anderson said it was hers. Graham overheard Anderson on the phone and got the impression that she was getting ready to go out and meet someone.

¶ 3. At approximately 10:00 that evening, Anderson walked out of her grandmother's house. She was wearing a jacket, blue jeans, and brown boots and carried her book bag with her. Brimage watched Anderson through her grandmother's glass front door as Anderson walked toward a white Ford Taurus parked in the driveway. Brimage saw Anderson stand by the car for a moment and talk to a man. After about five minutes, Anderson got in the white Ford Taurus with the man, and the vehicle drove away.

¶ 4. The following evening, Martin Smith was hunting with dogs in a secluded, wooded area located west of Highway 15 in northern Harrison County. Smith was searching for one of his dogs that had strayed from the pack when he came across an unclothed dead body lying on a dirt logging road. Smith then called law-enforcement personnel.

¶ 5. Shortly before midnight that same evening, Investigator Michelle Carbine of the Harrison County Sheriff's Department received a call that a body had been found in a wooded area. Carbine arrived at the scene in the early morning hours of December 7, 2008. It was too dark to begin processing the body, so Carbine decided to secure the crime scene and wait until daylight. Carbine returned to the scene around 6:30 a.m. that morning with evidence technician Nancy Kurowski and ***626** medical examiner Dr. Paul McGarry. They found the naked body of a black female lying in the middle of a logging path. Carbine said that the deceased female had a red tint to her body, missing hair, and blood underneath the facial area. The body was smeared with blood and dirt, partially burned, and mangled with scrapes, gouges, and lacerations. The body bore at least three tire marks.

¶ 6. Near the scene of the body, investigators found a burned patch of grass and drag marks indicating that something or someone had been dragged from this area to the spot where the body lay. As they walked back toward the body, officials found broken glass from a bottle of New Amsterdam gin and a burned piece of cloth. Pieces of glass were recovered. Numerous tire tracks were near and in a turning pattern around the female's body. Photographs and impressions of the tracks were made and measurements were taken. Based on the condition of the body and the crime scene, Dr. McGarry theorized that the female had been run over by a vehicle, most likely a car.

¶ 7. After some investigation, Carbine determined that the deceased female was Anderson. Based on Brimage's description of the man with whom Anderson had left that Friday evening, and Graham's recollection of “Bo” calling Anderson's phone, as well as information from friends and family, Carbine began looking for a light-skinned black male,

approximately five feet, five inches tall, from the Moss Point area, nicknamed “Bo,” who drove a white Ford Taurus.

¶ 8. On the evening of December 9, 2008, Lieutenant Ken McClenic of the Jackson County Sheriff's Department received information that Harrison County was looking for a black man with the nickname “Bo” who drove a white Ford Taurus. Through his investigation, McClenic identified Leslie Galloway as a possible suspect. Having obtained a residential address for Galloway, McClenic drove by and observed a white Ford Taurus in the driveway. McClenic and other deputies began conducting surveillance of the residence. Later that same evening, the white Ford Taurus was reported leaving the residence. Officers stopped the vehicle a short distance away. Galloway and Cornelius Triplett, a friend of Galloway's, were inside the vehicle. Galloway was placed under arrest.

¶ 9. Carbine responded to the scene. Carbine walked around the Taurus and noticed a small piece of possible evidence flapping underneath the passenger side. Since the vehicle was going to be towed and Carbine feared the substance might be lost, she collected the item. Officers also noticed some broken glass on the lip of the trunk. The vehicle was then towed and secured at Bob's Garage. A search warrant for the car was obtained and executed by Kurowski and two other investigators. When the vehicle was raised on a lift, officers noted that one side of the undercarriage appeared to be wiped cleaner than the other. Pursuant to a second search warrant, the car was turned over to the Harrison County Sheriff's Department and taken to a work center for processing.

¶ 10. Kurowski processed the car. For comparison to the tire impressions taken from the crime scene, Kurowski made tread impressions of the white Ford Taurus. The tire tracks at the crime scene matched the type of tire on the white Ford Taurus Galloway was driving when he was arrested. From the interior of the car, Kurowski collected blood located just above the trunk-release latch and blood from the left rear passenger door near the door handle. From different places underneath the car, Kurowski collected several pieces of a stringy tissue-like substance. ***627** Both the blood and the tissue substances were matched to Anderson's DNA.

¶ 11. A search warrant was obtained and executed for Galloway's residence. There, officers seized a pair of Nike shoes, an Atlanta Braves baseball hat, a Burger King shirt with the name tag "Bo," and an empty bottle of New Amsterdam gin. DNA testing revealed the presence of Anderson's DNA on the shoes and on the baseball hat.

¶ 12. During the autopsy, Dr. McGarry collected additional physical and biological evidence from Anderson's body, including swabs of her anal and vaginal cavities. Analysis of the vaginal swab indicated the presence of DNA from Anderson, Galloway, and James Futch. Futch was Anderson's boyfriend, who admitted that he had sexual intercourse with her days prior to her disappearance and death. As part of his examination, Dr. McGarry noted that Anderson had a dilated vagina—indicative of sexual activity—and her anus had stretching injuries including abrasions, rubbing of the lining, and a fresh tear—three quarters of an inch by one quarter of an inch—characteristic of forceful anal penetration. Dr. McGarry concluded that the anal tear had been caused by forceful sexual penetration. He reasoned

that the tear could not have been caused by being run over or crushed by the automobile, because Anderson's rectum was intact—or had not been penetrated by any broken bones—but was naturally in a protected area of the body. Dr. McGarry also explained that the tear was not caused by some foreign object, such as a metal or wooden instrument, because the rubbing and stretching injuries to the rectum were not consistent with jamming, ripping, or irregular injuries that would be associated with penetration by that type of object. The injury to her anus involved much more subtle characteristics.

¶ 13. Days after his arrest, on December 10, 2008, Galloway spoke with Carbine. Galloway admitted that he went by the nickname "Bo." Galloway stated that he had been seeing Anderson since November 2008, and he said that he had sex with Anderson on Thanksgiving Day. Galloway admitted that he spoke with Anderson on December 5 and picked her up that evening in a white Ford Taurus.

¶ 14. Also, as part of the criminal investigation, Carbine obtained cell-phone records for Galloway from November 1, 2008, to December 21, 2008. The records indicated that Galloway and Anderson had been in contact beginning as early as November 11, 2008, and every day in December leading up to her disappearance and murder. They were in contact as many as fourteen times on Friday, December 5, 2008, the last time being 11:12 p.m.

¶ 15. Galloway was indicted and tried for the capital murder of Anderson. A jury found him guilty of capital murder based upon sexual assault. During the penalty phase, the jury heard

testimony from Galloway's friends and family members, who testified that he was a good father and that they would visit him if he was given life imprisonment. The jury also heard testimony from corrections officers explaining that Galloway had not caused any trouble during his prior incarceration. The State introduced a "pen pack" which included Galloway's prior conviction for carjacking and demonstrated that Galloway was under supervision of the Mississippi Department of Corrections (MDOC) when he murdered Anderson. Unpersuaded by Galloway's mitigating proof and finding four aggravating factors, the jury returned a sentence of death.

¶ 16. Galloway now appeals, asserting thirty assignments of error. Additional facts, as necessary, will be related during our discussion of the issues.

***6281. The trial court committed plain and reversible error by permitting the State to present Dr. Paul McGarry's "junk science" testimony in support of its allegation of anal sexual battery.**

2. The court committed reversible error by failing to respond in a reasonable manner to a jury note regarding a critical issue in the case, resulting in a genuine probability that Galloway was convicted for "conduct that is not crime."

3. The trial court committed reversible error by allowing the admission of DNA test results without providing Galloway the opportunity to confront the DNA analyst who did the testing.

4. Trial counsel was ineffective for failing to object to critical aspects of Dr. McGarry's testimony.

5. The trial court reversibly erred by allowing the State to admit Galloway's incomplete first statement but granting the State's motion to suppress his second statement, which would have literally completed the story.

6. The court violated Galloway's rights by excluding penalty-phase evidence that would have rebutted the implication raised by the State's evidence that he was a future danger.

7. The exclusion of penalty-phase testimony about prison conditions violated Galloway's due-process rights and prevented him from presenting relevant mitigating evidence.

8. The prosecution engaged in misconduct that requires reversal.

9. Galloway was severely prejudiced by the State's injection into the trial of nonconfronted hearsay statements.

10. The trial court committed reversible error by overruling the defense's objection to speculative and constitutionally unreliable testimony on an important issue.

11. Unwarranted delay in scheduling the trial in this case violated Galloway's constitutional right to a speedy trial.

12. The trial court erred by denying the defendant's proposed sentencing instructions.

13. The court erred in sustaining the State's objections to defense counsel's closing arguments at the sentencing phase.

14. The trial court committed plain and reversible error by requiring the defense to disclose pretrial "the general nature of the defense."

15. The trial court erred by overruling defense counsel's objection to Bonnie Dubourg's expert qualifications and in allowing her unreliable testimony.

16. The trial court committed reversible error by allowing the admission of DNA statistical probabilities generated by the FBI software program and its CODIS database without providing Mr. Galloway the opportunity to confront the person who created the program and database.

17. Dixie Brimage's highly suggestive and unreliable in-court identification of Galloway violated his constitutional rights and mandates reversal.

18. The court's failure to respond adequately to the jury note regarding the critical issue in the case resulted in a reasonable probability*629 that at least some jurors convicted Galloway for having consensual, vaginal sex with Ms. Anderson—"conduct that is not crime."

19. The evidence was insufficient to sustain the predicate felony of sexual battery and thus insufficient to sustain Galloway's capital murder conviction.

20. The court erred in ruling inadmissible evidence of the victim's prior sexual behavior, including letters found in her school locker.

21. The trial court committed reversible error by denying the defendant's motion to suppress evidence.

22. The trial court violated Galloway's rights in allowing victim-impact evidence in the guilt-innocence phase over defense objection.

23. Galloway was denied the effective assistance of counsel.

24. The evidence introduced by the State in support of the aggravating circumstance of a prior conviction for a crime of violence was constitutionally insufficient.

25. The especially heinous, atrocious, or cruel aggravating circumstance was constitutionally invalid.

26. By requiring prospective jurors to swear prior to voir dire that they would render "true verdicts ... according to the law and evidence" and commit that they will "follow the law," the trial court created a constitutionally intolerable risk that Galloway was unable to vindicate his constitutional right to determine whether the prospective jurors in his case could be fair and impartial and follow the law.

27. The trial court erred by limiting nonelector jurors to "resident freeholders for more than one year."

28. Mississippi's capital punishment scheme is unconstitutional on its face and as applied.

29. Prosecutor's unfettered, standardless, and unreviewable discretion violate[d] equal protection, due process, and the Eighth Amendment.

30. This Court should reverse due to the cumulative harm of the errors.

DISCUSSION

1. The trial court committed plain and reversible error by permitting the State to present Dr. Paul McGarry's "junk science" testimony in support of its allegation of anal sexual battery.

¶ 17. Galloway contends that Dr. McGarry improperly and without any scientific basis told the jury that Anderson's anal injury must have been caused by penile sexual penetration, to the exclusion of all other causes, and that the penetration was resisted, to the exclusion of consensual sex. Galloway further contends that Dr. McGarry was permitted to testify that the tear was evidence of an "anal rape." Gallloway claims that the certainty Dr. McGarry conveyed to the jury was fictional and constituted nothing more than junk science. He submits that, at most, Dr. McGarry properly could have testified only that the injury was consistent with nonconsensual, anal penetration.

[1][2][3] ¶ 18. At the outset, we note that Dr. McGarry testified without objection ***630** from the defense. Further, the defense did not challenge Dr. McGarry's qualifications, nor did it

conduct voir dire prior to his testimony.[1] Thus, Galloway must show that Dr. McGarry's testimony constituted plain error. "Plain error exists where such error affects the defendant's substantive/fundamental rights, even though no objection was made at trial." *Parker v. State,* 30 So.3d 1222, 1227 (Miss.2010). "To determine if plain error has occurred, this Court must determine if the trial court has deviated from a legal rule, whether that error is plain, clear or obvious, and whether the error has prejudiced the outcome of the trial." *Cox v. State,* 793 So.2d 591, 597 (Miss.2001).

¶ 19. According to Dr. McGarry's findings:

> [T]he victim's anus had stretching type of injuries. The rectal opening, the anus, had the kind of injuries that occur with forceful penetration, with stretching, abrasion or rubbing of the lining of the anus and a tear, so that the anus had been stretched to a point where the tissue ripped up inside the anus canal.
>
> The anus has a ring of muscle around it which normally is closed. When it's forced open by penetration, the lining is rubbed away, and she had that rubbing injury around her anus. And then up inside where the full stretching had occurred there was a tear, a fresh tear.

¶ 20. The injury, he stated, would have "caused enough pain that it would be resisted. It would not be ... something that a person would want to have done to them. It would be painful enough to want to stop ... or prevent it." In Dr. McGarry's opinion, the anal tear was caused by

> forceful penetration of the anus that caused injury to the—what is called the sphincter or the muscle ring around the anus that ordinarily is less than a fourth of an inch in diameter, stretched out to more than an inch in diameter by the penetration of the anal canal. It's evidence of anal rape.

¶ 21. Dr. McGarry was asked if it was plausible the anal tear was caused by being crushed beneath the vehicle. He stated that "the roll over injury doesn't affect the anus" because the anus and anal canal are "away from the injuries [caused by] the vehicle. This is in a very protected part of her body between her buttocks, below her pelvis and behind her vagina."

¶ 22. On cross-examination, Dr. McGarry was asked if there was any possibility that bones fractured into the anal area. Dr. McGarry explained that the anal canal is protected by

> the front of the bladder, then there is the back of the bladder, then there's the vagina, then there is the anus behind that. [the pelvic bones] didn't go through to the anus. It would have had to go through the pelvic organs plus it's higher than that. It's above the anus. It's not part of that injury.

¶ 23. Defense counsel then asked Dr. McGarry why the tear could not have been caused by a branch or some other object. Dr McGarry replied:

> [The anal canal] is in a very protected area. You can see by the photographs that this would be out of the reach of something coming into that area. It doesn't have the appearance of a foreign object being jammed into the anus causing ***631** that kind of injury. This is a different kind of injury than a dilating injury, a penetrating

> injury causes a more subtle type of injury. An object like a branch or part of a car coming toward her body, it's not likely to hit in that area. But even if it did, it would not make this kind of injury. It, [a foreign object], causes a tearing, ripping, irregular, not a dilating, distending stretching injury, but a jamming, tearing injury. This was not what she had.

Dr. McGarry reiterated that, in his opinion, the anal tear could have been caused only by sexual penetration.

¶ 24. The defense presented its own forensic expert, Dr. Leroy Riddick. Dr. Riddick testified that the three-quarter-inch-by-one-quarter-inch tear "could be produced by the stretching of the buttocks" as a result of being run over by a car or from having "strained at the stool or having large very difficult bowel movements." Dr. Riddick noted that no semen or DNA was found in the anus.

¶ 25. On rebuttal, Dr. McGarry refuted Dr. Riddick's theory. Dr. McGarry stated:

> The injuries that were present in her inner legs and over the area of her vagina and anus were in no way produced by spreading of the legs. Her injuries were those of a rolling type of crush injury where her legs stayed together, her arms got broken, but her legs did not get broken. The area of her anus and her vagina remained in a very protected area. It did not get injured by being dragged or pulled along a road surface. There was no evidence of that around the edges [of the anus]. I would not expect for those to be absent if the injuries of her anus were due to direct damage to the area.

The reason this is important is to distinguish between injuries coming in a random fashion from injuries to the body versus forceful sexual penetration. This is so important in distinguishing these two that there are photographs and there are demonstrations that we use in teaching our trainees to make that distinction. They are quite different.

These were injuries of the rim of the anus, just the ring of skin and the muscle around the anus, and then a stretching type of injury that causes the anus to become stretched to a point where it actually tore in one place directly in back, midline in back. And it was inside the anus. There were no injuries around the area or over the vagina that indicated that that part of her body was exposed to the outside or to any rough surfaces. These are classic patterns of penetration, forceful, resisted into anus.

¶ 26. Dr. McGarry was asked to describe the difference between injuries associated with a insertion of a foreign object versus those caused by forceful penile penetration.

Foreign object has whatever shape it has. It digs into the area and would cause a totally different type of injury, tears and rips the skin and abrades the outside. It goes in at an angle and an unusual configuration. The injuries that are produced by forceful penetration with a penis dilate the anus. It gets bigger and bigger and bigger with more penetration. The edges of the anal opening are rubbed away with repeated penetration, and finally it gets distended and stretched enough that it tears in one place. It tears because that is the place that tears when the entire anus is stretched. It characteristically tears in the midline in back. And this is exactly what she had. She had the injury of forceful penetration by a penis of a sexual event, not a random injury of the area between her legs.

***632** [4][5][6][7] ¶ 27. The admission of expert testimony is within the discretion of the trial court. In Mississippi, expert testimony is admissible if it is "relevant and reliable." *Ross v. State,* 954 So.2d 968, 996 (Miss.2007). Expert testimony is relevant if it will "assist the trier of fact in understanding or determining a fact at issue." *Id.* Expert testimony is reliable if it is "based on methods and procedures of science," not "unsupported speculation." *Id.* Unless this Court concludes that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand. *Id.* at 995.

¶ 28. Mississippi operates under a modified *Daubert*[2] standard that provides that expert testimony should be admitted pursuant to Rule 702 of the Mississippi Rules of Evidence if it meets a two-pronged inquiry. *Anderson v. State,* 62 So.3d 927, 936–37 (Miss.2011) (citing *Miss. Transp. Comm'n v. McLemore,* 863 So.2d 31, 35 (Miss.2003)). "First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue." *McLemore,* 863 So.2d at 35 (internal citations omitted). "The *Daubert* analysis is a flexible one" that varies from case to case. *Id.* at 38.

[8][9] ¶ 29. "[I]n Mississippi, a forensic pathologist may testify as to what produced [a victim's] injuries ... and what trauma such an injury would produce." *McGowen v. State,*

859 So.2d 320, 335 (Miss.2003) (quoting *Holland v. State,* 705 So.2d 307, 341 (Miss.1997) (*Holland II*)). A forensic pathologist may also testify about "wounds, suffering, and the means of infliction of injury," since it falls within his or her area of expertise. *Holland,* 705 So.2d at 341. Furthermore, a forensic pathologist may testify as to whether a particular instrument or weapon in evidence was consistent with particular injuries to a victim. *McGowen,* 859 So.2d at 336.

¶ 30. Dr. McGarry provided similar testimony in the *Holland* case. In *Holland v. State,* 587 So.2d 848, 874–75 (Miss.1991) (*Holland I*), this Court affirmed Gerald Holland's conviction for capital murder but reversed his death sentence and remanded for a new sentencing hearing because the jury prematurely had deliberated the sentence. As related by the *Holland I* Court, Dr. McGarry provided the following testimony with regard to his autopsy findings:

> The first injuries were of the face, over the sides of the face, over the center of the face, the lips, over the nose, the eyes, they were more swollen, they were the most advanced. About the same time frame, next in line, the injuries of the arms, forearms, wrists, knees, shins. In that same time pattern, the injuries to the genital region, the stretching and scraping and tearing of the vagina and rectal tissues.... These are produced by forceful penetration of the vagina and rectum by a structure that is able to distend and stretch and tear in a symmetrical pattern. In other words, a round—a roughly round structure penetrating and stretching the vagina and stretching the anus and rectum.... In order to produce these injuries all the [sic] around the edge, it has to be something not as firm and unyielding as a metal

> or wooden instrument. It has to be a part of a human body or something with that same texture consistency[—like a] male sex organ.

Id.

¶ 31. In *Holland II,* Holland appealed the death sentence delivered by a resentencing ***633** jury, and he argued, *inter alia,* that the trial court had erred in denying his motion to enjoin Dr. McGarry's testimony, which he contended was rank speculation. *Id.* at 341. We held that this argument was barred procedurally because Holland had failed to raise this objection to Dr. McGarry's testimony during the guilt phase. *Id.* We found, however, that, in spite of the procedural bar, Holland's assignment of error was meritless, as the State "had demonstrated that Dr. McGarry's testimony fell within the bounds of forensic pathology by demonstrating that his expertise dealt with wounds, suffering, and the means of infliction of injury." *Id.*

¶ 32. In *Harrison v. State,* 635 So.2d 894, 898–99 (Miss.1994), Dr. McGarry was permitted to testify to a number of possible causes of death, and he was allowed to opine that the victim was raped. Dr. McGarry's expert opinion was the only evidence of rape the State had against the defendant. *Id.* at 899. Reversible error in *Harrison* occurred because the trial court denied all defense-counsel attempts to invoke the *Box* procedures,[3] to consult with or interview Dr. McGarry to ascertain what opinions he might offer, or to make a proffer of proof. *Id.* at 899–900. This Court also held that due process and fundamental fairness required the trial court to allow the defense access to an independent pathologist because

"no amount of lay testimony could have possibly refuted the 'objective' opinion of the State's expert." *Id.* at 902.

[10] ¶ 33. Here, unlike in *Harrison,* Galloway was allowed his own expert to rebut Dr. McGarry's testimony and opinion. The experts' testimonies and opinions presented factual questions for the jury to determine. We cannot say Dr. McGarry's opinion that the anal tear was evidence of "anal rape" went beyond his scope of expertise or improperly invaded the province of the jury. For these reasons, we find no reversible error in this issue.

2. The trial court committed reversible error by failing to respond in a reasonable manner to a jury note regarding a critical issue in the case, resulting in a genuine probability that Galloway was convicted of "conduct that is not a crime."

[11] ¶ 34. During deliberations, the jury sent out a note which asked, "does murder escalate the sex automatically to sexual battery?" Afterwards, there was some debate in the judge's chambers about the meaning of the jury's question. Defense counsel proposed answering the question, "no, it doesn't." The prosecution, however, expressed concern over placing too much emphasis on one instruction. The trial court ultimately responded to the jury's note in writing, "you have all of the instructions of law that apply to this case. Please review those instructions and continue your deliberations."

¶ 35. Galloway claims this was a deficient response that created a "reasonable probability the jury misapplied the elements of sexual battery." He contends jury instructions S–2A, S–3, S–4A were "imprecise and ambiguous." He argues that instruction S–2A might have confused the jury and caused the jurors to consider the "without consent" language contained therein as an element of murder instead as a modifying element of sexual penetration. We disagree.

***634** [12][13] ¶ 36. The jury is presumed to have followed the trial court's instructions. *Grayson v. State,* 879 So.2d 1008, 1020 (Miss.2004). Rule 3.10 of the Uniform Rules of Circuit and County Court Practice states:

> If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its questions to writing and the court in its discretion, after affording the parties an opportunity to state their objections or assent, may then grant additional written instructions in response to the jury's request.

When reviewing a trial court's response to the jury's inquiry, this Court's inquiry is not whether the trial court was "right or wrong" in its response, but whether the trial court abused its discretion. *Hooten v. State,* 492 So.2d 948, 950 (Miss.1986). Unless the trial court based his decision on an erroneous view of the law, this Court is not authorized to reverse

for an abuse of discretion absent a finding the trial court's decision was "arbitrary and clearly erroneous." *Id.*

¶ 37. In *Girton v. State,* this Court spoke to this type of situation and provided the following:

> One of the most nettlesome problems faced by a circuit judge is an inquiry from the jury when it has retired to reach its verdict. The ensuing colloquy between the judge and jury, or instruction resulting therefrom, or both, have been one of the grounds of many appeals to this Court.
>
> We really cannot lay down hard and fast legal principles to govern the myriad circumstances in which a problem may arise.
>
> The patient and attentive judge has heard the evidence, following which he has diligently endeavored to instruct the jury on every possible relevant aspect of the case to guide this body in its deliberations. Having done so, and while he, the parties, and their counsel await the verdict, the judge is called upon to answer some question a juror has about the case.
>
> What is he to do? In deference we offer some common sense suggestions.
>
> Our first recommendation is that the circuit judge determine whether it is necessary to give any further instruction. *Unless it is necessary to give another instruction for clarity or to cover an omission, it is necessary that no further instruction be given.*
>
> Of course, a circuit judge may realize such a necessity even in the absence of an inquiry from the jury, and under such circumstances quite properly may give the jury additional written instructions. *See* *Wages v. State,* 210 Miss. 187, 49 So.2d 246 (1950).

> The second recommendation requires the trial judge to constantly bear in mind that justice in every trial requires communication and understanding. Unless words are clearly understood, there is only a communication of sound, or worse, a distinct possibility of the receiver of the information placing a different meaning on what is spoken or written than the author meant. This is critical in any communication from the circuit judge to the jury, or between the judge and jury.
>
> Therefore, a judge should make absolutely certain he understands precisely what is meant in any inquiry from the jury. Unless he is quite certain precisely what the jury means in its inquiry, how can the judge know he is responding properly?
>
> [T]he circuit judge may have understood precisely what Juror Goodnight meant. While this Court believes we have some understanding of what was ***635** troubling this juror, we must at the same time concede we are not sure.
>
> If the juror was indeed resolving an inquiry on a certain principle of law as appears from this record, and as the circuit judge apparently understood it, the principle of law had already been thoroughly covered in the two previous instructions.

Girton v. State, 446 So.2d 570, 572–73 (1984).

¶ 38. Here, rather than give a supplemental instruction, the trial court referred the jury to the instructions already provided. Jury Instruction S–2A instructed as to the elements of capital murder based on sexual battery as follows:

The Court instructs the jury that the defendant, LESLIE GALLOWAY, III, has been charged by an indictment with the crime of Capital Murder. If you find from the evidence in this case beyond a reasonable doubt and to the exclusion of every reasonable hypothesis consistent with innocence that:

1. On or about December 6, 2008, in the First Judicial District of Harrison County, Mississippi,

2. The defendant, LESLIE GALLOWAY, III, did willfully, unlawfully and feloniously and with or without design to effect death,

3. Kill and murder Shakeylia Anderson, a human being, without authority of law,

4. While in the commission of the crime and felony of Sexual Battery, as defined by Section 97–3–95, Miss.Code of 1972, as amended, in that:

5. The said, LESLIE GALLOWAY, III, did willfully, purposely, unlawfully and feloniously engage in the act of sexual penetration,

6. Without the consent of said Shakeylia Anderson,

then you shall find the defendant, LESLIE GALLOWAY, III, guilty of Capital Murder.

If the State has failed to prove any one or more of these essential elements beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis consistent with innocence then you shall find the defendant, not guilty of Capital Murder.

Jury Instruction S–3 reads:

> The Court instructs the Jury that in order to sustain the crime of Sexual Battery some penetration must be proven beyond a reasonable doubt, however, it need not be full penetration. Even the slightest penetration is sufficient to prove the crime of Sexual Battery.

And Jury Instruction S–4 states:

> The Court instructs the Jury that "sexual penetration" is any penetration of the anal opening of another person's body by any object or part of a person's body.

¶ 39. We do not find any of the foregoing instructions imprecise or ambiguous. The instructions, together, fully and accurately informed the jury of state law, and the trial court did not err in directing the jury to review these instructions. This issue is without merit.

3. The trial court committed reversible error by allowing the admission of DNA test results without providing Galloway the opportunity to confront the DNA analyst who did the testing.

¶ 40. At trial, Galloway moved to exclude the testimony of Bonnie Dubourg, a forensic DNA analyst for the Jefferson Parish (Louisiana) Sheriff's Department, whose lab conducted DNA testing on the blood and tissue samples obtained by the case investigators. Galloway objected on ***636** the basis that Julie Golden, a DNA analyst at the same lab, conducted the DNA testing procedures, not Dubourg. In denying the motion, the trial court stated,

> It's the court[']s understanding that a lab technician who does the testing does not have to testify in person, if the person who analyzed the tests is present and testifies. Miss Dubourg did testify that she analyzed the test results, and additionally she also testified that her superior also reviewed the test results and approved them. So I think under Mississippi law the actual lab technician who does the test is not required to come to court to testify. So the motion will be denied.

¶ 41. We find no error in the trial court's decision.

[14] ¶ 42. The Sixth Amendment to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution guarantee a defendant in any criminal prosecution the right to confront and cross-examine the witnesses against him or her. U.S. Const. amend. VI (applicable to the states through U.S. Const. amend. XIV); Miss. Const. art. 3, § 26 (1890). The United States Supreme Court has held that, under the Sixth Amendment Confrontation Clause, testimonial statements of witnesses absent from trial are admissible only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Wash.*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "Forensic laboratory reports created specifically to serve as evidence against the accused at trial are among the 'core class of testimonial statements' governed by the Confrontation Clause." *Grim v. State,* 102 So.3d 1073, 1078 (Miss.2012) (quoting *Melendez–Diaz v. Mass.,* 557 U.S. 305, 310, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)).

¶ 43. This Court recently addressed a similar issue in *Grim v. State,* 102 So.3d 1073 (Miss.2012), a certiorari case where we affirmed the Mississippi Court of Appeals' finding that a laboratory technician who actually performed the drug analysis need not testify as long as someone with adequate involvement with the testing process testifies. In *Grim,* the defendant, Frederick Grim, was convicted of selling cocaine. At Grim's trial, the State introduced into evidence a crime lab report that determined the substance Grim had sold was cocaine. *Grim,* 102 So.3d at 1077. The lab report was admitted through the testimony of Eric Frazure, a laboratory supervisor, who neither observed nor participated in the testing of the substance, but had reviewed the report for accuracy. *Id.* Frazure testified that he had performed "procedural checks" by reviewing all of the data submitted by the primary analyst to ensure that the data supported the conclusions contained in the report. *Id.* at 1081. Frazure had reached his own conclusion that the substance tested was cocaine, and he signed the report as the case "technical reviewer." *Id.*

¶ 44. In analyzing the issue, *Grim* reiterated that "when the testifying witness is a court-accepted expert in the relevant field who participated in the analysis *in some capacity, such as by performing procedural checks,* then the testifying witness's testimony does not violate a defendant's Sixth Amendment rights." *Id.* at 1079 (quoting *McGowen,* 859 So.2d at 339).*Grim* explained that, in determining whether such a witness satisfies the defendant's right to confrontation, we apply a two-part test:

> First, we ask whether the witness has "intimate knowledge" of the particular report, even if the witness was not the primary analyst or did not perform the

analysis firsthand. *637 *McGowen,* 859 So.2d at 340. Second, we ask whether the witness was "actively involved in the production" of the report at issue. *Id.* We require a witness to be knowledgeable about both the underlying analysis and the report itself to satisfy the protections of the Confrontation Clause.

Grim, at 102 So.3d at 1079 (quoting *Conners v. State,* 92 So.3d 676 (Miss.2012) (Carlson, P.J., specially concurring, joined by Waller, C.J., Dickinson, P.J., Randolph, Lamar, Kitchens, Chandler, and Pierce, JJ.)).

[15] ¶ 45. Galloway argues, however, that in this instance, Dubourg merely provided surrogate testimony of the kind found unacceptable for purposes of the Confrontation Clause by the United States Supreme Court in *Bullcoming v. N.M.,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011). We disagree.

¶ 46. In *Bullcoming,* the Supreme Court addressed whether "the Confrontation Clause permit[s] the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification." *Id.* at 2710. There, the evidence introduced was "a forensic laboratory report certifying that [Donald] Bullcoming's blood-alcohol concentration was well above the threshold for aggravated DWI." *Id.* at 2709. The laboratory analyst (Razatos) who testified about the report "was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id.* The Supreme Court held that, when the prosecution

elected to introduce the blood-alcohol analyst's (Caylor's) certification, that analyst became a witness Bullcoming had a right to confront. *Id.* at 2716. The Court reasoned: "surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 2715.

¶ 47. Galloway contends that, as in *Bullcoming,* Dubourg was not a sufficient surrogate for Golden. He argues that, because the State did not produce Golden, defense counsel could not question her about her critical tasks of initial presumptive testing, DNA extraction (including the differential extraction of the DNA on a vaginal swab), DNA quantitation, polymerase chain reaction (PCR), the separation and detection of PCR-produced STR (short tandem repeat) alleles and the production of electropherograms through electrophoresis. Galloway also contends that only Golden could have been examined concerning possible contamination of the samples and her vigilance in attempting to prevent it.

¶ 48. Galloway's contentions are without merit. Distinguishable from *Bullcoming,* the record here illustrates that Dubourg, as the technical reviewer assigned to the case, was familiar with each step of the complex testing process conducted by Golden, and Dubourg performed her own analysis of the data. *Cf. id.* at 2722 (Sotomayor, J., concurring) (specifying that an inadmissible report in the case had not been admitted through "a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the

scientific test at issue"). Dubourg personally analyzed the data generated by each test conducted by Golden and signed the report. Given Dubourg's knowledge about the underlying testing process and the report itself, any questions regarding the accuracy ***638** of the report due to possible contamination of the DNA samples could have been asked of Dubourg.[4] *See, e.g.,* *Williams v. Illinois,* —— U.S. ——, 132 S.Ct. 2221, 2244, 183 L.Ed.2d 89 (2012) (plurality opinion) ("knowledge that defects in a DNA profile may often be detected from the profile itself").

¶ 49. Consistent with our holding in *Grim,* we find that no Confrontation Clause violation occurred in this case. This issue is without merit.

4. Trial counsel was ineffective for failing to object to critical aspects of Dr. McGarry's testimony.

¶ 50. Galloway claims his trial counsel was constitutionally ineffective for failing to object to Dr. McGarry's highly prejudicial testimony (1) that the anal tear must have been caused by a human penis; (2) that the tear would have required such force as to be resisted; and (3) that stated a legal conclusion beyond his specialized knowledge.

[16][17][18][19][20] ¶ 51. In evaluating an ineffective-assistance charge, this Court applies the two-pronged test set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064–65, 80 L.Ed.2d 674, 693–95 (1984), and adopted by this Court in *Stringer v. State,* 454 So.2d 468, 476–77 (Miss.1984). Galloway must show: (1) that his counsel's performance was deficient, and (2) that this alleged deficiency prejudiced his defense. *Lindsay v. State,*

720 So.2d 182, 184 (Miss.1998) (citing *Strickland,* 466 U.S. at 687, 104 S.Ct. 2052). The burden of proving both prongs lies with Galloway, who is faced with a rebuttable presumption that trial counsel is competent and his performance was not deficient. *Chase v. State,* 699 So.2d 521, 526 (Miss.1997). Additionally, Galloway must show that there is a reasonable probability that, but for the errors of his counsel, the judgment would have been different. *Fisher v. State,* 532 So.2d 992, 997 (Miss.1988). Finally, this Court must determine whether trial counsel's performance was both deficient and prejudicial to the defense based upon the "totality of the circumstances." *Carr v. State,* 873 So.2d 991, 1003 (Miss.2004) (citing *Carney v. State,* 525 So.2d 776, 780 (Miss.1988)). If this Court finds that an ineffective-assistance charge chiefly fails under the prejudicial prong, then we may proceed directly to this part of the test. *See Strickland,* 466 U.S. at 697, 104 S.Ct. 2052 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

[21][22] ¶ 52. We note that ineffective-assistance-of-counsel claims ordinarily are more appropriately brought during post-conviction proceedings, as this Court on direct appeal is limited to the trial-court record in its review of the claim. *Wilcher v. State,* 863 So.2d 776, 825 (Miss.2003). If we find that the record before us contains insufficient information to address the claim, the appropriate procedure is to deny relief, preserving the defendant's right to argue the issue through a petition for post-conviction relief. *Read v. State,* 430 So.2d 832, 837 (Miss.1983). This Court, however, may address an ineffectiveness claim on

direct appeal if the presented issues are based on facts fully apparent from the record. M.R.A.P. 22.

***639**¶ 53. Here, we proceed directly to the prejudice prong. Having already concluded that no reversible error was present in Dr. McGarry's testimony, we find that Galloway's ineffective-assistance-of-counsel claim with regard to Dr. McGarry's testimony fails. Accordingly, this issue is without merit.

5. The trial court reversibly erred by allowing the State to admit Galloway's incomplete first statement but granting the State's motion to suppress his second statement, which would have literally completed the story.

¶ 54. After his arrest, Galloway gave investigators two statements. The first statement was given on December 10, 2008. The second statement was given eight days later, on December 18. In his first statement, Galloway said he previously had had sex with Anderson and that he had picked her up in his mother's car on December 5, 2008. Thereafter, he invoked his right to counsel and the interrogation ended. In his second statement, which Galloway initiated, Galloway stated that he and Anderson had gone to a park on the night of the murder, where they had consensual sex. At the park, they were overpowered by two men with a gun, who raped and killed Anderson by setting her afire and running her over with the car.

¶ 55. The State introduced the first statement at trial during Carbine's testimony. The State, however, filed a pretrial motion to exclude the second statement on the basis that it

was self-serving. Galloway contends that the trial court granted the motion and committed reversible error by excluding the second statement.

¶ 56. The record does not clearly indicate that to be the case. It shows the following pretrial exchange, in pertinent parts, regarding these two statements:

> PROSECUTOR: Yes, sir, your Honor. The basic motion is to exclude a self-serving statement. There are actually two statements obtained in this case, one was on ... December 10, 2008 and [another was given December 18, 2008]. We're moving to exclude the statement and any reference to the statement made on [December 18], because it's self-serving.
>
> THE COURT: You don't intend to use any portion of the statement?
>
> PROSECUTOR: We do not at this time, your Honor. And again, I'm specifically referring to the December 18 [statement.]
>
> THE COURT: The 18th statement.
>
> PROSECUTOR: Yes, sir. And as a part of our motion we would ask that any reference to that statement, not just the statement alone, but whether it be the defendant's demeanor or any reference to the defendant's statement, we would ask that it be excluded.
>
> THE COURT: All right. Mr. Rishel or Mr. Stewart, any response?

DEFENSE: Judge, if I could just respond briefly on that matter. You ruled on this matter when we tried to suppress it back-I'm not sure, but it was several months ago. Now Mr. Huffman is talking about two different statements here, and in my understanding based on their motion that they want to exclude the second statement, which is made on December the 18th.

THE COURT: Which one did I suppress?

DEFENSE: You didn't suppress either one of them. We moved to suppress them, judge. You ruled against us with reference to that.

***640** THE COURT: And now the [S]tate is moving to basically suppress one of them.

DEFENSE: Yes, sir. And that's the trouble I have right now. We're not objecting to that right now, [J]udge, but I still have concerns about the first statement if they're trying to—if the [S]tate is going to try to put in the first statement, I guess that's the [S]tate's—

PROSECUTOR: Uh-huh.

DEFENSE: Unless they open the door for some reason, [J]udge.

THE COURT: I understand. If they open the door you can certainly use it.

DEFENSE: Certainly. Judge, I know we had the same motion recently, and I anticipate what your ruling is going to be and we have no objection to it at this point.

THE COURT: All right. The motion will be granted. I will see y'all in the morning at nine.

PROSECUTOR: And, your Honor, if I can briefly, ... I know it's long, but as part of your ruling that would include any reference to that statement whether it be did you make a statement, did you speak to law enforcement.

THE COURT: No reference to the December 18 statement.

¶ 57. Based on this Court's reading of the trial court's ruling, Galloway was not expressly prohibited from introducing the December 18 statement. Rather, the trial court prohibited Galloway from referring to the second statement unless the State opened the door by introducing the first statement. When the State did introduce the first statement, Galloway made no attempt to introduce the second statement. Accordingly, this issue is without merit.

6. The court violated Galloway's rights by excluding penalty-phase evidence that would have rebutted the implication raised by the State's evidence that he was a future danger.

¶ 58. Relying on *Skipper v. South Carolina,* 476 U.S. 1, 5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, 7 (1986), Galloway argues that the State implicitly impressed upon the jurors' minds that he was a future danger; therefore, he had the due-process right to introduce evidence (via Dr. Beverly Smallwood) regarding how he might behave in the future. The implications contended by Galloway, for the first time on appeal, that unfairly conveyed to the jury that he posed a future danger are: evidence that he previously had been convicted of carjacking and was under post-release supervision at the time of the crime; Dr. McGarry's comment on

direct examination that the massive surface burn sustained by Anderson "would be a million times worse than touching a hot flame"; the four statutory aggravating factors alleged by the State; the fact that the State questioned Deputy Catchings about whether she had seen Galloway "outside of the jail"; and the State's commending Brimage for "bravely" identifying Galloway, which suggested that she had reason to fear Galloway.

¶ 59. The State responds that it made no express or implied attempt at trial to place Galloway's future propensity for dangerousness in issue. The State contends that Galloway attempts to demonstrate the State's purported implication(s) by pointing to inconsequential snippets of the trial, in which the defense made no contemporaneous objection.

¶ 60. We agree with the State. Galloway's contentions on this assignment of error are simply after-the-fact assertions, barred from consideration on appeal because ***641** they were not properly raised and preserved in the trial court. *Hemmingway v. State,* 483 So.2d 1335, 1337 (Miss.1986). The issue of whether Galloway posed a future danger, however, was a matter at trial, and we will address it accordingly.

¶ 61. Prior to trial, the State filed a motion in limine seeking to prohibit Galloway from introducing evidence concerning his "ability to adapt to prison life in the future and his propensity (or lack thereof) to commit violent acts in the future." The State's motion contended that such evidence "is inadmissible because it is purely speculative and irrelevant to the charges in this case ... [and] is not being offered through the testimony of a qualified, accepted expert in the field of predicting future behavior."

¶ 62. Prior to the sentencing phase, the trial court heard arguments from both sides (none of which involved the "implications" complained of above) concerning the State's motion. The defense argued that Galloway had the right to present mitigating evidence to the jury showing that, if Galloway were spared the death penalty and sentenced to life in prison without parole, his life would be a suffering existence and not that of someone sitting in an air-conditioned room watching ESPN all day. The record indicates that Galloway sought to illustrate the true conditions of prison life through the testimony of Donald Cabana, former superintendent of the Mississippi State Prison at Parchman. The record also shows that the defense had hoped to have Dr. Smallwood, a psychologist, testify as a mitigating witness. But, as Galloway's defense told the trial court, Dr. Smallwood was unavailable to testify; thus, the defense did not intend to call her as a witness-contrary to Galloway's contention on appeal.

¶ 63. Ultimately, the trial court made the following ruling: "I'm not going to prevent [Galloway] from putting on any kind of testimony about his behavior while incarcerated in the past," but the defense witnesses "will be prohibited from speculating as to how he might behave in the future."

¶ 64. We find no error in the trial court's ruling. This Court has rejected similar arguments in *Wilcher v. State,* 697 So.2d 1123 (Miss.1997), and *Hansen v. State,* 592 So.2d 114, 147 (Miss.1991), and we do so again today.

¶ 65. In *Hansen,* Tracy Hansen argued that the trial court erred in refusing to allow opinion testimony of a prison counselor that he would adapt well to prison life in the future. *Hansen,* 592 So.2d at 147. The counselor had become acquainted with Hansen while Hansen was incarcerated in the Florida correctional system. *Id.* Hansen relied on *Skipper,* 476 U.S. at 5, 106 S.Ct. 1669, wherein the United States Supreme Court wrote:

> [E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.

Hansen, 592 So.2d at 147. The *Hansen* Court noted this Court's long acceptance of this rule, and stated:

> All of this is but an elaboration upon the familiar lesson of *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973, 989–990 (1978): "the Eighth and Fourteenth Amendments require that the sentencer ... *not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.*" The Constitution demands individualized sentencing and prohibits a court from excluding any ***642** relevant mitigating evidence as a matter of law. *Eddings v. Oklahoma,* 455 U.S. 104, 113–14, 102 S.Ct. 869, 876–77, 71 L.Ed.2d 1, 10–11 (1982).

Hansen, 592 So.2d at 147 (emphasis added). *Hansen* held, however, that speculative opinion testimony of how a defendant may adapt to prison life in the future is not admissible unless the expert is qualified and accepted in the field of predicting future behavior. *Id.* Because Hansen had failed to show the counselor was qualified as such an expert, we affirmed the trial court's decision not to allow the counselor to opine how Hansen would

adapt to prison life in the future. *See* *id.* (noting the trial court did allow the counselor "substantial liberties in testifying about Hansen's past").

¶ 66. In *Wilcher,* Bobby Wilcher argued that the trial court erred in excluding both Cabana's testimony and photographs of Parchman to demonstrate the harshness of a life sentence. *Wilcher,* 697 So.2d at 1133. The *Wilcher* Court held that the trial court properly excluded this evidence because "[t]he harshness of a life sentence in Parchman in no way relate[d] to Wilcher's character, his record, or the circumstances of the crime." *Id.* (citing *Hansen,* 592 So.2d at 147; *Minnick v. State,* 551 So.2d 77, 96 (Miss.1989), *reversed on other grounds by* *Minnick v. Mississippi,* 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990); *Cole v. State,* 525 So.2d 365, 371 (Miss.1987); *Lockett v. State,* 517 So.2d 1317, 1334 (Miss.1987)).

[23][24] ¶ 67. Here, no proffer was made to the trial court as to what Cabana's testimony would entail, and no evidence was presented that he is an expert in the field of predicting future behavior. We can surmise, though, based on the defense's argument to the trial court, that the defense intended Cabana to testify about generalities of prison life. Consistent with our holding in *Wilcher,* the trial court properly excluded such testimony because it was irrelevant to Galloway's character, his record, or the circumstances of his crime. As the State points out, the trial court permitted the testimony of two corrections officers who testified that Galloway had not caused any problems during his prior incarceration. This was relevant mitigating evidence that bore on Galloway's character and prior record. The jury

could infer from such evidence, if it chose, that Galloway had the ability "to make a well-behaved and peaceful adjustment to life in prison" and would not pose any danger in the future. *Skipper,* 476 U.S. at 6–8, 106 S.Ct. 1669.

¶ 68. We find no merit in this issue.

7. The exclusion of penalty-phase testimony about prison conditions violated Galloway's due-process rights and prevented him from presenting relevant mitigating evidence.

¶ 69. This issue is without merit for reasons discussed in the preceding issue.

8. The prosecution engaged in misconduct that requires reversal.

¶ 70. Galloway argues that his conviction and death sentence were based on significant and pervasive prosecutorial misconduct. He contends the prosecution (1) presented and relied heavily upon Dr. McGarry's scientifically unreliable and, therefore, false and highly misleading testimony; (2) misstated the evidence; (3) vouched for a witness; (4) inflamed the passions and prejudices of the jurors; (5) deflected the jury's attention from the issues it had to decide; and (6) misstated the law. The State argues that Galloway made no contemporaneous objection to preserve these issues for appeal; therefore, they are barred from review. ***643***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). Procedural bar notwithstanding, we will address the merits of this issue.

(1) *Dr. McGarry's testimony*

¶ 71. Galloway contends that the prosecution violated the Constitution by presenting Dr. McGarry's scientifically invalid and therefore false and highly misleading testimony to the jury and relying upon it in closing. This contention already has been addressed. Dr. McGarry's testimony presented no reversible error, and the State was permitted to rely on it during its summation of the evidence.

[25][26][27][28][29][30] ¶ 72. The standard of review which this Court must apply to lawyer misconduct during opening statements or 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) (citing *Ormond v. State,* 599 So.2d 951, 961 (Miss.1992)). Attorneys are afforded wide latitude in arguing their cases to the jury, but they are not allowed to employ tactics which are "inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury." *Sheppard,* 777 So.2d at 661 (citing *Hiter v. State,* 660 So.2d 961, 966 (Miss.1995)). The purpose of a closing argument is to fairly sum up the evidence. *Rogers v. State,* 796 So.2d 1022, 1027 (Miss.2001). The State should convey those facts on the basis of which it asserts a verdict of guilty would be proper. *Clemons v. State,* 320 So.2d 368, 370 (Miss.1975). "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." *Bell v. State,* 725 So.2d 836, 851 (Miss.1998). "Counsel 'cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence.' " *Sheppard,* 777 So.2d at 661 (quoting *Nelms & Blum Co. v. Fink,* 159 Miss. 372, 131 So. 817, 821 (1930)).

(2) *Misstating the evidence*

[31][32] ¶ 73. Galloway contends that, during closing arguments, the prosecution misstated the testimony of Dr. Ronald Acton, the defense's DNA expert, by proclaiming that Dr. Acton agreed with certain findings of the State's DNA expert, Dubourg. First, he claims the State misrepresented that Dr. Acton had "agreed with every [sic] all but two different exhibits that were presented by the crime lab beyond a reasonable doubt that this defendant was responsible for the murder of ... Anderson." Second, the prosecution twice misrepresented that Dr. Acton had agreed that the tissue found under the Ford Taurus was that of the victim. Galloway also contends the prosecution misstated Dubourg's testimony, as she testified that her lab had obtained samples from shoes found at Galloway's mother's house with "possible blood like" substances and a hat with a "soiled" bill. Yet, the prosecution claimed that the shoes and the hat had Anderson's blood on them.

¶ 74. As the State points out, Dr. Acton essentially acknowledged during cross-examination that the DNA sample taken from the left rear passenger seat was consistent with Anderson's DNA, testifying that "you can say there is no evidence that she is excluded from having contributed." Dr. Acton also acknowledged that the DNA sample found underneath the Ford

***644** Taurus and the sample taken from the car's exhaust both were consistent with Anderson's DNA. The State maintains that Dr. Acton never specifically refuted the State's DNA proof; rather, Dr. Acton chose to take issue with the testing lab's statement of findings and statistical conclusion.

¶ 75. As to the prosecutor's remark regarding blood on the shoes and hat, no objection was entered by the defense. Procedural bar notwithstanding, we find any error here was harmless, given the presence of the victim's DNA on the items.

(3), (4), and (5) *Witness vouching; inflaming the passions and prejudices of the jurors; and deflecting the jury's attention away from the issues*

[33] ¶ 76. Galloway claims the State improperly vouched for Brimage and went outside the record when it stated, "[Brimage] bravely told us who [Anderson] was talking to by the car, the defendant, Leslie Galloway." Galloway also contends that this comment improperly inflamed the jurors' passions and prejudices by suggesting that Brimage had reason to fear Galloway. Galloway further claims that the prosecution inflamed the jurors' passions and prejudices, which also deflected their attention from the issue they were to decide when the prosecution repeatedly asked Galloway's mitigation witnesses whether they believed that the punishment should fit the crime.

¶ 77. The State responds that Galloway has cherry-picked the word "bravely" and is attempting to elevate it to an unconstitutional term of art that inflames passion and prejudice. We find that, whatever the prosecution meant by use of the word, no serious contention can be made that it rendered Galloway's trial fundamentally unfair.

[34] ¶ 78. As to the point of contention with regard to asking whether punishment should fit the crime, we see no problem with such a question. The prosecution's repeated query should have served to focus the jury on the appropriate punishment for Galloway's crime.

¶ 79. These arguments are without merit.

(6) *Misstating the law*

¶ 80. Galloway argues that, during the penalty-phase summation, the prosecution misstated the law by telling the jury that a carjacking conviction "clearly and by law is a conviction involving the use of threat or violence to another person" and that the jury should find the aggravating circumstances that Galloway previously had been convicted of a felony involving the use of threat or violence to another person. He contends that carjacking is not a per se crime of violence, and so carjacking is not per se a conviction meeting the criteria of an aggravating circumstance.

¶ 81. The State submitted evidence during the penalty phase that Galloway previously had been convicted of the crime of carjacking under Mississippi Code Section 97–3–117(1). That Section states:

> Whoever shall knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempting to do so, or by any other means shall take a motor vehicle from another person's immediate actual possession shall be guilty of carjacking.

Miss.Code Ann. § 97–3–117(1) (Rev.2006).

[35] ¶ 82. For a prior conviction to qualify as a felony involving the use or threat of violence to a person under Section 99–19–105(b), the conviction must have been made under a statute which has as an element the use or threat of violence ***645** against the person or, by necessity, must involve conduct that is inherently violent or presents a serious potential risk of physical violence to another. *Holland,* 587 So.2d at 874. In *Holland,* the aggravating prior conviction had occurred in another state. *Id.* Our holding there, of course, also applies to a Mississippi conviction.

[36] ¶ 83. Here, based on the elements set forth in Section 97–3–117(1), we find that the act of carjacking per se involves conduct that presents a serious potential risk of physical violence to another. Therefore, for purposes of Section 99–19–105(b), any conviction made under Section 97–3–117(1) constitutes a felony involving the use or threat of violence to the person. Accordingly, this argument is without merit.

9. Galloway was severely prejudiced by the State's injection into the trial of nonconfronted hearsay statements.

¶ 84. Galloway claims the trial court violated his Confrontation Clause rights by allowing prejudicial testimonial hearsay statements during the testimony of Investigator Carbine, Lieutenant McClenic, and Dubourg.

A. Carbine

¶ 85. Carbine testified that she found a pair of shoes, a hat, and a New Amsterdam gin bottle in a space she identified as Galloway's room in his mother's house. During cross-examination, Carbine stated that she knew the area belonged to Galloway because, when executing the search warrant on the house, his mother pointed out "his living space, the space he occupied while he was there." Carbine described the space as "a bathroom, with a majority—or all of Galloway's items belonging to him, clothes hung up, a toilet, it was just an old bathroom." When asked how she knew items in the room belonged to Galloway, Carbine said, "Because his mother explained to us that those were his things." On redirect, when asked again how she knew the space belonged to Galloway, Carbine responded, "His mom pointed it out to us." Galloway entered an objection at that point on hearsay, which was overruled. Also, Carbine identified cell-phone numbers during her testimony as belonging to Anderson and Galloway. The defense did not object to this testimony.

¶ 86. Galloway claims on appeal that Carbine's testimony merely reiterated the mother's out-of-court statements, which were highly prejudicial. Galloway also contends that Carbine's identification of the phone numbers contained in the phone records obtained by

investigators was prejudicial because: (1) Carbine had no personal knowledge that the phone numbers contained therein belonged to him and Anderson, and (2) the State sought to use the phone records to prove that, since his calls to Anderson abruptly stopped the night she disappeared, this demonstrated consciousness of guilt.

[37][38] ¶ 87. We find that the defense opened the door to what Galloway's mother told Carbine when defense counsel asked Carbine on cross-examination how she knew the room, and the items contained therein, belonged to Galloway. Thus, Galloway cannot now charge error on appeal. "A defendant cannot complain on appeal of alleged errors invited or induced by himself." *Caston v. State,* 823 So.2d 473, 502 (Miss.2002) (quoting *Singleton v. State,* 518 So.2d 653, 655 (Miss.1988)); *see also* *United States v. Jimenez,* 509 F.3d 682, 691 (5th Cir.2007) (rejecting Confrontation Clause challenge to admission of testimony where defense counsel opened the door by asking the witness on cross-examination the basis for his suspicions about defendant). Moreover, statements ***646** admitted to explain an officer's course of investigation are generally excepted from the rule against hearsay. *See* *Rubenstein v. State,* 941 So.2d 735, 764 (Miss.2006) (citing Rule 803(24) of the Mississippi Rules of Evidence).

[39] ¶ 88. As to Galloway's argument with regard to the phone records, they were admitted, without objection, under the business-record exception of Rule 803(6) of the Mississippi Rules of Evidence, "which by their nature, are non-testimonial for purposes of the Sixth Amendment." *United States v. Green,* 396 Fed.Appx. 573, 575 (11th Cir.2010). Further, no

objection was made to Carbine's statements regarding the phone records. Instead, Galloway chose to question Carbine about the fact that the phone number used by Galloway was actually in Lashondra Taylor's name and that Anderson also had received a number of phone calls from a phone number used by Triplett.

B. McClenic

[40] ¶ 89. McClenic testified that Galloway was driving his mother's white Ford Taurus when he left her house on December 9, 2008, shortly before law-enforcement personnel arrested him. On cross-examination, McClenic admitted that he was reporting what his deputies had told him. Galloway argues for the first time on appeal that this was hearsay testimony, which was admitted for its truth and damaged his defense. Galloway contends that he conceded his mother's Taurus was the murder weapon, but he questioned who drove the vehicle. Specifically, the defense maintained that Triplett may have been the person Brimage saw in the Taurus the night Anderson disappeared.

¶ 90. Again, we find that defense counsel invited such information and did so in order to show to the jury that McClenic did not actually ever see Galloway driving the Taurus.

C. Dubourg

[41] ¶ 91. Galloway argues that Dubourg testified that her lab received and tested blood samples obtained from the interior of the Taurus for DNA testing, despite there not being

any evidence that she had conducted any serological testing herself to confirm that the substance was blood. He contends that the prosecution exploited her hearsay statements as truth during closing arguments, claiming that the substance found in the interior of the car contained Galloway's blood and Anderson's blood. Galloway, however, did not object to any of the complained-of testimony or summation. Procedural bar notwithstanding, we find that any error here was harmless, given that the substances collected and tested revealed the presence of both Anderson's and Galloway's respective DNA profiles.

¶ 92. This issue is without merit.

10. The trial court committed reversible error by overruling the defense's objection to speculative and constitutionally unreliable testimony on an important issue.

[42] ¶ 93. Galloway submits that one of his theories was that the DNA found in the Taurus may have gotten on the vehicle when it was left unattended overnight at Bob's Garage in Jackson County after Galloway's arrest. McClenic testified on cross examination that he did not know whether the owner of the garage or "anyone else" went in and out while the car was stored there. On redirect examination, McClenic blurted out: "The only other person who would have gone in the building is [sic] if he got any more wrecker calls that night." When defense counsel objected to speculation, McClenic improperly insisted, "Well, I know

it to be a fact." The ***647** trial court overruled the objection. Galloway contends that, in so ruling, the trial court committed reversible error.

¶ 94. The State responds that the trial court did not err by overruling Galloway's objection based on speculation because the testimony was supported by the facts. To place the statement in context, the State has reproduced the relevant portions of McClenic's testimony beginning with Galloway's cross-examination of the witness.

Q. All right. Now the car was towed to Bob's Garage?

A. Yes, sir.

Q. And you followed it all the way to Bob's Garage?

A. Yes, sir.

Q. Okay. When you got to Bob's Garage you said that the car was secured?

A. Yes, sir.

Q. I take it they pulled it inside a building?

A. Yes, sir.

Q. This building have garage doors on it?

A. Yes, sir.

....

A. This building does not have any bays.

Q. It didn't?

A. No.

Q. Okay. And they had a guard dog there?

A. Yes, sir.

Q. Now, does this guard dog belong to the owner?

A. Yes, sir.

Q. So the owner could control this dog?

A. Yes, sir.

Q. So the owner could go in and out of this building all he wanted, and the dog wouldn't do anything to him, would it?

A. No, sir.

Q. Okay. Did the owner go in and out of the building while the car was there?

A. Don't know, sir.

Q. Okay. Did anyone else go in and out of the building while the car was there?

A. I don't know, sir.

Q. Did you post a police officer or someone there 24 hours a day to watch the car?

A. No, sir.

Q. Okay. So someone else could have gotten into the car, drove the car, touched the car, spilled something in the car, done anything to this car during any period of this time because there wasn't a police officer there watching the car, was there?

A. I explained to the owner, which is very good-we only use-when we have a car that is involved in a case of this magnitude, we only use certain wreckers that we know is dependable, reliable[,] that has good secured buildings, no employees that would interfere in any way. We don't use a rotation. We only use a wrecker company that we know is able to secure a vehicle that is used in a homicide. We just don't use anybody.

....

And I know, you know, if somebody had broke in the building to touch or mess with this car, the alarm would have went off and they would have had to kill the German Shepherd, and the German Shepherd is still alive, so I know they didn't go in there.

Q. But the bottom line is that you cannot sit here today under oath and say unequivocally that no one touched that ***648** garage or had anything to do with that garage before you turned it over to the Harrison County Sheriff's department, can you?

A. No, sir.

¶ 95. The following is from the State's redirect:

Q. You said an alarm would have gone off at Bob's?

A. Yes, sir.

Q. There is an alarm at the building?

A. Yes, sir.

Q. Did y'all report back to Bob's for broken windows or anything that night?

A. No, sir, not that night. I wasn't there that night.

Q. An alarm go off that night?

A. The only other person who would have gone in the building is [sic] if he got any more wrecker calls that night.

MR. RISHEL [defense counsel]: Your Honor, we object to the speculation.

THE WITNESS: Well, I know it to be a fact.

THE COURT: Overruled.

¶ 96. We find that the trial court did not abuse its discretion in overruling Galloway's objection. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." M.R.E. 602. As the State points out, McClenic testified only to his belief that no person other than the owner of Bob's Wrecker Service would have entered the garage while the Ford Taurus was stored there. McClenic's belief was based on McClenic's past personal experience and personal observations with the operation of Bob's Wrecker Service, as established by questions posed by Galloway's defense attorney on cross-examination. The jury heard McClenic also admit that he could not definitively testify that no one touched the vehicle before it was turned over to authorities.

¶ 97. This issue is without merit.

11. Unwarranted delay in scheduling the trial in this case violated Galloway's constitutional right to a speedy trial.

[43] ¶ 98. Galloway argues that his constitutional right to a speedy trial was violated because 424 days passed between his arrest on December 10, 2008, and the date of his first trial setting, February 8, 2010. Galloway notes in his brief that trial actually began on September 21, 2010. Since the February 8, 2010, trial setting was continued at the request of defense counsel, Galloway does not include the time frame after February 8 in his analysis.

[44] ¶ 99. Both the United States Constitution and the Mississippi Constitution provide an accused the right to a speedy and public trial. U.S. Const. amend. VI; Miss. Const. art. 3, § 26. Four factors guide this Court when determining whether an accused's right to speedy trial has been violated: (1) length of delay, (2) reason for delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the defense suffered any prejudice from the delay. *Johnson v. State,* 68 So.3d 1239, 1241 (Miss.2011) (citing *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). The *Barker* factors are to be considered along with other relevant circumstances. *Id.* at 1242.

¶ 100. According to the record, Galloway was arrested on December 10, 2008. A preliminary hearing was conducted on January 29, 2009. An indictment was returned on June 8, 2009.

Galloway filed a motion to dismiss on July 10, 2009, asserting his speedy trial rights. Galloway was ***649** formally arraigned on July 23, 2009, at which point trial was set for February 8, 2009. Galloway thereafter filed another motion on July 29, 2009, in which he reasserted his right to a speedy trial. The motion also included a request for a psychiatric evaluation, an omnibus hearing, authorization to obtain experts, and other requests. On July 29, 2009, the trial court issued an order granting Galloway funds for a DNA expert to review the findings of the State's DNA expert. On August 31, 2009, an agreed scheduling order was entered, with the trial still set for February 8, 2010. On January 13, 2010, the trial court entered an order directing the Harrison County Board of Supervisors to pay for the expenses incurred for the use of the DNA lab in Louisiana. The record contains an invoice from that lab, dated December 29, 2009. On February 11, 2010, the trial court entered a new agreed scheduling order, which set the start of trial on May 10, 2010. In that order, Galloway waived his speedy-trial rights from the original trial date of February 8, 2010, until the new trial date of May 10. On April 27, 2010, the trial court entered an order granting Galloway funds to obtain the services of forensic pathologist Dr. Riddick. On May 4, 2010, Galloway filed a continuance, seeking additional time to consult with Dr. Riddick. In the motion, Galloway contended that defense counsel had received a letter from the State disclosing the opinions of Dr. McGarry, which Galloway claimed were not in the discovery provided to counsel prior to that date. Trial began on September 21, 2010.

¶ 101. On February 11, 2010, the trial court held a hearing to rule on open motions. The court heard arguments from both sides regarding Galloway's July 29, 2010, motion to

dismiss for lack of speedy trial. The prosecution provided a timeline for the trial court. The prosecution informed the trial court that 224 days had elapsed between Galloway's arrest and his arraignment, and 200 days from the arraignment to the first trial setting, which was February 8, 2010. The prosecution told the trial court at the arraignment that the State and the defense had agreed to a scheduling order. The prosecution also told the trial court that this case involved much DNA evidence and that exhibits had been sent to a lab in Louisiana. Referring to *Manix v. State,* 895 So.2d 167 (Miss.2005), the prosecution argued that delays caused by backlog of state or federal crime labs constitute good cause for delay. The prosecution further argued that this case involves "expert consultation on behalf of the defense which has also resulted in some delays, and in fact, one of [the defense's] experts still hasn't got a report [sic] and won't have one until May 4th." The prosecution then argued that Galloway had not established that he had suffered any prejudice as the result of any delay. At this point in the proceedings, as the trial court was doing its calculations, the prosecution told the trial court that "case law states you don't count the date of arrest." To which the trial court responded, "Well, that wouldn't even approach the eight-month requirement. So as far as length of delay, the court finds that there has not been a substantial length in getting this matter to trial." The trial court also found that both the State and the defense had reason for the delay, as "both needed time to get the extensive evidentiary documents and other evidence analyzed by the Crime Lab and DNA expert." The trial court acknowledged that the defendant had asserted his speedy-trial right, but found "in light of the fact that the court finds that he is getting a speedy trial, that factor is not involved." The trial court added: "As most of the cases do point out, what appears to this court to be the most important factor is ***650** prejudice to the defendant. And there has been

no showing of any prejudice to the defendant by the delay of this trial that is now set for May 10th."

1. Length of Delay

[45] ¶ 102. As the State acknowledges on appeal, Galloway's constitutional right to a speedy trial attached at the time of his arrest. *Price v. State,* 898 So.2d 641, 648 (Miss.2005). "In evaluating a speedy trial issue arising under constitutional considerations, as opposed to Mississippi's statutory scheme, the commencement of the period begins when a person is arrested." *Id.* (citing *Sharp v. State,* 786 So.2d 372, 380 (Miss.2001); *Taylor v. State,* 672 So.2d 1246, 1257 (Miss.1996)). "The statutory right to a speedy trial attaches and time begins running after the accused has been arraigned." *Adams v. State,* 583 So.2d 165, 167 (Miss.1991); *see also*Miss.Code Ann. § 99–17–1 (Rev. 2007). Galloway's statutory speedy-trial right appears to be what the prosecutor meant when he told the trial court that "you don't count the date of the arrest." Galloway, however, did not assert a statutory violation.

[46][47] ¶ 103. For purposes of a constitutional speedy-trial determination, a delay longer than eight months in bringing a criminal case to trial from the date of arrest is considered "presumptively prejudicial and triggers further analysis of the remaining three *Barker* factors." *Johnson,* 68 So.3d at 1242. A presumptively prejudicial delay does not, however, automatically equate to "actual prejudice." *Id.* "Actual prejudice" is determined later in the *Barker* analysis. *Id.* Presumptive prejudice "simply marks the point" where the court

must then consider the remaining *Barker* factors, and the burden is shifted to the State to show good reason for delay. *Id.* (*citing* *Doggett v. U.S.*, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). Here, the 424–day period from Galloway's arrest until the first trial setting exceeded eight months and is presumptively prejudicial. Thus, we proceed to discuss the other three *Barker* factors.

2. Reason for Delay

¶ 104. As mentioned, the trial court found both the State and the defense had reason for the delay, as "both needed time to get the extensive evidentiary documents and other evidence analyzed by the Crime Lab and DNA expert." We agree with Galloway, though, that the State failed to provide any documentation or facts of actual delays in obtaining testing results from the Louisiana crime lab. We do not know when the State submitted its evidence to the lab for testing or when the State received the results. All that the record contains is an invoice from that lab, dated December 29, 2009. In *Flora v. State,* 925 So.2d 797, (Miss.2006), this Court stressed the importance of making a clear record to allow proper review of speedy-trial claims. That said, the record clearly indicates that this was a complicated case, which required the use of experts for both sides, and it fairly indicates that neither side was ready for trial prior to the eight-month threshold. Indeed, both sides agreed to an initial trial setting of February 8, 2010. Thus, this factor appears close to neutral. But we are unable to reach that conclusion, as the State failed to provide us a more definite record from which to analyze this factor. Accordingly, this factor is weighed slightly against the State.

3. Assertion of the Right to a Speedy Trial

¶ 105. This factor weighs in favor of Galloway, as he asserted his speedy-trial rights.

4. Prejudice to Galloway

[48] ¶ 106. To assist in analyzing this factor, the *Barker* Court identified three ***651** interests protected by the right to a speedy trial to be considered when determining whether the defendant has been prejudiced by the delay in bringing him or her to trial. These interests are: (a) prevent oppressive pretrial incarceration, (b) minimize anxiety and concern of the accused, and (c) limit the possibility that the defense will be impaired. *Barker,* 407 U.S. at 532, 92 S.Ct. 2182. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *Id.* In *State v. Magnusen,* 646 So.2d 1275, 1284 (Miss.1994), this Court found presumptive prejudice from a fifteen-month delay between arrest and trial but no actual prejudice; thus, we weighed the prejudice factor against the defendant. This Court looks to such questions as whether witnesses have died or become unavailable, documents or other evidence have been destroyed, or memories have dimmed so that the accused is at a disadvantage which would not have attended him at a prompt trial. *Jaco v. State,* 574 So.2d 625, 632 (Miss.1990); *see also Perry v. State,* 419 So.2d 194, 200 (Miss.1982); *Wells v. State,* 288 So.2d 860, 863 (Miss.1974).

¶ 107. Here, Galloway contends that he was "detained on capital charges, the most serious and anxiety-producing, for several months before a trial date was set." He further contends that the delayed trial may have affected the reliability of the memory of at least one state witness, Dixie Brimage.

[49] ¶ 108. Although Galloway's pretrial incarceration was lengthy, incarceration alone does not constitute prejudice. *Johnson v. State,* 68 So.3d at 1245. "Mississippi case law does not recognize the negative emotional, social, and economic impacts that accompany incarceration as prejudice." *Id.*

¶ 109. As to Galloway's contention that the delay may have affected the memory of Brimage, he fails to show us how. Galloway also made no assertion or argument to the trial court as to how he (or his defense) was (or would be) prejudiced by the delay. Instead, Galloway simply sets forth in his brief on appeal the following:

> [T]he delayed trial may have affected adversely the reliability of the memory of at least one state witness. See R. 432, 443 (Testimony of Dixie Brimage that she could positively identify Mr. Galloway at the time of trial, two years after she allegedly observed him); R. 442–43 (testifying that she could not identify Mr. Galloway with certainty shortly after the crime from the photo line up at the police station).

¶ 110. Ordinarily, we would dismiss this assertion out of hand for lacking explication. But, since Galloway pulls from this same portion of the record later in issue seventeen, where he attempts to bootstrap his speedy-trial claim alongside the claim that he was prejudiced by

Brimage's "highly suggestive and unreliable in-court identification of [him]," we will relate what these pages of the trial transcript show (as well as a couple of other immediate pages—to keep it in context) and speak to them here.

¶ 111. (Dixie Brimage–Direct Examination, pp. 431–32):

Q. Now as you were standing at the front door tell us what you saw.

A. I saw [Anderson]. She was going by the car, and she was standing by—the car was in front of the driveway, and she was walking out there.

Q. Okay, She walked out there?

A. Yes.

Q. Describe the car that she walked towards.

A. A white Ford Taurus.

***652** Q. Okay. Now was there somebody standing out by this car?

A. Yes.

Q. Who was it?

A. Him.

Q. All right. Now describe, if you would tell us what he's wearing.

A. A striped shirt and brown khakis.

MR. SMITH: Your Honor, we would ask that the record reflect she's pointed to and identified the defendant.

THE COURT: All right. The record will so reflect.

....

Q. Okay. Now, how long did she stand outside by this car?

A. About five minutes.

Q. Okay. And what were they doing at that time?

A. Talking.

Q. And did you watch them at the door as they talked?

A. Yes.

(Dixie Brimage—Cross–Examination, pp. 442–43):

Q. Miss Brimage, I will be somewhat brief with you. The man you identified, this defendant, as the person who picked Kela up. I know I'm repeating myself, but you spoke to the police department and [sic] actually showed you a picture of the defendant; is that true?

A. Yes.

Q. And isn't it true you couldn't identify him at that point?

A. Yes.

Q. Okay. But here two years later you can identify him, correct?

A. Yes.

Q. Okay. Second can—does the defendant have gold teeth?

A. I can't see. No.

MR. STEWART: That's all I have, judge.

THE COURT: All right. Redirect.

(Dixie Brimage—Redirect Examination, pp. 443–45):

Q. Dixie, is it easier for you to identify someone in person rather than a picture?

A. Yes.

Q. Okay. And when they showed you that, how many pictures did they show you that day?

A. Six.

Q. And did you pick one of the pictures?

A. Yes.

Q. All right. And whose picture was it?

A. His.

Q. All right. But you told them you weren't 100 percent sure that was him?

A. Yes.

Q. Okay, the picture that is.

A. Yes.

Q. Is there any doubt in your mind the man sitting at this table you pointed to is the man who picked her up that day?

A. Yes.

Q. Is there any doubt in your mind?

A. No.

Q. Okay. You said that you were standing at the front door, and it's a glass screen door, right?

A. Yes.

Q. Is that a clear glass?

A. Yes.

Q. Does grandmama keep that glass pretty clean?

A. Yes.

Q. Did that glass keep you from seeing outside the house that night?

***653** A. No.

Q. All right. Now you were asked on cross-examination if you said anything to him when he got there that night and you said no. Was he there to see you that night?

A. Yes, but he probably didn't see me.

Q. Okay. Was he there to pick you up or was he there to pick up Kela?

A. Kela

Q. Right. And did he say anything to you?

A. No.

Q. All right. Now, they asked you if your description to the police included gold teeth, right?

A. Yes.

Q. If you would, tell us everything how you described him to the police at that time.

A. He was five-five tall, light skinned, had a belly with gold teeth and hair on his head.

Q. Okay. So he was five foot five inches tall, light skinned and a belly, right and had hair?

A. Yes.

Q. All right. Now, this Ford Taurus that you say you saw him pick her up in that day, as a student, are these Ford Tauruses pretty recognizable to you?

A. Yes.

Q. Why?

A. The [sic] school district cars that we have at our school.

Q. Okay. And is there any doubt in your mind that the defendant picked her up the last night you saw her in this car?

A. No.

¶ 112. Looking at this portion of Brimage's testimony, we find no basis for believing that Galloway was put at an evidentiary disadvantage by reason of the delay. Brimage no doubt would have testified with the same effect had the trial been held a week after indictment.

¶ 113. Still, both Galloway and the dissent contend that Galloway demonstrated to the extent possible that he suffered prejudice due to the impact on Brimage's memory. This is because Brimage, the only eye-witness in the case, was (1) unsure in her identification of the man talking to Anderson; and (2) certain that the man talking to Anderson had gold teeth, and Galloway did not have gold teeth at the time of trial.

¶ 114. First, as the record shows, Brimage did actually identify Galloway from a six-photo line-up a few days after the murder, but she told authorities at the time she was not 100 percent certain. Second, we are not at all troubled by the gold-teeth discrepancy. *See* the case of *Thomas v. Dwyer,* 2007 WL 2137807at *9 (E.D.Mo. July 23, 2007) for an illustration why.

¶ 115. Because Galloway has failed to show any actual prejudice due to the delay of his trial, this factor weighs in favor of the State.

¶ 116. Upon examination and analysis of the *Barker* factors, under the totality of the circumstances, we hold that Galloway's constitutional right to a speedy trial was not violated.

12. The trial court erred by denying the defendant's proposed sentencing instructions.

¶ 117. Galloway claims the trial court erred by denying his proposed sentencing instructions D2A, D3AA, D4A, and D7A. Since Galloway makes no argument with regard to the denial of D7A, we address only the trial court's refusal of proposed jury instructions D2A, D3AA, D4A.

***654** [50][51] ¶ 118. This Court's standard for review for the denial of jury instructions is as follows:

> Jury instructions are to be read together and taken as a whole with no one instruction taken out of context. A defendant is entitled to have jury instructions given which present his theory of the case; however, this entitlement is limited in that the court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence.

Chandler v. State, 946 So.2d 355, 360 (Miss.2006) (quoting *Ladnier v. State,* 878 So.2d 926, 931 (Miss.2004)).

[52] ¶ 119. D2A provided:

The Court instructs the jury that should you be unable to agree unanimously on punishment and inform the Court that you are unable to agree, then the Judge shall sentence the Defendant, Leslie Galloway, III, to life imprisonment without parole or hope of early release.

¶ 120. The instruction was denied as cumulative to S–100A (typically referred to as the "long-form instruction"), which provided, in part:

[T]o return the death penalty, you must find that the mitigating circumstances, those which tend to warrant the less severe penalty of life imprisonment without parole, do not outweigh the aggravating circumstances, those which tend to warrant the death penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed;

1. The capital offense was committed by a person under sentence of imprisonment.

2. The defendant was previously convicted of a felony involving the use or threat of violence to another person.

3. The capital offense was committed when the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, a sexual battery.

4. The capital offense was especially heinous, atrocious or cruel.

You must unanimously find, beyond a reasonable doubt, that one, or more of the preceding aggravating circumstances exists in this case to return the death penalty. If none of these

aggravating circumstances are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

"We, the jury find the defendant should be sentenced to life imprisonment without parole."

If one or more of the above aggravating circumstances is found to exist beyond a reasonable doubt, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstance(s). Consider the following elements of mitigation in determining whether the death penalty should be imposed:

Any matter, any other aspect of the defendant's character or record, any other circumstance of the offense brought to you during the trial of this cause which you, the jury, deem to be mitigating on behalf of the defendant.

If you find from the evidence that one or more of the preceding elements of mitigation exists, then you must consider whether it (or they) outweigh(s) or overcome(s) the aggravating circumstance(s) you previously found. In the event that you find that the mitigating circumstance(s) do not outweigh or overcome ***655** the aggravating circumstance(s), you may impose the death sentence.

¶ 121. Galloway argues that, under Mississippi law, a sentence of life in prison without parole is imposed if the jury cannot agree on a sentence. Miss.Code Ann. § 99–19–103 (Rev.2007). Galloway submits that almost all jurors know that a hung jury ordinarily means

there will be another trial, before another jury. Therefore, the jury had a right to know that if they failed to reach an agreement, the trial court would impose a life sentence.

¶ 122. This argument was rejected by the Court in *Stringer v. State,* in which this Court found:

> The argument creates an illusion of prejudice, which has no logical basis. If the jurors were unable to unanimously find that the aggravating circumstances were sufficient to impose the death penalty and that there were insufficient mitigating circumstances to outweigh the aggravating circumstances, then they could not return a death sentence. Further, in the event they could not unanimously agree after a reasonable period of deliberation, it would be the trial judge's duty under Miss.Code Ann. § 99–19–103 to dismiss the jury and impose a sentence of life imprisonment on the defendant.

500 So.2d 928, 945 (Miss.1986) (quoting *King v. State,* 421 So.2d 1009, 1018 (Miss.1982) (overruled on other grounds)). Here, the trial court properly refused D2A.

[53] ¶ 123. D3AA provided:

> Each individual juror must decide for themselves whether the death penalty or life imprisonment without parole or probation is an appropriate punishment for the defendant. Even if mitigating circumstances do not outweigh aggravating circumstances,

the law permits you, the jury to impose a sentence a life imprisonment without the possibility of parole.

Only if you, the jurors, unanimously agree beyond a reasonable doubt that death is the appropriate punishment may you impose a sentence of death.

The trial court found that S–100A's inclusion of the sentence, "in the event that you find the mitigating circumstances do not outweigh or overcome the aggravating circumstances, you may impose the death penalty," adequately stated the proposition in the defense's proposed D3AA.

¶ 124. Galloway contends, however, that S–100A did not expressly inform the jury that it could impose a life sentence even if it found that the mitigating circumstances did not outweigh the aggravators.

¶ 125. In *Thorson v. State,* 895 So.2d 85 (Miss.2004), the trial court denied an almost identical sentencing instruction. We affirmed, holding that the "instruction is nothing more than a mercy instruction and was properly refused by the trial court." *Id.* at 108;*see also* *Walker v. State,* 913 So.2d 198, 248–49 (Miss.2005) (in which we upheld the trial court's refusal of a similar instruction on the basis that it constituted a "mercy" instruction); *Edwards v. State,* 737 So.2d 275, 317 (Miss.1999) (same); *Watts v. State,* 733 So.2d 214, 241 (Miss.1999) (same); *Foster v. State,* 639 So.2d 1263, 1300 (Miss.1994) (same); *Ladner v. State,* 584 So.2d 743, 761 (Miss.1991) (holding that a defendant has no right to a mercy instruction); *Williams v. State,* 544 So.2d 782, 788 (Miss.1987) (same); *Cabello*

v. State, 471 So.2d 332, 348 (Miss.1985) (same). Accordingly, the trial court properly refused D3AA.

[54] ¶ 126. D4A provided:

> A mitigating circumstance is any fact relating to the Defendant's character or history, or any aspect of the crime itself, which may be considered extenuating or reducing the moral culpability of the killing or making the Defendant less deserving of the extreme punishment of ***656** death. In offering mitigating circumstances, the Defendant is not suggesting that the crime is justifiable or excusable. Mitigating circumstances are those circumstances that tend to justify the penalty of life imprisonment without parole as opposed to death.

The trial court refused the instruction because it was included elsewhere. Galloway, however, contends that he was entitled to an instruction that adequately defined what is a mitigating circumstance.

¶ 127. This Court addressed a similar issue *Branch v. State,* 882 So.2d 36 (Miss.2004). There, Lawrence Branch, who was sentenced to death for capital murder, complained the trial court erred by refusing his proposed instruction defining "mitigation." *Id.* at 72. Branch argued that mitigation is a legal term which is not commonly understood. *Id.* The *Branch* Court reviewed a previous decision in which where a similar argument was denied. *Id.* (citing *Booker v. State,* 449 So.2d 209, 218–19 (Miss.1984)). The *Branch* Court then held that, since the trial court had given the "standard long-form sentencing instruction

informing the jury how to consider aggravating and mitigating circumstances," and that instruction tracked statutory language, the defense's proposed mitigation instruction was appropriately denied. *Id.* at 69, 72.

¶ 128. Similarly, we find Galloway's proposed mitigation instruction D4A was sufficiently covered in the long-form instruction; thus, the trial court did not err in refusing it.

¶ 129. This issue is without merit.

13. The court erred in sustaining the State's objections to defense counsel's closing arguments at the sentencing.

¶ 130. Galloway argues that the trial court erroneously sustained the prosecution's objections to the defense's argument pointing out the weakness of the State's evidence of sexual battery and the argument that a sentence of life without parole would "end all of the killing in this situation." Galloway contends these rulings, individually and cumulatively, violated his rights under Mississippi law and under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article 3, Sections 14, 24, 26, and 28 of the Mississippi Constitution, including his right to closing argument, a constitutionally guaranteed, basic element of the adversary process.

[55] ¶ 131. During the penalty phase, the defendant is limited to introducing evidence relevant to his sentence. *Holland,* 705 So.2d 307 (Miss.1997) (citing *Jackson v. State,* 337 So.2d 1242, 1256 (Miss.1976)). The defendant generally may present any relevant mitigating evidence. *Eddings v. Oklahoma,* 455 U.S. 104, 113–14, 102 S.Ct. 869, 876–77, 71 L.Ed.2d 1 (1982). Both the State and the defendant shall be permitted to present arguments for and against the sentence of death. Miss.Code Ann. § 99–19–101(1) (Rev.2007).

¶ 132. Here, defense counsel addressed the jury as follows:

> What made it capital murder was that you decided that there was, based on what Dr. McGarry said, there was sexual battery. So I want to talk about that for a second.
>
> This sexual battery that Dr. McGarry testified to, what did he say. He said that she had a three quarter inch cut, abrasion, tear, use whatever, word you think is proper, to her anus. Three quarters of an inch. About that far. That's how long this cut was that he said was caused by a sexual battery. Someone ***657** trying to penetrate her. And from that three quarter inch cut, that one cut, that one injury, he made the quantum leap to sexual battery.
>
> There wasn't any other evidence of sexual battery. No sperm. No other kinds of injuries nothing. Just that, that three quarter inch cut about that long on her anus.
>
> MR. HUFFMAN: Your Honor, I would object to the—this argument based on the fact that the guilty phase has already been established.
>
> THE COURT: Sustained.

MR. RISHEL: Your Honor, I would argue that they introduced all of the facts as part of the aggravating circumstances and made it part of it. So I should be able to comment on it. That's all I'm doing here.

THE COURT: All right. But don't challenge the jury with regard to the decision that they've already made.

¶ 133. The State relies on *Holland II* for its argument that evidence of innocence or "residual doubt" is not a mitigating factor during the sentencing phase. *Holland,* 705 So.2d at 324.*Holland II* addressed whether Holland was barred from reintroducing evidence to dispute guilt at resentencing phase, to rebut aggravators offered by the prosecution, to dispute the *Enmund* factors which the prosecution must prove for imposition of the death penalty, or to support an argument on residual doubt. *Id.* at 321;*see also Enmund v. Florida,* 458 U.S. 782, 797, 102 S.Ct. 3368, 3376–77, 73 L.Ed.2d 1140 (1982). *Holland II* held that, because of the finding of guilt by the prior jury, Holland was barred by *res judicata* from relitigating the prior jury verdict of guilt and was collaterally estopped in the proceedings from attacking his guilt. *Id.* at 325. Drawing from *Franklin v. Lynaugh,* 487 U.S. 164, 172–73, 108 S.Ct. 2320, 2327, 101 L.Ed.2d 155 (1988), *Holland II* added there could be no error in denying Holland the right to argue residual doubt, since it was not a mitigating factor that is constitutionally recognized. *Id.* at 326. Notably, in a footnote, *Holland II* opined: "Residual doubt may have a place in a sentence phase conducted before the same jury that convicted a capital defendant. However, there is no residual doubt of guilt to be argued in cases such as that at bar." *Id.* at n. 7.

¶ 134. In *Franklin,* the Supreme Court said:

> Our edict that, in a capital case, " 'the sentencer ... [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,' " *Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor.

Franklin, 487 U.S. at 174, 108 S.Ct. 2320. In *Oregon v. Guzek,* 546 U.S. 517, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006), the Supreme Court reaffirmed *Franklin,* finding no constitutional right to introduce residual-doubt evidence at sentencing. In *Ross v. State,* 954 So.2d 968, 1011–12 (Miss.2007), this Court, citing *Franklin* and *Holland II,* held that a capital defendant is not entitled to a jury instruction on residual doubt. In *Minnick,* this Court, in construing *Franklin,* expressed that "where a defendant argues residual doubt ***658** to the jury, which a defendant is free to do to a relevant extent, the defendant's right to have a jury consider residual doubt is not impaired by the trial court rejecting an instruction on residual doubt." *Minnick,* 551 So.2d at 95 (citation omitted).

[56] ¶ 135. Here, the State contends that Galloway was allowed to argue "residual doubt," because, even though the trial court technically sustained the objection, the trial court

permitted the defense to point out alleged weaknesses in the evidence. The State points to the following argument defense counsel made to the jury immediately after the trial court sustained the prosecution's objection:

> MR. RISHEL: Yes, sir, I agree.
>
> [Speaking to the jury]:
>
> And I hope—I don't want to confuse you. I'm not trying to challenge your decision. You made your decision, and I respect that. But my point is that if the facts of this case are going to be presented as an aggravating factor, then certainly I can comment on them and try to show you the points that I think would mitigate those factors, would mitigate the facts. Things that you should consider.
>
> I think one of them is that. She had a broken pelvis and she had a puncture wound to her leg. Remember Detective Carbine talked about that. She had a puncture wound in her leg. Dr. McGarry said, she didn't have any wounds to this area. What about that puncture wound.
>
> MR. HUFFMAN: Same objection, Your Honor. He's challenging the verdict of the guilt phase.
>
> THE COURT: Overruled on that argument.

¶ 136. The State contends this exchange shows that the trial court was not disallowing the "residual doubt" argument but was concerned that the defense was attempting to challenge guilt.

¶ 137. We agree. The trial court properly admonished defense counsel not to challenge the jury with regard to its guilty verdict. The court, in its discretion, allowed the defense to question the State's evidence in the case with regard to the aggravating factors. Accordingly, we find this point of contention is without merit.

[57] ¶ 138. As to Galloway's next assignment of error, defense counsel argued to the jury:

> The bottom line is, you don't need to do that. You don't need to kill Leslie Galloway. You can send him to jail for the rest of his life, and he will die there in jail. That is punishment. And there's one other thing that that would do. There's one other effect that that would have if you decide that Mr. Galloway should go to jail for the rest of his life. And it would be a good thing. It would end all of the killing in this situation, wouldn't it.

The prosecution objected at that point and the trial court sustained the objection. Galloway claims this violated his constitutional right to plead for mercy. The State argues that, while not articulated, the trial court likely sustained the objection on the basis that defense counsel's argument improperly enticed the jury.

¶ 139. Defense counsel's argument was not improper. *King v. State* explains:

Miss.Code Ann. § 99–19–101(1) provides in pertinent part: "The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death." Clearly, it is appropriate for the defense to ask for mercy or sympathy in the sentencing phase. It is equally appropriate for the state to further its goal of deterrence by arguing to "send a message" in the sentencing phase. Both of these arguments are recognized as legitimate considerations to be had by those who argue "for or against" the death penalty. In ***659** *Humphrey v. State,* 759 So.2d 368, 374 (Miss.2000), we allowed the prosecution to present a "send a message" argument to the jury during the sentencing phase of a bifurcated capital trial. We based our decision on *Wells v. State,* 698 So.2d 497, 513 (Miss.1997), where we chose "not to fault the prosecution for arguing that the 'message' conveyed by a death penalty verdict would be different than that urged by the defense." We stated, "To do so would be disingenuous given the inescapable reality that deterrence is, in fact, an established goal of imposing the death penalty, which goal necessarily entails, to some extent, sending a message."

We today follow the above-cited statute and hold that in closing argument during the sentencing phase each side may argue its respective position on the death penalty. Of course, neither side may ever argue these positions during the guilt phase; for a conviction or an acquittal must be based solely on law and fact. It should be noted further that neither side is entitled to a jury instruction regarding mercy or deterrence. To the extent that our holding is contrary to previous case law on the subject, those cases are expressly overruled.

King v. State, 784 So.2d 884 (Miss.2001).

[58] ¶ 140. Though the trial court erred by sustaining the State's objection, we find the error harmless. The jury already had heard the remark, and the jurors had been instructed that counsels' arguments were not evidence.

14. The trial court committed plain and reversible error by requiring the defense to disclose pretrial "the general nature of the defense."

[59] ¶ 141. Galloway claims for the first time on appeal that disclosures by his defense during an omnibus hearing relating the general nature of his defense violated his right against self-incrimination and Rule 9.04 of the Uniform Rules of Circuit and County Court Practice. The hearing took place prior to trial, and the results were reduced to a court order without objection.

¶ 142. The portion Galloway now argues was objectionable is as follows:

11(a) The defense attorney states the general nature of the defense is:

1. Lack of knowledge or contraband;

2. Lack of special intent;

3. Diminished mental responsibility;

4. Entrapment;

5. General denial. Put prosecution to proof.

(bold transcription in original). The bold portions indicate Galloway's anticipated defense as acknowledged by trial counsel at the omnibus hearing.

¶ 143. Galloway is correct that Rule 9.04 does not require pretrial disclosure of a criminal defendant's general defense. But, as the State points out, it does not proscribe such disclosure either.

¶ 144. Rule 9.05 requires a criminal defendant to disclose his or her intention to use an alibi defense.*See* URCCC 9.05. The United States Supreme Court spoke to such a requirement in *Williams v. State of Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), in which it approved Florida's Notice of Alibi Rule, which is substantially similar in many respects to Rule 9.05. The Supreme Court said:

> The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until ***660** played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.

Id. at 82, 90 S.Ct. 1893.

¶ 145. Other jurisdictions provide for disclosure of defenses a criminal defendant intends to use at trial. Arkansas has a criminal rule of procedure which requires disclosure of defenses to be used at trial where the prosecuting attorney requests it. Arkansas Rule of Criminal Procedure 18.3 states:

> Subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

California has a similar rule, which provides:

> Subject to constitutional limitations, the defense shall disclose to the prosecution the nature of any defense, other than alibi, which the defense intends to use at trial. The defense shall also disclose the names and addresses of persons whom the defense intends to call as witnesses at trial.

Cal. R.Crim. P. 16(II)(c).

¶ 146. Finding no constitutional violation in requiring a criminal defendant to disclose the general nature of defenses to be used at trial and based on Galloway's failure to object to the trial court's order, this point of contention fails under plain-error review.

15. The court erred in overruling defense counsel's objection to Bonnie Dubourg's expert qualifications and in allowing her unreliable testimony.

[60] ¶ 147. At trial, Galloway objected to Dubourg's expert testimony based upon her not having a Ph.D. degree. The trial court overruled the objection, finding that qualifications for an expert do not require that she have a Ph.D. The trial court found that, by her education, training, and experience, Dubourg was qualified to testify as a forensic DNA analyst, and that she would be allowed to give opinions consistent with Rule 7.02 of the Mississippi Rules of Evidence.

[61] ¶ 148. This Court reviews a trial court's decision to accept expert testimony for an abuse of discretion. *Smith v. State,* 925 So.2d 825, 834 (Miss.2006). Acceptance or refusal of expert testimony falls within the sound discretion of the trial court, and this Court will reverse a trial judge's decision only if it was "arbitrary and clearly erroneous." *Poole v. Avara,* 908 So.2d 716, 721 (Miss.2005).

¶ 149. Rule 702 states:

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

M.R.E. 702.

¶ 150. The record shows that Dubourg earned a bachelor of arts in biology in 1978. She has sixteen years' experience ***661** working with bodily fluids in the forensics field. At the time of trial, she had ten years' experience working as a DNA analyst. She has testified in other courts as a forensic DNA analyst approximately thirty times and approximately fifteen times as a serologist. Her training is continual and includes regular attendance at conferences, seminars, and on-the-job training. Because she works for an "accredited lab," she is required to participate in "continuing education" annually. She also is required to submit to proficiency testing twice a year.

¶ 151. Given Dubourg's experience and training analyzing forensic DNA, combined with her education, we find that the trial court did not abuse its discretion in allowing Dubourg to testify as an expert in this matter.

16. The trial court committed reversible error by allowing the admission of DNA statistical probabilities generated by the FBI software program and its CODIS database without providing Galloway the opportunity to confront the person who created the program and database.

¶ 152. Galloway contends that the trial court committed reversible error when it allowed, through Dubourg's testimony, the admission of out-of-court statistical probability assessment calculated by a software program without first providing him the opportunity to confront: the estimates used in the software program; the program's ability to calculate

statistics for a DNA mixture; or the program's ability to calculate statistics where some of the defendant's alleles are missing.

[62] ¶ 153. The State argues that the issue is waived for Galloway's failure to lodge a contemporaneous objection at trial. We agree.

[63] ¶ 154. Procedural bar notwithstanding, we find no Confrontation Clause violation in the admission of this information. The testimonial hearsay at issue is the data that Dubourg relied upon in reaching her opinion regarding statistical probability assessments for DNA mixtures. On direct examination, Dubourg repeatedly identified Anderson's and Galloway's DNA, respectively, as being present on or in various pieces of evidence collected from underneath, inside and outside the Ford Taurus, as well as Galloway's residence. When Dubourg was asked to identify the DNA extracted from a particular piece of evidence, she typically would state to whom the DNA belonged and offer that the probability of finding the same DNA profile if the DNA had come from a randomly selected individual other than Anderson or Galloway was approximately one in more than 100 billion. Dubourg explained that the one–in–more–than–100–billion probability is generated from a statistical program called “pop stat” that was developed by the Federal Bureau of Investigations (FBI). She testified that the pop stat system is generally accepted and used by crime labs that have access to the CODIS database.[5]

¶ 155. The Kansas Supreme Court addressed a similar question in *State v. Appleby,* 289 Kan. 1017, 221 P.3d 525 (2009). There, the defendant argued that he was denied the opportunity to cross-examine the FBI's random-match probability estimates because the witnesses presented at trial did not prepare the CODIS database and had no personal knowledge of the ***662** methods and procedures the FBI used to compute the statistical estimates or the set of data upon which the calculations were based. *Appleby,* 221 P.3d at 549. In finding no Confrontation Clause violation, the *Appleby* Court reasoned:

> [A]pplying the tests utilized in *Melendez–Diaz,* we conclude the population frequency data and the statistical programs used to make that data meaningful are nontestimonial. We first note that DNA itself is physical evidence and is nontestimonial. *Wilson v. Collins,* 517 F.3d 421, 431 (6th Cir.2008); *United States v. Zimmerman,* 514 F.3d 851, 855 (9th Cir.2007); *see also Schmerber v. California,* 384 U.S. 757, 765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (holding that "blood test evidence, although an incriminating product of compulsion, [is] neither ... testimony nor evidence relating to some communicative act or writing" and is therefore not protected by the Fifth Amendment).
>
> Placing this physical evidence in a database with other physical evidence—i.e., other DNA profiles—does not convert the nature of the evidence, even if the purpose of pooling the profiles is to allow comparisons that identify criminals. *See* 42 U.S.C. §§ 14132(b)(3), 14135e (2006) (stating purposes of CODIS and clearly recognizing use during trial when rules of evidence allow). The database is comprised of physical, nontestimonial evidence. Further, the acts of writing computer programs that allow a comparison of samples of physical evidence or that calculate probabilities of a particular sample occurring in a defined population are nontestimonial actions. In other words, neither the database nor

> the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination. Rather, it is the expert's opinion, which is subjected to cross-examination, that is testimonial.
>
> ...
>
> Here, as explained in the testimony in this case, the database and the statistical program are accepted sources of information generally relied on by DNA experts. Based on this scientific data—which by itself is nontestimonial—the experts in this case developed their personal opinions. *See State v. Dykes,* 252 Kan. 556, 562, 847 P.2d 1214 (1993). These experts were available for cross-examination and their opinions could be tested by inquiry into their knowledge or lack of knowledge regarding the data that formed the basis for their opinion. Consequently, the right to confront the witnesses was made available to Appleby.

Id. at 551–52.

¶ 156. This is persuasive reasoning from the Kansas Supreme Court. Likewise, we too view this type of information as nontestimonial. This issue is without merit.

17. Dixie Brimage's highly suggestive and unreliable in-court identification of Galloway violated his constitutional rights and mandates reversal.

[64] ¶ 157. Citing *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), Galloway argues on appeal that, as the only eyewitness in the case, Brimage's in-court identification of Galloway as the driver of the vehicle was unreliable, suggestive, and highly prejudicial, and requires reversal. Without it, the State would have been stuck with Brimage's inconclusive photo identification and her previous description to the police of a man with gold teeth who could not have been Galloway because he did not have gold teeth. And this would have strengthened ***663** his defense at trial that another person may have been in the car, and that person may have been Triplett.

¶ 158. At trial, Brimage identified Galloway in court, with no objection raised by the defense. She described him as the man she saw standing by the white Ford Taurus parked in her grandmother's driveway and who drove the vehicle away with Anderson inside.

¶ 159. We find that Galloway waived this assignment of error by not entering an objection to Brimage's in-court identification of him at trial. *McQuarter v. State,* 574 So.2d 685, 687–88 (Miss.1990). Galloway's contention also fails under plain-error review.

¶ 160. Notably, Galloway made no assertion at or before trial that Brimage's out-of-court identification was either improper or unnecessarily suggestive, nor does he do so on appeal. He now simply claims that Brimage's in-court identification of him was inherently and impermissibly suggestive because he was the defendant; thus, it should have been excluded.

¶ 161. At the outset, we find that Galloway's reliance on *Biggers* and the five reliability factors described therein misses the mark. In *Biggers,* the Supreme Court said "[i]t is the likelihood of misidentification which violates a defendant's right to due process." *Biggers,* 409 U.S. at 198, 93 S.Ct. 375. "*Biggers* recognized the identification problem could come about in two different evidentiary situations: (1) an in-court identification based upon a suggestive pretrial identification procedure, and (2) testimony pertaining to the out-of-court suggestive identification proceeding itself." *York v. State,* 413 So.2d 1372, 1381 (Miss.1982). *Biggers* held that, in order to satisfy due process, pretrial identifications resulting from a suggestive process must be examined under the totality of the circumstances in order to determine the identification's reliability. *Biggers,* 409 U.S. at 199–200, 93 S.Ct. 375. The reliability of a pretrial identification resulting from a suggestive process depends on: (1) the witness's opportunity to view the accused at the time of the crime, (2) the degree of attention exhibited by the witness, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty exhibited by the witness at the confrontation, and (5) the length of the time between the crime and the confrontation. *Id.* As recognized in *Latiker v. State,* 918 So.2d 68, 74 (Miss.2005), *Biggers* essentially prescribes a two-step inquiry for allegations of an impermissible identification: (1) the court must first determine whether the identification was unduly suggestive; if that inquiry is answered affirmatively, then (2) the court must determine whether, under the totality of the circumstances and using the five *Biggers* factors, the identification was nevertheless reliable.

¶ 162. The United States Supreme Court has not decided whether *Biggers* applies to an in-court identification not preceded by an impermissibly suggestive pretrial identification. *See, e.g.,* *United States v. Domina,* 784 F.2d 1361, 1369 (9th Cir.1986), *cert. denied,*479 U.S. 1038, 107 S.Ct. 893, 93 L.Ed.2d 845 (1987) ("The Supreme Court has not extended its exclusionary rule to in-court identification procedures that are suggestive because of the trial setting."). A majority of courts have concluded that *Biggers* does not apply to strictly in-court identifications. *Byrd v. State,* 25 A.3d 761, 767 (Del.2011). *See also* *State v. Lewis,* 363 S.C. 37, 609 S.E.2d 515, 518 (2005), where the South Carolina Supreme Court concluded, "as the majority of [courts] have," that *Biggers* "does not apply to a first-time in-court identification because the judge is present and can adequately address relevant problems; the jury is physically present to witness the identification, rather than merely hearing ***664** testimony about it; and cross-examination offers defendants an adequate safeguard or remedy against suggestive examinations."

¶ 163. The Georgia Supreme Court has reasoned:

> Because pretrial identification procedures occur beyond the immediate supervision of the court, the likelihood of misidentification in such cases increases, and courts have required that pretrial identification procedures comport with certain minimum constitutional requirements in order to ensure fairness. These extra safeguards are not, however, applicable to ... the in-court identification ... [here]. Rather, [such] testimony is subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial.

Ralston v. State, 251 Ga. 682, 309 S.E.2d 135, 136 (1983). *See also* *United States v. Bush,* 749 F.2d 1227, 1231 (7th Cir.1984), *cert. denied,*470 U.S. 1058, 105 S.Ct. 1771, 84 L.Ed.2d 831 (1985) ("deference shown the jury in weighing the reliability of potentially suggestive out-of-court identification would seem even more appropriate for in-court identifications where the jury is present and able to see first-hand the circumstances which may influence a witness"); *People v. Medina,* 208 A.D.2d 771, 772, 617 N.Y.S.2d 491 (1994) ("where there has not been a pretrial identification and defendant is identified in court for first time, defendant is not deprived of fair trial because defendant is able to explore weaknesses and suggestiveness of identification in front of the jury"); *State v. Smith,* 200 Conn. 465, 470, 512 A.2d 189 (1986) (defendant's protection against obvious suggestiveness in courtroom identification confrontation is his right to cross-examination); *People v. Rodriguez,* 134 Ill.App.3d 582, 89 Ill.Dec. 404, 480 N.E.2d 1147, 1151 (1985), *cert. denied,*475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986) ("Where a witness first identifies the defendant at trial, defense counsel may test perceptions, memory, and bias of the witness, contemporaneously exposing weaknesses and adding perspective to lessen hazards of undue weight or mistake.").

[65] ¶ 164. Here, we see no reason to expand the *Biggers* two-step inquiry to an in-court identification where no impermissibly suggestive pretrial identification is alleged to have preceded it. The trial itself affords the defendant adequate protection from the general inherent suggestiveness present at any trial. The defendant receives the full benefit of a

trial by jury, presided over by an impartial judge, with representation by counsel, and witnesses subject to oath and cross-examination.

[66] ¶ 165. The extent to which there were inconsistencies between Brimage's pretrial identification and her subsequent in-court identification goes to the weight of the evidence, not to its admissibility. This issue is without merit.

18. The court's failure to respond adequately to the jury note regarding the critical issue in the case resulted in a reasonable probability that at least some jurors convicted Galloway for having consensual, vaginal sex with Anderson, "conduct that is not crime."

¶ 166. This argument was addressed in issue two. It is without merit.

19. The evidence was insufficient to sustain the predicate felony of sexual battery and thus insufficient to sustain Galloway's capital-murder conviction.

¶ 167. Galloway contends that, if Dr. McGarry had given scientifically valid testimony ***665** that the injury was consistent with nonconsensual, anal penetration, the evidence would have been insufficient to support a finding of guilt beyond a reasonable doubt as to the predicate felony of anal sexual battery. For support, Galloway cites *Williams v. State*, 35 So.3d 480, 485–87 (Miss.2010), in which, he contends, this Court found evidence of sexual battery insufficient when the only evidence that the child victim had been abused was the testimony of the State's expert that the child's anal injuries were "very consistent with anal

penetration." Galloway further claims that the State failed to adduce sufficient evidence establishing that the alleged anal penetration was nonconsensual or that it must have occurred within the time Galloway was known to be around Anderson, because Dr. McGarry described the tear only as "fresh," but otherwise gave no timeframe for it. Galloway maintains that, in light of Anderson's history with Galloway and at least one other sexual partner, the State's evidence was insufficient to establish that the alleged penetration occurred during the commission of Anderson's murder, as required under Mississippi Code Section 97–3–19(2)(e).

[67] ¶ 168. In deciding whether the State presented legally sufficient evidence to support a jury's verdict, this Court must determine whether, when viewing the evidence in the light most favorable to the State, any rational juror could have found that the State had proved each element of the crime charged beyond a reasonable doubt. *Bush v. State,* 895 So.2d 836, 843 (Miss.2005). Under this inquiry, all evidence supporting the guilty verdict is accepted as true, and the State must be given the benefit of all reasonable inferences that can be drawn from the evidence. *McClain v. State,* 625 So.2d 774, 778 (Miss.1993).

¶ 169. At the outset, we find *Williams* distinguishable from this case. There, the defendant was convicted on two counts of sexual battery, one against each of his two daughters. *Williams,* 35 So.3d at 483. The defendant challenged the sufficiency of the evidence supporting the sexual-battery charge in Count II against his younger, ten-month-old daughter. *Id.* at 485. This Court reversed and rendered Count II because the State's only

evidence on that count was the doctor's testimony, and the doctor had couched his opinion in terms of "suspicion of probability." *Id.* at 485–87, 492. On Count I, the doctor had testified that the older child's injuries were " 'definitely consistent' with someone who had been sexually abused 'to a reasonable degree of medical certainty.' " *Id.* at 486. But the doctor "did not recount his findings in such unequivocal terms" when discussing the younger daughter. *Id.*

¶ 170. Here, Dr. McGarry did not use the phrase, "to a reasonable medical certainty." But, unlike the physician in *Williams,* Dr. McGarry expressed his opinion with the requisite certainty necessary to deem it reliable. Again, when asked on direct examination whether he had an expert opinion as to what caused the injury to the victim's anus, Dr. McGarry stated:

> My impression is that it was forceful penetration of the anus that caused injury to the—what is called the sphincter or the muscle ring around the anus that ordinarily is less than a fourth of inch in diameter, stretched out to more than an inch in diameter by the penetration of the anal canal. It's evidence of anal rape.

¶ 171. Dr. McGarry's opinion was predicated on his findings that:

> The anus had stretching type injuries. The rectal opening, the anus, had the kind of injuries that occur with forceful ***666** penetration, with stretching, abrasion or rubbing of the lining of the anus and a tear, so that the anus had been stretched to a point where the tissue ripped up inside the anus canal.
>
> ...

The tearing went about an inch, three quarters to an inch up inside the anus above the muscular closure of the anus up inside the lining of the anus.

...

The anus has a ring of muscle around it which normally is closed. When it's forced open by penetration, the lining is rubbed away, and she had that rubbing injury around her anus. And then up inside where the full stretching had occurred there was a tear, a fresh tear.

¶ 172. In *Catchings v. State,* 684 So.2d 591 (Miss.1996), this Court thoroughly addressed the use of the phrase, *to a reasonable medical certainty,* as follows:

The issue here is whether medical experts are required to state their opinions "to a reasonable medical certainty" in order that their opinions be given probative value and therefore be admissible as evidence. Although this Court has not addressed this specific question, this Court can find analysis of the issue under the Federal Rules of Evidence, a course to which this Court has looked for analysis in other issues. *Hopkins v. State,* 639 So.2d 1247, 1250 (Miss.1993) (citing *Johnson v. State,* 529 So.2d 577, 587 (Miss.1988)). Further analysis of the federal rule and the Mississippi rule of evidence at issue here does not reveal a conflict exists between the two rules.

A similar challenge was made in the federal case of *LeMaire v. United States,* 826 F.2d 949 (10th Cir.1987), when the plaintiff argued that the testimony of the defense's medical expert was "not competent because he failed to state his opinions in terms of a "reasonable

degree of medical probability." Applying Colorado substantive law that a medical opinion is admissible if founded on reasonable medical probability, the federal court held the expert testimony admissible. Further, the court held "the fact that the expert cannot support his opinion with certainty goes only to its weight not its admissibility." *Id.* at 953.

In the federal case of *Schulz v. Celotex Corporation,* 942 F.2d 204 (3rd Cir.1991), the court also held that an attending physician's failure to use the words "reasonable medical certainty" did not require exclusion of the testimony. The use of the word "certainty" is more applicable to Mississippi's rule of evidence and cases interpreting it. The analysis in *Schulz* is as follows:

> One commentator has explained that "there is nevertheless an undercurrent that the expert in federal court express some basis for both the confidence with which his conclusion is formed, and the probability that his conclusion is accurate." *Hullverson, Reasonable Degree of Medical Certainty: A Tort et a Travers,* 31 St. Louis U.L.J. 577, 582 (1987). To that extent, the phrase "with a reasonable degree of medical certainty" is a useful shorthand expression that is helpful in forestalling challenges to the admissibility of expert testimony. Care must be taken, however, to see that the incantation does not become a semantic trap and the failure to voice it is not used as a basis for exclusion without analysis of the testimony itself. *LeMaire v. United States,* 826 F.2d 949, 954 (10th Cir.1987) (applying state law, entire testimony examined to determine if opinion expressed with the requisite degree of certainty).

***667** Situations in which the failure to qualify the opinion have resulted in exclusion are typically those in which the expert testimony is speculative, using such language as "possibility." *State v. Harvey,* [121 N.J. 407,] 581 A.2d [483] at 495 [(1990)]; *Mayhew*

> *v. Bell S.S.,* 917 F.2d [961] at 963 [(6th Cir.1990)] (Expert testified: "suspicious that it could have been"); *Grant v. Farnsworth,* 869 F.2d [1149] at 1152 [(8th Cir.1989)] ("could only guess"); *Kirschner v. Broadhead,* 671 F.2d 1034, 1039–40 (7th Cir.1982) (possibility is not an affirmative basis for a finding of fact). Phrases like "strong possibility," or "20–80% probability," also invite speculation. *Chaney v. Smithkline Beckman Corp.,* 764 F.2d 527, 529–30 (8th Cir.1985).
>
> In some cases, the courts are more demanding in requiring a degree of certainty in predictions of future consequences.
>
> Accordingly, while the particular phrase used should not be dispositive, it may indicate the level of confidence the expert has in the expressed opinion. Perhaps nothing is absolutely certain in the field of medicine, but the intent of the law is that if a physician cannot form an opinion with sufficient certainty so as to make a medical judgment, neither can a jury use that information to reach a decision. *McMahon v. Young,* 442 Pa. 484, 276 A.2d 534, 535 (1971).

Id. at 597 (citations and footnote omitted).

[68] ¶ 173. Here, as found in the first issue, Dr. McGarry's opinion that the anal tear was evidence of "anal rape" did not go beyond his scope of expertise and did not improperly invade the province of the jury. The State's evidence as a whole, which included the crime scene, the condition of the body, the victim's defensive wounds, the "fresh" injury to her anus, was sufficient to sustain the jury's ultimate determination that Galloway committed

sexual battery against Anderson, and the act occurred during the commission of her murder. This issue is without merit.

20. The court erred in ruling inadmissible evidence of the victim's prior sexual behavior, including letters found in her school locker.

¶ 174. Galloway argues that he had a right under the Mississippi Rules of Evidence and the United States and Mississippi Constitutions to present evidence of prior sexual behavior of the victim to demonstrate that (1) any sexual behavior between him and Anderson was consensual; and/or (2) another person caused her anal injury and was the source of the DNA found her vaginal cavity.

¶ 175. Prior to trial, the State moved in limine to exclude any evidence of Anderson's prior sexual activity, including letters found in Anderson's school locker. The letters were addressed to "Demetri Lamar Brown," and signed "Shakeylia." One of the letters contained a sexually graphic solicitation for oral sex, and closed with: "Demetree and Shakeylia FOR EVER. I love you." Galloway contends the trial court ruled that he could introduce evidence of prior sexual activity between him and Anderson only if he took the stand. And the court would not allow the defense to call witnesses to testify that they had sex with Anderson. Galloway argues that the trial court's rulings violated Rule 412(c) of the Mississippi Rules of Evidence, and denied him due process or a fair trial.

¶ 176. The State argues the motion was granted to the extent that the defense might offer testimony of Anderson's prior sexual conduct, excluding any such contact ***668** between her

and Galloway. The State maintains that the trial court left open the possibility that the defense might be able to show the nature and extent of Anderson's relationship with Galloway, and the trial court clarified its ruling: "I think if the DNA experts come in here and say they found DNA from two different persons, that's admissible. But my ruling is to the extent that you might bring some witness in to say, I had sex with her the night before or two days before, a week before. That's not admissible."

[69][70] ¶ 177. As with all evidentiary rulings, a trial court's denial of a motion in limine regarding a Rule 412 motion is reviewed under an abuse-of-discretion standard. *McDowell v. State,* 807 So.2d 413, 421 (Miss.2001). The purpose of Rule 412 is "to prevent the introduction of irrelevant evidence of the victim's past sexual behavior to confuse and inflame the jury into trying the victim rather than the defendant." *Hughes v. State,* 735 So.2d 238, 273 (Miss.1999).

¶ 178. Prior to the court's ruling, the following exchange occurred with regard to the State's Rule 412 motion:

> DEFENSE: Your Honor, we have no objection other than to the prior sexual encounters she may have had with the defendant. They had had sex prior to this time. I think the facts will show that.
>
> THE COURT: What about that, Mr. Huffman?

PROSECUTOR: Your Honor, I think if he's going to testify to that, then I think that would be permitted by the rules.

THE COURT: Yeah, I think it is too. So I'm going to grant the motion in limine to the extent that it applies to other witnesses, but if the defendant takes the stand and testifies—

DEFENSE: Your Honor, I meant other than that, if in fact because consent is part of the defense here. And if witnesses can testify that they know that he had went with her, went places with her and they were in such a position or place that they might have engaged in some sexual activity, then I think we're entitled to have that information brought out and given to the jury, not that anybody else can say—I don't think anybody else can say they saw them.

THE COURT: That's what I was going to say. That sounds pretty speculative or conjectural.

DEFENSE: I know, Your Honor, and-but I think if we were at that point, the [S]tate would object to it and say, he's trying to show that they were lovers or something. And I think we have a right to do that.

THE COURT: Well, I'm going to grant the motion at this time, Mr. Rishel. But if we come to a point in the trial where there is a witness that you think might bring out this testimony and it would be admissible, we'll dismiss the jury and have a proffer or have a hearing on the matter.

¶ 179. Based on our review of the record, despite the trial court's conditional offer, Galloway made no attempt to introduce any such witness(es) at trial. Accordingly, this issue is without merit.

21. The trial court committed reversible error by denying the defendant's motion to suppress evidence.

¶ 180. Galloway contends the trial court erred in denying his motion to suppress evidence collected from his mother's Ford Taurus. He claims (1) Carbine did not have probable cause to conduct a warrantless search of the vehicle; (2) the inventory ***669** search of the vehicle immediately after Galloway's arrest was illegal; and (3) Galloway's arrest was a pretext for searching and seizing his mother's vehicle.

[71][72] ¶ 181. This issue is without merit. "In reviewing the denial of a motion to suppress, we must determine whether the trial court's findings, considering the totality of the circumstances, are supported by substantial credible evidence." *Gore v. State,* 37 So.3d 1178, 1187 (Miss.2010) (quoting *Moore v. State,* 933 So.2d 910, 914 (Miss.2006)). Review of the record is not limited to evidence presented to the trial judge at the suppression hearing; this Court may look to the entire record to determine whether the trial judge's findings are supported by substantial evidence. *Holland v. State,* 587 So.2d 848, 855 (Miss.1991); *see also* *Carroll v. United States,* 267 U.S. 132, 162, 45 S.Ct. 280, 285–86, 69 L.Ed. 543 (1925).

[73][74][75] ¶ 182. Individuals are protected under both the United States Constitution and the Mississippi Constitution from unreasonable searches and seizures. U.S. Const. amend. IV; Miss. Const. art. 3, § 23; *see also* *Graves v. State,* 708 So.2d 858, 861 (Miss.1997) (noting that Mississippi's Constitution provides greater protection from unreasonable search and seizure than the U.S. Constitution). As a general rule, our state and federal Constitutions prohibit searches without a valid warrant unless an exception applies. *Eaddy v. State,* 63 So.3d 1209, 1213 (Miss.2011). Such exceptions include "a consensual search, a search incident to arrest, an inventory search, a search under exigent circumstances if probable cause exists, and a search of a vehicle when making a lawful contemporaneous arrest." *Bradley v. State,* 934 So.2d 1018, 1022 (Miss.Ct.App.2005) (citing *Graves v. State,* 708 So.2d 858, 862–63 (Miss.1998)). The State bears the burden to show that a warrantless search comes within an exception for evidence seized thereupon to be admissible. *Jackson v. State,* 418 So.2d 827, 829 (Miss.1982).

¶ 183. Here, the trial court denied Galloway's suppression motion after finding that Galloway's vehicle was stopped lawfully and Carbine had probable cause to conduct a walk-around inspection of the vehicle. The record supports the trial court's findings.

¶ 184. Carbine testified that, immediately upon inspecting Anderson's body and the crime scene, they began "looking for a vehicle as a murder weapon." Carbine determined that the victim was last seen leaving her grandmother's house in a white Ford Taurus with a light skinned black male called "Bo" from the Moss Point area. The investigation identified two

individuals who went by the nickname "Bo," who lived in Moss Point and drove a white Ford Taurus. One of the individuals was Galloway, who investigators determined possibly resided at 6425 Shortcut Road. On December 9, 2008, Carbine drove by the residence, viewed the vehicle's license plate number, and learned that the vehicle was registered to Galloway's mother, Ollie Varghese. McClenic also drove by the residence and observed a white Ford Taurus in the driveway. Through his investigation, McClenic learned that Galloway had an outstanding arrest warrant for a misdemeanor and a suspended driver's license. McClenic and his deputies "began running constant surveillance on 6425 Shortcut Road." After about an hour and a half of surveillance, at approximately 10:00 p.m. on December 9, the white Ford Taurus reportedly left the residence. Authorities stopped the vehicle a short distance away and arrested Galloway on the outstanding warrant. Galloway's friend Triplett also was in the vehicle when it was stopped. When Carbine arrived at the ***670** scene, Galloway was standing by the driver's side door in handcuffs, and officers were conducting an inventory search of the vehicle in preparation for having it towed. Carbine walked around the vehicle and performed a visual inspection. She noticed underneath the vehicle "something hanging, kind of flapping in the wind." Because the vehicle was going to be towed, Carbine removed and secured the substance, which later was determined to be Anderson's skin. The vehicle was towed and secured at Bob's Garage. Two different search warrants for the vehicle were obtained and executed, neither of which Galloway challenged on legality at trial; nor does he do so on appeal.

¶ 185. On appeal, Galloway and the State both provide this Court a thorough discussion with regard to warrantless searches and seizures under Fourth Amendment law and state constitutional law. But we need not respond in kind because it is plain from the record that there was no violation of either.

[76] ¶ 186. This record before us abounds with evidence justifying a finding of probable cause and exigent circumstances. *See Deeds v. State,* 27 So.3d 1135, 1144 (Miss.2009) (warrantless searches are permissible in exigent circumstances if shown that grounds existed to conduct the search that, had time permitted, reasonably would have satisfied a disinterested magistrate that a warrant properly should issue). The investigation in this matter rapidly came together on December 9. That was when investigators spoke to the victim's family-Brimage in particular, who described the person with whom Anderson had left and the white Ford Taurus in which they had driven away. Brimage was certain it was a Ford Taurus because her school district uses these type vehicles. As a result of Carbine's and McClenic's ensuing investigative efforts, Galloway became a suspect. Investigators determined his possible location and there observed a parked white Ford Taurus fitting Brimage's description. Based on the underlying facts and circumstances attending the case, the vehicle itself was believed to be evidence in a crime. And sufficient probable cause existed at that point to obtain a search warrant. Whether authorities were in the process of obtaining one, the record does not disclose. No matter, because the record illustrates that Jackson County authorities, armed with a valid arrest warrant, lawfully stopped the white Ford Taurus shortly after it left its location, en route to who knows where. Through prudent police work,

Carbine thereafter obtained a piece of evidence from the vehicle's undercarriage prior to the vehicle being towed.

¶ 187. For these reasons, we find the trial court correctly overruled Galloway's suppression motion. This issue is meritless.

22. The trial court violated Galloway's rights in allowing victim-impact evidence in the guilt-innocence phase over defense objections.

¶ 188. Galloway contends the prosecution introduced improper and highly prejudicial victim-impact evidence during the guilt/innocence phase of trial through its first witness, Graham, the victim's uncle. Galloway contends this evidence bore no relevance to the issue of Galloway's guilt and served only to inflame the jury.

¶ 189. During Graham's testimony, he described Anderson as "beautiful, healthy, fun loving. She had dark eyebrows. She was like what we might call light skinned with a tan." Graham called her "Ching" because she looked Asian when she was a baby. He told the jury Anderson was "the baby," the youngest of four siblings. He ***671** testified that Anderson was "a senior in high school" and that she was "all excited about graduating and joining the Air Force. She had been in the ROTC." The State asked Graham if other family members were in the Air Force, and Graham responded, "Yeah, her older brother Jerry is still in the Air Force, and one of her sisters, Janice, was in the Air Force." The defense entered an objection at that point on the ground of "relevancy," which the trial court overruled.

¶ 190. On appeal, Galloway acknowledges that the State called Graham because he was present at the grandmother's house with Anderson on the night she disappeared. But he contends Graham's testimony far exceeded his account of the circumstances that night and instead focused on Anderson's physical appearance, the family members that she left behind, and the promising future that was taken from her.

¶ 191. "Victim impact statements are those which describe the victim's personal characteristics, the emotional effect of the crimes on the victim's family, and the family's opinion of the crimes and the defendant." *Wells v. State,* 698 So.2d 497, 512 (Miss.1997) (citing *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)). In *Hansen v. State,* 592 So.2d 114, 146–47 (Miss.1991), this Court adopted the United States Supreme Court's holding in *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), that the Eighth Amendment does not bar victim-impact evidence during the penalty phase at trial.

¶ 192. This Court points out that, in reaching its holding, the *Payne* Court noted that various pieces of evidence regarding the victim's background likely would have been presented during the guilt phase of the trial. *Id.* at 823. Accordingly, the Court concluded that it would be anomalous to require strict exclusion of such evidence at the sentencing phase because the jury already would have heard that evidence at the guilt phase. *Id.* at 840–41. Thus, *Payne* suggests that limited victim-background evidence may be admitted—indeed, may have to be admitted—during the guilt phase of trial.

¶ 193. In *Goff v. State,* 14 So.3d 625, 652 (Miss.2009), we found testimony provided by the State's witness, who identified himself as the victim's "husband of eight years, who reiterated they had two children together, and stated where the [the victim] worked," did not constitute victim-impact evidence. Rather, it " 'concerned the background of the victim' and merely set the stage for the presentation of relevant evidence." *Id.* (quoting *Spicer v. State,* 921 So.2d 292, 307 (Miss.2006)). In *Spicer,* this Court found that testimony "concerning the background and habitual actions of the victim was not 'victim impact' testimony, but instead was admissible to explain the circumstances surrounding the crime and establish guilt." *Spicer v. State,* 921 So.2d at 307 (quoting *Scott v. State,* 878 So.2d 933, 963–64 (Miss.2004), *overruled on other grounds* by *Lynch v. State,* 951 So.2d 549 (Miss.2007)). In *Scott,* the victim's wife testified that she and her husband had been married almost fifty-two years, hunted and fished together, and both were enjoying retirement. *Scott v. State,* 878 So.2d at 963. This Court found the wife's testimony was not victim-impact testimony. *Id.* at 964.

[77][78] ¶ 194. Here, Graham was the State's first witness. He merely provided some background information concerning Anderson. Graham did not state any emotional effect the crime had on him or his family, nor did he state an opinion of the defendant. In our opinion, however, the trial court erred in not sustaining Galloway's objection to Graham's statement regarding ***672** Anderson's siblings, as such information was irrelevant. Nevertheless, we find the error harmless beyond a reasonable doubt.

23. Galloway was denied effective assistance of counsel.

¶ 195. Galloway contends the totality of trial counsel's errors, including those noted in issues 4, 8, 9, 10, 14, 15, 16, 17, 19, 20, 21, 22, and 24 (incorporated here), and those described below, violated his right to effective assistance of counsel.

¶ 196. As previously discussed, we apply the two-pronged test set forth in *Strickland v. Washington,* 466 U.S. at 687, 104 S.Ct. 2052, for ineffective-assistance-of-counsel claims. Galloway must show that his counsel's performance was deficient, and that counsel's alleged deficiency prejudiced his defense to such extent there is a reasonable probability the result of the proceeding would have been different. *Id.* at 694, 104 S.Ct. 2052. Because we are limited to the trial record on direct appeal, we will address an ineffectiveness claim only if the presented issues are based on facts fully apparent from the record. M.R.A.P. 22.

¶ 197. The ineffectiveness claim under issue 4 already has been addressed. We find the ineffectiveness claims made under previously discussed issues 8, 9, 10, 14, 15, 16, 19, 20, 21, and 22 are based on facts fully apparent from the record. Having considered the claims associated therewith, we find that Galloway has failed to show prejudice sufficient to satisfy the second *Strickland* prong. With regard to issue 17, dealing with Brimage's in-court identification of Galloway, Galloway claims defense counsel failed to ask for a ruling on a pretrial motion to suppress any show-up identifications of Galloway. This cannot be addressed based on the record before us. Galloway may argue this claim through a petition for post-conviction relief. Galloway's ineffectiveness claim with regard to issue 24 will be addressed under that issue.

¶ 198. We will now speak to Galloway's other ineffectiveness claims.

A. *Voir Dire Ineffectiveness*

[79] ¶ 199. Galloway alleges that trial counsel was ineffective for failing to challenge potential juror McCoy for cause. He contends McCoy should have been challenged because he initially indicated that he automatically would impose the death penalty for capital murder. This contention is without merit. McCoy was not chosen as a juror or an alternate juror. And the record shows that after additional individual voir dire, McCoy explained that he had misunderstood the question and changed his answer by indicating he would be fair and consider all possible punishment that could be imposed.

¶ 200. Galloway next contends that Juror Smith should have been challenged because she indicated that she would have very strong feelings and would impose the death penalty for any crime involving sexual assault. This contention is without merit because, like McCoy, Smith was not chosen as a juror or an alternate juror.

B. *Pretrial Ineffectiveness*

¶ 201. Galloway contends that defense counsel failed to request a ruling on a motion to suppress Galloway's police statement challenging his waiver of his *Miranda*[6] rights as not knowing, voluntary, or intelligent. This contention cannot be addressed based on the record

before us. Therefore, Galloway may argue the claim through a petition for post-conviction relief.

[80] ¶ 202. Galloway contends another pretrial failure occurred when defense ***673** counsel sought an order for funds from the trial court for Dr. Riddick's assistance while in the State's presence, thereby failing to take advantage of this Court's clear law from *Manning v. State,* 726 So.2d 1152 (Miss.1998), which says "the State has no role to play in the determination of the defendant's use of experts." Galloway submits the necessity and propriety of such assistance is a matter left entirely to the discretion of the trial court. The State argues that *Manning* cuts both ways. In *Manning,* the defendant claimed that the trial court erred by requiring the defense to give notice to the prosecution of his intent to seek a mental-competency exam. *Id.* Since the motion for a competency exam was filed prior to the trial court's instruction, the Court held the issue was meritless. The *Manning* Court then commented that "the State has no role to play in the determination of the defendant's use of experts. The necessity and propriety of assistance is a matter left entirely to the discretion of the trial court." *Id.*

¶ 203. We agree with the State. *Manning* did not find the trial court erred by requiring the defense to provide notice regarding the possible retention of an expert. Nor does *Manning* stand for the proposition that trial counsel was ineffective by requesting an expert on the record in the prosecution's presence. The case, rather, reiterates that the determination of a defendant's use of experts is left to the discretion of the trial court.

¶ 204. As this Court noted in *McGilberry v. State,* 741 So.2d 894, 916 (Miss.1999), the federal courts have held that hearings concerning an indigent's need for expert assistance and the services of an investigator must be held ex parte. But "[a]ll involve the interpretation of 18 U.S.C. § 3006A(e)." *Id* (citation omitted). Mississippi "has not seen fit to adopt this requirement either by statute or court rule." *Id.*

¶ 205. Accordingly, this claim fails under both *Strickland* prongs. There being no per se requirement in this State that Galloway's request for expert assistance be made ex parte, defense counsel cannot be deemed to be deficient by failing to pursue an ex parte motion or ruling from the trial court. Moreover, Galloway has failed to demonstrate how this was prejudicial to the assurance of a fair trial.

C. Penalty–Phase Ineffectiveness

¶ 206. Defense counsel promised the jury in its opening statement at the penalty phase that the jury would hear from Dr. Beverly Smallwood, a psychologist who had met with Galloway and had performed testing on him. But defense counsel failed to call Dr. Smallwood.

¶ 207. We cannot address this claim based on the record before us. Therefore, Galloway will be allowed to raise it in a post-conviction proceeding.

¶ 208. Galloway also contends that defense counsel was ineffective for failing to object to the trial court's sentencing instruction defining mitigation evidence as "any matter or aspect of the defendant's character or record and any other circumstance of the offense brought to you during the trial of this case which you, the jury, deem mitigation of behalf of the defendant." This argument was addressed in issue eleven. This language was part of jury instruction S–100A, the "long-form instruction." As mentioned, this instruction was approved by this Court in *Branch,* 882 So.2d at 69. Thus, there was no basis to object to it.

24. The evidence introduced by the State in support of the aggravating circumstance of a prior conviction for a crime of violence was constitutionally insufficient.

[81] ¶ 209. During the penalty phase, the State submitted a certified "pen ***674** pack"[7] as evidence that Galloway had a prior felony conviction involving the use or threat of violence and that Galloway was under a sentence of imprisonment at the time he murdered Anderson. The "pen pack" contained (1) certification of records form; (2) sentence computation record; (3) social admission interview; (4) release document; (5) order; (6) commitment papers; (7) indictment; (8) fingerprint card; and (9) photograph.

¶ 210. In *Russell v. State,* 670 So.2d 816, 831 (Miss.1995), this Court held that a "pen pack," containing essentially the same kind of documents here, submitted as evidence during the penalty phase of a capital-murder case, was relevant under Section 99–19–101(5)(b) to prove beyond a reasonable doubt the two statutory aggravators charged in that

case.[8] *See also* *Duplantis v. State,* 708 So.2d 1327, 1346 (Miss.1998) ("Certified copies of indictments and sentencing orders are sufficient to prove prior criminal convictions for habitual offender sentencing.").

¶ 211. Likewise, we find the "pen pack" submitted in this case sufficiently established that Galloway had a prior felony conviction involving the use or threat of violence to the person and was under sentence of imprisonment. This issue is without merit.

25. The "especially heinous, atrocious, or cruel" aggravating circumstance was constitutionally invalid.

[82] ¶ 212. Galloway argues that the trial court's sentencing instruction on the "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague and overbroad. The instruction provided as follows:

> The Court instructs the Jury that in considering whether the capital offense was especially heinous, atrocious, or cruel: heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel mean [s] designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.
>
> An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set the crime apart from the norm of Capital Murders, the

conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence beyond a reasonable doubt that the defendant utilized a method of killing which caused serious mutilation, that there was dismemberment of the body prior to death, that the defendant inflicted physical or mental pain before death, that there was mental torture and aggravation before death, or that a lingering or torturous death was suffered by the victim then you may find this aggravating circumstance.

¶ 213. The exact language of this instruction has been found to be legally sufficient so as to satisfy constitutional requirements recognized in previous decisions by this Court. *See Bennett,* 933 So.2d at 955–56;*Havard v. State,* 928 So.2d at 799–800 (Miss.2006); *Knox,* 805 So.2d at 533;*Stevens v. State,* 806 So.2d 1031, 1060 (Miss.2001). Thus, this contention is without merit.

***675** [83] ¶ 214. Galloway also contends that the prosecution failed to adduce sufficient evidence to convince a reasonable juror beyond a reasonable doubt the method of killing utilized caused the victim "physical pain," or "mental pain," "mental torture and aggravation," "serious mutilation," or "dismemberment of the body," "a lingering death," or "a tortuous death." Galloway further contends that the jury's contrary finding was against the overwhelming weight of the evidence.

¶ 215. Dr. McGarry testified at length regarding the condition of Anderson's body both at the crime scene and upon autopsy. When Dr. McGarry arrived at the crime scene he found the body "lying on a dirt road, twisted and distorted, smeared with blood and dirt, with parts of her body gouged out." Where Anderson's body lay, there was "evidence of tire tracks in a

turning pattern around her and over her body at least three places." Dr. McGarry "found teeth and pieces of bone and flesh ten feet from her body." In examining Anderson at that location, Dr. McGarry found evidence of her body "having been rolled over and crushed, distorted, mangled. She had a swollen face. She had injuries of her hands and face that preceded the rollover."

¶ 216. From his autopsy report, Dr. McGarry related that he found evidence of defensive wounds on Anderson. He explained:

> Defensive wounds are those injuries that occur on a person who is being attacked by another person who holds up arms, holds up hands, holds hands over face, pulls up knees, shins and attempts to ward off injuries being inflicted by another person. The injuries are on these parts of the body, the backs of the forearms and hands, the knees, the shins and the shoulders and hips. And when I see that pattern I call those defensive injuries. They are injuries inflicted when she is attempting to defend herself against an attacker.

¶ 217. Dr. McGarry stated that Anderson had three cuts on the skin of her neck, two close together, two inches long, along the left side, and one around the right side that came across the midline. He said, "These were not part of her general injuries. These were throat cutting type of injuries, three in a row by some kind of sharp object. It did not go all the way through the skin." When asked by the prosecution if these cuttings caused Anderson's death, Dr. McGarry replied, "No."

¶ 218. Dr. McGarry described the burns found on Anderson's body and opined what caused them:

> This [is] what I would call a flash burn, the kind of burn that occurs when something is put on the body, like throwing some kind of flammable substance on the body, and it burns all of a sudden. It burned most of her hair, eyebrows, eyelashes, and then it went over her body in sort of a splash pattern. Didn't get all of the skin, but it had large linear line like area of burns that would occur if she were splashed with something and then ignited.
>
> ....
>
> [T]his would be a massive surface burn. It would not be instantly fatal. It would be a million times worse than touching a hot flame with a part of the body. It's widespread and almost generalized. It would be extremely painful, but it would not be lethal at the moment. A person with this kind of burn ordinarily would live a few days and be treated.

When asked by the prosecution if a human would be able to retreat with this type of burn, Dr. McGarry replied: "This would be so painful that it would be a paralyzing ***676** type of pain, kind of pain that makes a person collapse and be helpless."

¶ 219. Dr. McGarry's examination also revealed that Anderson suffered a fractured breast bone, broken ribs in front and back, and her "chest was crushed in a band of injury across the heart and lung." Her lungs, liver, and spleen were ruptured. She had tears of both kidneys, and both sides of the front of her pelvis were fractured.

¶ 220. Dr. McGarry determined that Anderson had died from "crushing injuries causing punctures of the lungs, rupture of internal organs, internal bleeding, inability to breathe." And he testified that the type of injuries Anderson received were consistent with being set on fire and run over by a vehicle.

¶ 221. The evidence more than sufficiently supports the jury's finding that Anderson's death was heinous, atrocious, and cruel. And there is nothing about this evidence that preponderates so heavily against this jury's finding on this aggravator that would sanction an unconscionable injustice by allowing it to stand.

¶ 222. Reasonable minds rationally could conclude from these facts that Galloway inflicted physical and mental pain upon Anderson prior to her death, as evinced by the defensive wounds discovered on her body. Reasonable minds also could conclude that Anderson suffered a torturous death by being set afire before being crushed to death by Galloway's vehicle. A burn location was some feet from the clearing where Anderson's body was found, and Dr. McGarry and Carbine observed a drag pattern from that location to the spot where Anderson's body was found among tire tracks. Since Dr. McGarry determined Anderson's cause of death was her being crushed by an automobile, and her body was found surrounded by tire tracks, one could reasonably infer from these facts that Anderson was burned while still alive and dragged to the logging road where Galloway ran his vehicle over her. And then there is the actual method of killing Galloway utilized, repeatedly rolling over

Anderson with his vehicle, which crushed the life out of her and left her body in a "mutilated" state.

¶ 223. There is no merit in this issue.

26. By requiring prospective jurors to swear prior to voir dire that they would render "true verdicts ... according to the law and evidence," and commit that they will "follow the law," the trial court created a constitutionally intolerable risk that Leslie Galloway was unable to vindicate his constitutional right to determine whether the prospective jurors in his case could be fair and impartial and follow the law.

¶ 224. Prior to voir dire, the trial court administered the petit juror oath, pursuant to Mississippi Code Section 13–5–71, requiring the prospective jurors to swear that they "will well and truly try all issues and execute all writs of inquiry that may be submitted to you by the Court during the present week and true verdicts according to the law and the evidence so help you God?" Miss.Code Ann. § 13–5–71 (Rev.2002). Then, before general voir dire questioning by the parties, the judge asked the jurors to "commit to me now ... even though you don't know what the law will be until I give it to you, do you commit to me that you will follow the law that I give you at the end of the case?" After the jury was selected, the trial court administered the capital juror oath pursuant to Section 13–5–73.

[84] ¶ 225. Galloway argues that administration of the petit juror oath and ***677** requiring jurors to commit to following the law prior to voir dire created a constitutionally intolerable

risk that his defense was unable to determine whether prospective jurors could be fair and impartial and follow the dictates of the law. Galloway contends that jurors who have sworn that they will render such verdicts and have committed to doing so will be far less willing to admit during voir dire that they are unable to do so, because to admit that they are unable to do so would be to admit in effect that they had sworn falsely. For support of his argument, Galloway relies on *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992),—a decision which in no way supports Galloway's argument.

¶ 226. Indeed, *Morgan* acclaims juror oaths.

¶ 227. As recognized by the Fifth Circuit, *Morgan* "involves the narrow question of whether, in a capital case, jurors must be asked whether they would automatically impose the death penalty upon conviction of the defendant." *United States v. Greer,* 968 F.2d 433, 437 n. 7 (5th Cir.1992). *Morgan* held that a capital defendant "must be permitted on voir dire to ascertain whether his prospective jurors" would "impose death regardless of the facts and circumstances of conviction." *Id.* at 735–36, 112 S.Ct. 2222.*Morgan* explained that due process demands that, "if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by the Sixth Amendment's holding." *Id.* at 727, 112 S.Ct. 2222. In capital cases, a juror is constitutionally unqualified if he has "views on capital punishment" that would "prevent or substantially impair the performance of his duties as a juror in accordance with his *instructions and his oath.*" *Id.* at 728, 112 S.Ct. 2222 (emphasis added). "[A] juror

who in no case would vote for capital punishment, *regardless of his or her instructions,* is not an impartial juror and must be removed for cause." *Id.* at 728, 112 S.Ct. 2222 (emphasis added). Likewise, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to *consider the evidence of aggravating and mitigating circumstances as the instructions require him to do* [,]" and must also be removed for cause. *Id.* at 729, 112 S.Ct. 2222 (emphasis added).

¶ 228. *Morgan* rejected Illinois' argument that "general fairness questions and 'follow the law' questions ... are enough to detect those in the venire who automatically would vote for the death penalty." *Id.* at 735, 112 S.Ct. 2222.*Morgan* said "such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed." *Id.* at 735, 112 S.Ct. 2222. "More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability *to follow the law*." *Id.* (emphasis added). The *Morgan* Court added, "It may be that a juror could, in good conscience, *swear to uphold the law* and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so." *Id.* (emphasis added). Thus, "[a] defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception." *Id.* at 735–36, 112 S.Ct. 2222.

¶ 229. Here, the record shows that, after the petit juror oath was administered and before voir dire examination began, the trial court informed the venire this was a capital case, where the death penalty is a possible punishment. The court explained ***678** the case would

be tried in two stages; that during the second stage, the jury-after hearing, considering, and weighing the evidence of aggravating and mitigating circumstances-would retire to consider the sentence to be imposed; and that only two sentences could be considered-death or life imprisonment without parole. The trial court then emphasized that the death penalty cannot automatically be imposed for this crime and stated that "the jury should not consider any sentence until after hearing all the evidence, receiving instructions, and hearing arguments at the conclusion of the second stage of this trial."

¶ 230. Afterward the trial court queried the venire, as follows:

> Should this case require by your verdict a second phase or penalty phase, I must now inquire as to your thoughts or beliefs as to the imposition of the death penalty. Do any of you have conscientious scruple[s] against the infliction of the death penalty when the law authorizes it in the proper case and where the testimony and the evidence warrants it? Does anybody have conscientious scruples against awarding the death penalty? All right.
>
> All right. This is a follow-up question. Could or would your attitude toward the death penalty prevent you or materially affect you in making the decision as to the defendant's guilt? In other words, if you have conscientious scruples against the death penalty, would that affect your ability to impartially decide the guilt phase of the case?
>
> All right. Let me ask you this question, if you do have conscientious scruples against awarding the death penalty, ... [w]ould you automatically vote against the imposition of the death penalty without regard to the evidence that might be developed in the trial of

this case ... ? In other words, would you vote against the death penalty without regard to the evidence that is brought forth during the course of the trial? All right.

All right. The next question is would you automatically vote for the imposition of the death penalty without regard for the evidence of aggravation or mitigation and only for the reason that you may find the accused guilty of the crime of capital murder? In other words, do you hold the belief that if he was to be found guilty of the crime of capital murder that you would vote for the imposition of the death penalty regardless of the evidence?

¶ 231. The record illustrates that eleven venire members indicated that they could under no circumstances impose the death penalty, and ten members indicated that they would automatically impose the death penalty. The record shows that, upon further examination by the trial court and attorneys from both sides, of the eleven who initially indicated that they absolutely opposed the death penalty, one later withdrew his original response and stated that he could find circumstances where the death penalty was appropriate. Of the ten who stated they automatically would impose the death penalty, four revised their initial responses and stated they would not indiscriminately impose the death penalty. They told the court they would consider the aggravating and mitigating circumstances and could make a determination whether life in prison without parole should be imposed.

¶ 232. The record before us belies Galloway's notion. And we find his argument meritless.

27. The trial court erred by limiting nonelector jurors to "resident freeholders for more than one year."

[85] ¶ 233. Galloway next contends that the trial court erred by limiting the ***679** venire to qualified electors of Harrison County or resident freeholders for more than one year. But Galloway failed to raise a contemporaneous objection to this criteria and thus is procedurally barred from asserting the claim on appeal. *Williams v. State,* 684 So.2d 1179, 1203 (Miss.1996). Procedural bar notwithstanding, Galloway's claim is meritless. This same claim was asserted in *Jordan v. State,* 786 So.2d 987 (Miss.2001), and it was rejected. *Jordan* found the issue meritless, noting that the Legislature "added the qualifier of freeholder for the very reason that jury members would not be limited to registered voters, *Brown v. State,* 240 So.2d 291, 292 (Miss.1970), thereby expanding the list of qualified venire." *Jordan,* 786 So.2d at 1024.

28. Mississippi's capital-punishment scheme is unconstitutional on its face and as applied.

¶ 234. Galloway claims there are six reasons why Mississippi's capital-punishment scheme is unconstitutional on its face and as applied to him. First, Galloway contends that the jury made no specific-intent finding, and it is constitutionally impermissible to execute a defendant without a finding of specific intent to commit a crime. Second, Galloway submits that, by treating the nature of his *mens rea* as a threshold aggravating issue, Mississippi's capital-punishment statute put beyond the effective reach of the sentencing jury the mitigating fact that Galloway did not kill, attempt to kill, or intend that a killing take place, which violated the Eighth and Fourteenth Amendments to the United States Constitution

and the corresponding provisions of the Mississippi Constitution. Third, under Mississippi's capital-punishment scheme, persons such as Galloway convicted of murder simpliciter automatically are guilty of capital murder and eligible for the death penalty, but persons convicted of killing a human being with "deliberate design," or by committing "an act eminently dangerous to others and evincing a depraved heart" are guilty only of simple murder and are ineligible for the death penalty. Fourth, the sexual battery in this case was used both to make the murder death-eligible and as a means of narrowing the class of murders. Fifth, the death sentence in this case is wanton, freakish, excessive, and disproportionate. And sixth, the death penalty in Mississippi has been and is being imposed discriminatorily against defendants convicted of killing whites, against defendants convicted of killing white women, against males, and against poor people.

[86] ¶ 235. For his first contention, Galloway's cites *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), in which the Supreme Court held that it was unconstitutional to execute a criminal defendant without the jury finding specifically that the defendant actually had killed, attempted to kill, intended to kill, or contemplated that lethal force would be employed. This Court has interpreted *Enmund* to hold that "the factors are read in the disjunctive, so that it is sufficient and necessary that the jury find one *Enmund* factor before a defendant can be sentenced to death." *Jordan v. State,* 786 So.2d 987, 1029 (Miss.2001) (citing *Holland,* 705 So.2d at 327). All that is constitutionally required is that the jury find, as they did here, that Galloway actually killed, regardless of intent. *Id.* This point of contention is without merit.

¶ 236. Galloway's second contention is a rehashing of the first and likewise is without merit.

[87] ¶ 237. As to Galloway's third and fourth contentions, he claims that Mississippi's capital-punishment scheme, as applied to felony murders, violates the ***680** Eighth and Fourteenth Amendments because it does not furnish a principled means of distinguishing defendants who receive the death penalty. He argues there is no rational or historical basis for treating felony murderers as more culpable than premeditated murderers for purposes of capital punishment. Further, the sexual battery in this case was used both to make the murder death-eligible and as a means of narrowing the class members.

[88][89] ¶ 238. As this Court has held:

> Our precedents make clear that a State's capital sentencing scheme must ... genuinely narrow the class of defendants eligible for the death penalty. When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.

Blue v. State, 674 So.2d 1184, 1216 (Miss.1996) (quoting *Arave v. Creech,* 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993)). Not every defendant eligible for the

death penalty will have committed murder while in the course of sexual battery or the other statutorily enumerated felonies. *See*Miss.Code Ann. § 97–3–19 (Rev.2006). Therefore, the felony-murder aggravator genuinely narrows the class of defendants eligible for the death penalty. Further, "[t]he legislature has a very great latitude in prescribing and fixing punishment for crime." *Thorson v. State,* 895 So.2d 85, 106 (Miss.2004) (quoting *Wilcher,* 697 So.2d at 1109). Use of the underlying felony as an aggravating factor during sentencing has been upheld consistently by this Court in capital cases.*Wilcher,* 697 So.2d at 1108.

> The argument is the familiar "stacking" argument that the state can elevate murder to felony murder and then, using the same circumstances can elevate the crime to capital murder with two aggravating circumstances. As pointed out in *Lockett v. State,* 517 So.2d 1317, 1337 (Miss.1987), this Court has consistently rejected this argument.

Id. (quoting *Walker v. State,* 671 So.2d 581, 612 (Miss.1995)). The United States Supreme Court has held that this practice does not render a death sentence unconstitutional. *See* *Lowenfield v. Phelps,* 484 U.S. 231, 246, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (fact that aggravating circumstance duplicated one of the elements of the crime does not make a death sentence constitutionally infirm).

¶ 239. Galloway next argues that the offense for which he was convicted was, though tragic, simply not within that "narrow category of the most serious crimes" that the Eighth Amendment contemplates punishing with the ultimate penalty. We find that it is, for reasons already discussed.

¶ 240. 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 ***681** 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 decision makers 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.

¶ 241. Likewise, Galloway offers no proof that the death penalty is applied in a discriminatory manner in Mississippi, or that he suffered discriminatory application of the law. His only support for this claim is insufficient statistical data, similar to that rejected by the *McCleskey* Court. This point of contention is without merit.

29. Prosecutor's unfettered, standardless, and unreviewable discretion violates equal protection, due process, and the Eighth Amendment.

[90] ¶ 242. Galloway contends Mississippi lacks statewide standards governing the discretion of local prosecutors to seek or decline the execution of death-eligible defendants. As a result, the decision whether to seek the death penalty turns on personal policies of the local prosecutor. Relying on reasoning from *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), Galloway claims Mississippi fails to provide even an "abstract proposition" or "starting principle" as to how local prosecutors should make these life-and-death decisions.

¶ 243. Both this Court and the Supreme Court repeatedly have rejected this type of argument.*See* *McCleskey,* 481 U.S. at 296–97, 107 S.Ct. 1756 (presentencing decisions by actors in the criminal justice system that may remove an accused from consideration for the death penalty are not unconstitutional); *Gregg v. Georgia,* 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) ("Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."); *Jordan v. State,* 918 So.2d 636, 658–59 (Miss.2005) (there is no constitutional requirement that all equally culpable defendants receive the same punishment); *Jackson v. State,* 672 So.2d 468, 484 (Miss.1996) (finding the issue meritless because "the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law' ") (*quoting* *Ladner v. State,* 584 So.2d 743, 751 (Miss.1991)).

¶ 244. As the Supreme Court in *McCleskey* expressed, "Discretion in the criminal justice system offers substantial benefits to the criminal defendant." *McCleskey,* 481 U.S. at 311, 107 S.Ct. 1756. The local prosecutor "can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case." *Id.* at 312, 107 S.Ct. 1756. With that power of leniency is the power also to discriminate. *Id.* But "a capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.' " *Id.* (quoting *Gregg,* 428 U.S. at 200 n. 50, 96 S.Ct. 2909).

¶ 245. This issue is without merit.

30. This Court should reverse due to the cumulative harm of the errors.

¶ 246. Galloway claims that the cumulative effect of the errors in his trial warrants reversal.

***682** [91][92] ¶ 247. This Court may reverse a conviction and/or sentence based upon the cumulative effect of errors that independently would not require reversal. *Jenkins v. State,* 607 So.2d 1171, 1183–84 (Miss.1992). In capital cases, "although no error, standing alone, requires reversal, the aggregate effect of various errors may create an atmosphere of bias, passion and prejudice that they effectively deny the defendant a fundamentally fair trial." *Woodward v. State,* 533 So.2d 418, 432 (Miss.1988), *cert. denied,*490 U.S. 1028, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989).

¶ 248. After conducting a thorough review of the record, the briefs, and the argument, this Court has determined that there are no individual errors, or cumulative near-errors, which require reversal of either Galloway's conviction or his sentence.

31. Mississippi Code Section 99–19–105(3).

¶ 249. Pursuant to Mississippi Code Section 99–19–105(3), in addition to reviewing the merits of those issues raised by Galloway, we are required to 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; and

(c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Miss.Code Ann. § 99–19–105(3) (Rev.2007).

[93] ¶ 250. After reviewing the record in this appeal as well as the death-penalty cases listed in the appendix, we conclude that Galloway's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. We further find that the evidence is more than sufficient to support the jury's finding of statutory aggravating circumstances. The jury did not consider any invalid aggravating circumstances. In

comparison to other factually similar cases in which a death sentence was imposed, the sentence of death in this case is neither excessive nor disproportionate.

CONCLUSION

¶ 251. For the reasons set forth above, Galloway's arguments are without merit. We affirm Galloway's conviction and the sentence of death imposed by the Harrison County Circuit Court.

¶ 252. **CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH BY LETHAL INJECTION, AFFIRMED.**

WALLER, C.J., RANDOLPH, P.J., LAMAR AND COLEMAN, JJ., CONCUR. CHANDLER, J., CONCURS IN PART AND IN RESULT WITH SEPARATE WRITTEN OPINION JOINED IN PART BY DICKINSON, P.J., AND KITCHENS, J. DICKINSON, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS AND KING, JJ. KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., AND KING, J. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY DICKINSON, P.J., AND KITCHENS, J.

CHANDLER, Justice, concurring in part and in result:

¶ 253. I concur in part and in the result. I write separately to express my agreement with the analysis of the Confrontation ***683** Clause issue provided by Justice Kitchens in his dissenting opinion.

DICKINSON, P.J., AND KITCHENS, J., JOIN THIS OPINION IN PART.

DICKINSON, Presiding Justice, dissenting:

¶ 254. During deliberations, the jury sent the trial judge a note asking, "Does murder escalate the sex automatically to sexual battery?" The jury obviously wondered whether—because there was a murder involved—conduct that *did not* amount to sexual battery should be "escalated" to sexual battery. The clear, unequivocal, indisputable answer to the jury's question was "no."

¶ 255. In order to find capital murder based on sexual battery, the elements of the alleged sexual battery must be established, regardless of the murder. Rather than assisting the jurors, the trial judge allowed them to convict Galloway without an adequate understanding of a crucial element of capital murder. For this reason, I must dissent.

¶ 256. If the jury believed beyond a reasonable doubt that Galloway's conduct met the elements of sexual battery, there would have been no reason for them to inquire about "escalating" that conduct to sexual battery. It is no answer—as the majority finds—to simply refer the jurors to the jury instructions—the source of their confusion to begin with.

¶ 257. Since the trial judge refused to clarify[9] the instructions for the clearly-confused jury, I would reverse Galloway's conviction and remand for a new trial.

KITCHENS AND KING, JJ., JOIN THIS OPINION.

KITCHENS, Justice, dissenting:

¶ 258. While I fully join the dissents of Presiding Justice Dickinson and Justice King, I write separately to clarify the analysis of the Confrontation Clause issue in section three of the majority opinion. The majority ultimately is correct in finding that Leslie Galloway's Confrontation Clause rights were satisfied through the testimony of Bonnie Dubourg, the DNA analyst who did not physically test the samples but who analyzed the results of those tests to determine that the DNA samples matched and to implicate Galloway as a perpetrator. However, I disagree that this Court's analysis in *Grim v. State,* 102 So.3d 1073 (Miss.2012), regarding forensic testing of a substance to determine whether it was cocaine, is the proper lens through which to view the question presented in this particular case. In *Grim,* this Court addressed the receipt into evidence of a testimonial statement. Under *Williams v. Illinois,* —— U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012), the challenged statements of the nontestifying DNA analyst, Julie Golden, are nontestimonial. The testimonial statements that implicated Galloway were made by Dubourg, who performed an analysis of her own and testified. Therefore, Galloway's confrontation rights were not violated. Accordingly, our analysis should proceed under the Supreme Court's reasoning in *Williams,* not this Court's reasoning in *Grim.*

¶ 259. In order for a statement or an item of evidence to implicate a defendant's right to confront one or more witnesses against him, it must be testimonial. *See* *Crawford v. Washington,* 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In ***684***Grim,* this Court confronted the admission of a forensic report which positively identified the substance the defendant was alleged to have sold as cocaine. *Grim,* 102 So.3d at 1077. The report was clearly testimonial because it was offered as proof that the substance the defendant had sold was an illegal narcotic. The Court noted that "[f]orensic laboratory reports created specifically to serve as evidence against the accused at trial are among the 'core class of testimonial statements' governed by the Confrontation Clause." *Id.* at 1078 (quoting *Melendez–Diaz v. Mass.,* 557 U.S. 305, 310, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)). *Melendez–Diaz* addressed whether a defendant had the right to confront analysts who had tested a substance and provided testimonial statements that the substance was cocaine. *Melendez–Diaz,* 557 U.S. at 308, 129 S.Ct. 2527. In *Grim,* this Court also relied on the Supreme Court's decision in *Bullcoming v. N.M.,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), regarding whether the defendant had the right to confront the analyst who certified that his blood-alcohol level was above the legal limit when he was driving. In *Grim, Melendez–Diaz,* and *Bullcoming,* the statement at issue clearly was testimonial because it was a simple "Yes/No" result that was directly inculpatory to the defendant.[10] *See* *Williams,* 132 S.Ct. at 2240.

¶ 260. I dissented in *Grim* because I found that the testimonial report which concluded that the substance the defendant had sold was cocaine invoked the Confrontation Clause under

Melendez–Diaz and *Bullcoming,* and the person who actually conducted the testing should have testified. *Grim,* 102 So.3d at 1082 (Kitchens, J., dissenting). *See also Jenkins v. State,* 102 So.3d 1063, 1070 (Miss.2012) (Kitchens, J., dissenting). However, I noted, based on the holding in *Williams,* that the complex nature of DNA testing could involve a "primary analyst." *Grim,* 102 So.3d at 1084 (citing *Gray v. State,* 728 So.2d 36, 56–57 (Miss.1998)). In the case of DNA testing, the underlying reports of the nontestifying expert, if used only as a premise to support the testifying expert's opinion, may not be testimonial. *Id.* (citing *Williams,* 132 S.Ct. at 2221). In *Williams,* the testifying expert was the person who had analyzed the results of the DNA testing to determine whether the sample from the crime scene and the test sample matched. *Id.* at 2240. The underlying report upon which the expert's conclusions were based was not admitted into evidence. *Id.* The Court found that the expert's assertion that the two samples matched was true and not reliant at all upon the validity of the underlying testing used to generate the DNA profiles. *Id.* The expert simply had compared the two profiles and determined that they matched. *Id.* The "testimonial statement" and the statement that was incriminating of the defendant was that the two profiles matched, not that the report contained an accurate profile of the defendant's DNA. The Court found that this holding was in line with *Melendez–Diaz* and *Bullcoming,* in which the reports clearly were testimonial, as they were facially incriminating and were offered for the truth of what they asserted, while in *Williams,* the report was not offered for the truth of what it asserted, but instead was offered "to establish that the report contained a DNA profile that matched the DNA profile deduced from the [defendant's] blood." *Id.*

***685**¶ 261. The situation we address is strikingly similar to that found in *Williams.* As in *Williams,* here, the results of the actual DNA testing were not received into evidence. Instead, the result of the testing served as a premise upon which the testifying expert could determine whether two DNA samples matched. Under *Williams,* the testimonial and incriminatory statements were made by Dubourg, not by Golden, because Dubourg was the analyst who had concluded that the DNA samples from multiple areas of the crime scene matched Galloway's known DNA sample. Dubourg stated that Golden "actually ran the samples, and [Dubourg] analyzed her data." Golden's test results merely offered a profile, and, as such, were not testimonial statements under *Williams.* Dubourg testified about her own expert conclusion that the known sample from Galloway matched the DNA on several objects found at the crime scene. The defense was permitted to cross-examine her regarding this incriminatory conclusion. Accordingly, Galloway's right to confront the witness against him was satisfied because Dubourg, not Golden, made the testimonial statements, and Dubourg was the one who testified. This is not unlike a physician's reliance upon laboratory reports of tests that the physician had not performed personally. If the physician routinely relied on such information to make diagnoses, or to provide an expert opinion in court, we do not require the laboratory technician's testimony as a predicate to the physician's expert testimony concerning the diagnosis. *See* *Gray,* 728 So.2d at 57 (Miss.1998) (noting that, under Rule 703 of the Mississippi Rules of Evidence, "the opinion of the nontestifying expert would serve simply as a premise supporting the testifying expert's opinion on a broader issue") (citation omitted).[11]

¶ 262. Because the challenged report is not testimonial, and the expert with whom the testimonial statement had originated testified at trial, Leslie Galloway's right to confront the witnesses against him was not violated. The majority takes a much longer route to reach this conclusion by analyzing the issue under *Grim,* in which this Court addressed the admission of a clearly testimonial statement. The challenged statement in this case is nontestimonial under *Williams,* and should be treated as such in our analysis. Therefore, I respectfully disagree with the majority's analysis of that issue, I also fully join the dissents of Presiding Justice Dickinson and Justice King.

DICKINSON, P.J., AND KING, J., JOIN THIS OPINION.

KING, Justice, dissenting:

¶ 263. Because I disagree with the majority's conclusions on several of the issues Galloway raises, I respectfully dissent.

1. Whether the trial court erred by allowing speculative testimony on an important issue (Issue 10).

¶ 264. One of Galloway's defense theories was that the DNA found on the Taurus may have gotten on the vehicle while it was left unattended overnight at Bob's Garage after authorities arrested Galloway. Lieutenant Ken McClenic, an officer ***686** with the Jackson

County Sheriff's Department, testified regarding whether anyone had access to the Taurus overnight. Despite having no personal knowledge of the vehicle's security, or lack thereof, overnight, Lieutenant McClenic testified with utmost certainty that he "knew" it to be a "fact" that no one but the owner could have entered the building. This testimony was unsolicited, not even in response to a question. It is clear that he had no personal knowledge of what occurred at Bob's Garage that night, given that he was not present at Bob's Garage throughout the night. His testimony regarding the "fact" of who did or did not enter the building is clearly speculation.

¶ 265. Rule 602 of the Mississippi Rules of Evidence states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter."[12]M.R.E. 602. Lieutenant McClenic's testimony very clearly violated the basic premise of Rule 602, as it was mere speculation. He was not present at Bob's Garage throughout the night and did not have personal knowledge of who did or did not enter Bob's Garage that night. Thus, the trial court overruling Galloway's objection to Lieutenant McClenic's testimony in this regard was clearly error.

¶ 266. Such error was not harmless. *See Jones v. State,* 678 So.2d 707 (Miss.1996). In *Jones,* this Court found the speculative testimony of a welfare worker to be reversible error. *Id.* at 711. Carolyn Smith, the welfare worker investigating the case of a child killed by cocaine overdose and medical neglect, testified that she felt "certain that that's how the child got an overdose of cocaine through vaporization," despite a toxicologist for the State testifying as to the many different ways in which the child could have overdosed on cocaine. *Id.* at 710. The State argued that her testimony was cumulative and thus harmless. *Id.* at 709. This

Court noted that the evidence was ample to support the findings of culpable negligence, concluding that the "portion of Smith's testimony pertaining to the vaporization of cocaine was not necessary to establish guilt based on culpable negligence." *Id.* at 710–11. However, the Court found that "because of the certainty of Smith's testimony and her official capacity, her testimony likely was instrumental in the jury's decision." *Id.* at 711.

¶ 267. Lieutenant McClenic's testimony was extremely certain—he interrupted an exchange between an attorney and the judge to (unresponsively) state the factual nature of his assertion.[13] Furthermore, ***687** his official capacity was certainly likely to sway the jury. Thus, it is likely that his testimony swayed the jury significantly on the chain-of-custody defense regarding the DNA on the vehicle. This Court should reverse the trial court on this issue.

2. Whether Galloway's constitutional right to a speedy trial was violated (Issue 11).

¶ 268. An accused is guaranteed the right to a speedy and public trial by both the United States Constitution and the Mississippi Constitution. U.S. Const. amend. VI; Miss Cost. art. 3, § 26. The United States Supreme Court sets out four factors this Court must examine in determining if a defendant has been deprived of his right to speedy trial: "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101

(1972). "*No one factor is dispositive;* all factors must be considered together." *Burgess v. State,* 473 So.2d 432, 433 (Miss.1985) (emphasis added).

a. Length of Delay

¶ 269. The length of delay was 424 days, a delay that, exceeding eight months, is presumptively prejudice, as the majority acknowledges.*Johnson v. State,* 68 So.3d 1239, 1242 (Miss.2011); Maj. Op. ¶ 103. This presumptively prejudicial delay shifts the burden of persuasion to the State to establish good cause for the delay.[14]*Johnson,* 68 So.3d at 1242. An eight-month delay weighs in favor of the defendant in the balancing test analysis. *Flores v. State,* 574 So.2d 1314, 1322 (Miss.1990); *see also Johnson,* 68 So.3d at 1250 (Dickinson, P.J., dissenting).

b. Reason for Delay

¶ 270. A presumptively prejudicial delay, as here, shifts the burden of persuasion to the State to establish good cause for the delay. *Johnson,* 68 So.3d at 1242. As the majority notes, the State, which has the burden of persuasion, failed to make a clear record as to the reason for the delay. Maj. Op. ¶ 104. The majority concludes that this is a complicated case, and this factor "appears close to neutral. But we are unable to reach that conclusion, as the State failed to provide us a more definite record from which to analyze this factor." *Id.* Thus, the majority weighs this factor "slightly" against the State. *Id.*

¶ 271. The State has the burden of persuasion, and, as admitted by the majority, utterly fails to establish good cause for the delay in this case. I therefore disagree that this factor should only weigh "slightly" against the State. Such a determination impermissibly shifts the burden of persuasion to the defendant. I would weigh this factor more heavily against the State, given that it completely failed to meet its burden of persuasion. However, even the majority weighs this factor against the State, if only "slightly."

c. Assertion of the Right to Speedy Trial

¶ 272. As the majority concedes, Galloway asserted his speedy-trial rights, thus this factor weighs in his favor. Maj. Op. ¶ 105. "The more serious the deprivation, ***688** the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker,* 407 U.S. at 531–32, 92 S.Ct. 2182.

d. Prejudice

¶ 273. I disagree with the majority's conclusion that Galloway was not prejudiced, an issue that I will discuss below. However, *even if I accepted the majority's conclusion* that this factor weighs in favor of the State, I would still find that Galloway's right to speedy trial was violated. *See, e.g., Johnson,* 68 So.3d at 1253–59 (Dickinson, P.J., dissenting). The

majority admits that the other three *Barker* factors weigh in Galloway's favor. These three factors "outweigh item (4) prejudice, if the *Barker* and *Bailey*[15] holdings that no one factor is dispositive are to have any meaning at all." *Burgess,* 473 So.2d at 434 (footnote added). "If this were not so, the state could sit back and deliberately hold criminal charges against a citizen indefinitely so long as the individual could not point out any specific prejudice." *Id.* Thus, even accepting the majority's analysis, three *Barker* factors weigh in favor of Galloway, and only one weighs in favor of the State, therefore, the totality of the circumstances under the balancing test mandate that we find Galloway's speedy-trial right violated. Any other conclusion renders the prejudice factor dispositive and flies in the face of *Barker, Bailey,* and *Burgess.*

¶ 274. That being said, I do not agree with the majority's analysis of the prejudice factor. The prejudice factor weighs in favor of Galloway. Personal prejudice "is not always readily identifiable." *Barker,* 407 U.S. at 531, 92 S.Ct. 2182. The United States Supreme Court has identified three interests that the speedy-trial right was designed to protect, and which should *all* be considered in determining prejudice.[16] *Barker,* 407 U.S. at 532, 92 S.Ct. 2182. Those interests are preventing oppressive pretrial incarceration, minimizing anxiety and concern of the defendant, and limiting the possibility that the defense will be impaired. *Id.* The majority admits that Galloway's pretrial incarceration was lengthy. Maj. Op. ¶ 108. The United States Supreme Court has recognized that a lengthy pretrial incarceration has an obvious detrimental impact on a defendant. *Barker,* 407 U.S. at 533, 92 S.Ct. 2182. The time spent in jail

> often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious.

Id. at 532–33, 92 S.Ct. 2182.

¶ 275. Furthermore, Galloway alleges that the memory of a prosecution witness was unreliable due to the delayed trial, thus impairing his defense. The record demonstrates that shortly after the crime, Dixie Brimage, the only eyewitness in the case, was unsure in her identification of ***689** the man talking to the victim. She was also certain that the man talking to the victim had gold teeth. At trial, Brimage testified that she could positively identify Galloway as the man who was talking to the victim. She admitted that Galloway did not have gold teeth. Galloway has certainly demonstrated that Brimage's testimony positively identifying him has troubling issues and may reflect negatively on her memory. "Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Id.* at 532, 92 S.Ct. 2182. Galloway demonstrated to the extent possible that he suffered prejudice due to an impact on Brimage's memory.

¶ 276. The majority argues that Galloway fails to demonstrate how Brimage's memory was affected. Maj. Op. ¶ 109. Brimage's certainty in her ability to identify Galloway changed in the time period between her pretrial identification and her identification at trial, which certainly evinces possible prejudice to Galloway.

¶ 277. Thus, due to Galloway's lengthy incarceration, and the potential adverse effects to Brimage's memory, I find that the prejudice factor weighs in favor of Galloway. Therefore, Galloway's right to speedy trial was violated. As stated, *supra,* even if I agreed with the majority that this factor favored the State, I must still conclude that, in light of the totality of the circumstances, Galloway's right to speedy trial was violated, as the other three factors clearly weigh in his favor.

¶ 278. As Presiding Justice Dickinson has so aptly observed in previous cases, the "elephant in the room" is that the constitutional right to speedy trial in Mississippi is dead. *Ben v. State,* 95 So.3d 1236, 1258 (Miss.2012) (Dickinson, P.J., dissenting); *Johnson,* 68 So.3d at 1247 (Dickinson, P.J., dissenting).[17] In this case, I would reverse the trial court's determination that the State did not violate Galloway's right to speedy trial. And, as Presiding Justice Dickinson has stated before, "I would reverse this Court's trend of ignoring a defendant's right to a speedy trial." *Ben,* 95 So.3d at 1258 (Dickinson, P.J., dissenting).

3. Whether the trial court erred in denying Galloway's proposed jury instruction D3AA (Issue 12).

¶ 279. D3AA provided, in pertinent part, that "[e]ven if mitigating circumstances do not outweigh aggravating circumstances, the law permits you, the jury to impose a sentence of life imprisonment without the possibility of parole." The majority argues that this type of instruction is an impermissible "mercy" instruction. Maj. Op. ¶ 125.

¶ 280. Such an instruction is not a plea for mercy and does not impermissibly play on the sympathies of the jury, but merely tracks the sentencing statute, which provides that the jury should decide, based on several considerations, "whether the defendant should be sentenced to life imprisonment, life imprisonment without eligibility ***690** for parole, or death." Miss.Code Ann. § 99–19–101(2)(d) (Rev.2007). While one of the "considerations" is whether mitigating circumstances outweigh aggravating circumstances, nothing in the statute *mandates* that mitigating circumstances must outweigh aggravating circumstances in order for the jury to impose life imprisonment. Thus, Galloway's proposed instruction ensured that the jurors were fully informed as to the law. No other instruction adequately covered this issue.

¶ 281. Furthermore, I find it incongruous that a defendant is allowed by law to argue emotionally for mercy or sympathy in the sentencing phase, but not allowed to include a jury instruction that merely reflects the law that a jury is not *forced* to impose the death penalty, but may instead impose life imprisonment. *See* Maj. Op. ¶ 123; *King v. State,* 784 So.2d 884, 889–90 (Miss.2001). As the majority notes, "[a] defendant is entitled to have jury instructions given which present his theory of the case." *Chandler v. State,* 946 So.2d 355, 360 (Miss.2006). Instruction D3AA did not incorrectly state the law, was not covered fairly elsewhere in the instruction, nor was it without foundation in the evidence. *Id.* Thus, I would find that the trial court abused its discretion in denying Instruction D3AA and reverse the trial court on this issue.

4. Whether the trial court erred by failing to conduct an ex parte hearing regarding the defendant's funding for an expert[18]*(Issue 23).*

¶ 282. During the pretrial hearing on several issues, the State requested that the court "address some of the motions that did not require testimony first." The court responded: "I'm looking at a motion that looks like was recently filed for expert funds for Dr. Riddick?" Defense counsel responded in the affirmative. The court replied: "All right. Let me hear you on that." After defense counsel argued his motion, the *court* asked the State if it had any opposition to the motion. Counsel for the State responded that "it's generally something between the defense and the court," but went on to affirmatively argue against providing Galloway funding for his expert, objecting to the same. Defense counsel then responded to the objection, indicating in detail why Galloway felt the expert was necessary, thus revealing defense strategy to the State. The court then granted Galloway's request, but required Galloway to send the State the expert report as soon as Galloway received it, without any provision that such was conditioned on Galloway's intent to actually use the expert report.

¶ 283. The majority is correct that in *Manning v. State,* this Court did not find that the trial court erred by requiring the defense to provide notice regarding the possible retention of an expert. *Manning v. State,* 726 So.2d 1152, 1191 (Miss.1998), *overruled on other grounds by Weatherspoon v. State,* 732 So.2d 158 (Miss.1999). However, neither did this Court find a lack of error in the trial court's actions—this Court did not squarely address the issue at

all. Instead, we found that "Manning had no right to an independent mental examiner and he suffered no prejudice in not having one. This assignment of error is meritless." *Id.* at 1191. The Court went ***691** on to emphasize, however, "that the State has no role to play in the determination of the defendant's use of experts. The necessity and propriety of such assistance is a matter left entirely to the discretion of the trial court." *Id.* The Court's statement is congruous with the Fourteenth Amendment's due process guarantee of fundamental fairness, which "derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma,* 470 U.S. 68, 76, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985).

¶ 284. As this Court has noted, "[t]he purpose of the federal [statute] that requires the hearing to be *ex parte* is to protect the defendant from being forced to reveal his strategies and theories to the prosecutor." *McGilberry v. State,* 741 So.2d 894, 917 (Miss.1999)[19]; *see also* *Ake,* 470 U.S. at 82–83, 105 S.Ct. 1087 (implying that a defendant's requests should be *ex parte*). In allowing the State to object to Galloway's request, the trial court forced Galloway to reveal his defense strategy. Defense counsel was compelled to explain, in the presence of the State and in detail, that Galloway was seeking an expert to combat the State's assertion that the victim had been the subject of sexual battery. Furthermore, the court determined that Galloway should give the State a copy of the expert report, regardless of whether Galloway was actually going to use said report. This forced Galloway to reveal

his defense strategy to the State prematurely, a disadvantage that a nonindigent defendant would not have borne.

¶ 285. Thus, to the extent Mississippi has not formally adopted the rule that hearings regarding an indigent defendant's need for expert assistance should be *ex parte,* we should now formally adopt such a rule. A nonindigent defendant does not experience the disadvantage of being forced to reveal his defense strategy to the State, prematurely or otherwise; likewise, an indigent defendant should not experience such a disadvantage merely due to his financial status. Forcing an indigent defendant to reveal his defense strategy and other evidence, as Galloway was forced to do here, violates the very basic premise of *Ake. See also Ex parte Moody,* 684 So.2d 114 (Ala.1996) ("we find it necessary to hold that an indigent criminal defendant is entitled to an *ex parte* hearing on whether expert assistance is necessary, based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution"); *Brooks v. State,* 259 Ga. 562, 385 S.E.2d 81 (1989) (finding that an application for funds should be heard *ex parte* so that a defendant does not have to reveal his theory of the case); *Moore v. State,* 390 Md. 343, 889 A.2d 325 (2005) (requiring an *ex parte* hearing because an indigent defendant "should not be required to disclose to the State the theory of the defense when non-indigent defendants are not required to do so"); *State v. Barnett,* 909 S.W.2d 423 (Tenn.1995) (*ex parte* hearing required for psychiatric expert because indigent defendant should not have to reveal his theory of the defense when his affluent counterpart does not); ***692** *Williams v. State,* 958 S.W.2d 186 (Tex.Crim.App.1997) (indigent defendant should not be forced to reveal defense theory).

¶ 286. Because I believe that Galloway's arguments on issues 10, 11, 12, and 23 have merit, I am compelled to consider what remedy each requires. This Court has held that the remedy for issue 10, a violation of Mississippi Rule of Evidence 602, and the remedy for issue 12, improperly refusing a jury instruction, are reversal and remand for a new trial. *Jones,* 678 So.2d at 711;*Miss. Valley Silica Co., Inc. v. Eastman,* 92 So.3d 666, 673 (Miss.2012). This Court has never squarely addressed issue 23, whether a defendant is entitled to an *ex parte* hearing regarding funding for experts. Some courts have determined that reversal and remand is the appropriate remedy. *See, e.g.,* *Williams,* 958 S.W.2d at 195–96 (failure to hold hearing *ex parte* affected sentencing phase of trial, thus court reversed and remanded for retrial of sentencing phase); *United States v. Abreu,* 202 F.3d 386 (1st Cir.2000) (limited remand on sentencing phase for failure to handle issue *ex parte*); *United States v. Sutton,* 464 F.2d 552 (5th Cir.1972) (reversing conviction where trial court refused to hold hearing *ex parte,* so defense counsel refused to reveal information disclosing his defense, and trial court thus denied defendant's request on the grounds of inadequate showing of necessity). It seems in this case, where defense strategy has already been announced, but under a cloud of unclear Mississippi law, no present remedy exists. The only remedy appears to be the prospective remedy of adoption of the rule that a defense request for expert funding must be conducted and heard *ex parte.* Regarding issue 12, the violation of Galloway's right to speedy trial, this Court and the United States Supreme Court have concluded that dismissal is the only remedy to a speedy-trial violation. *Bailey,* 463 So.2d at 1064; *Strunk v. United States,* 412 U.S. 434, 439–40, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973).[20] A violation of the right to a speedy trial cannot be cured by a new trial at an even later date.

Thus, because I conclude that Galloway's right to a speedy trial has been violated, the only remedy is to reverse the conviction and dismiss the charges against Galloway. *Bailey,* 463 So.2d at 1064.

DICKINSON, P.J., AND KITCHENS, J., JOIN THIS OPINION.

APPENDIX

DEATH CASES AFFIRMED BY THIS COURT

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

Moffett v. State, 49 So.3d 1073 (Miss.2010).

Goff v. State, 14 So.3d 625 (Miss.2009).

Wilson v. State, 21 So.3d 572 (Miss.2009).

Chamberlin v. State, 989 So.2d 320 (Miss.2008).

Loden v. State, 971 So.2d 548 (Miss.2007).

King v. State, 960 So.2d 413 (Miss.2007).

Bennett v. State, 933 So.2d 930 (Miss.2006).

693Havard v. State,* 928 So.2d 771 (Miss.2006).

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

Hodges v. State, 912 So.2d 730 (Miss.2005).

Walker v. State, 913 So.2d 198 (Miss.2005).

Le v. State, 913 So.2d 913 (Miss.2005).

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

Powers v. State, 883 So.2d 20 (Miss.2004)

Branch v. State, 882 So.2d 36 (Miss.2004).

Scott v. State, 878 So.2d 933 (Miss.2004).

Lynch v. State, 877 So.2d 1254 (Miss.2004).

Dycus v. State, 875 So.2d 140 (Miss.2004).

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

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

Howard v. State, 853 So.2d 781 (Miss.2003).

Walker v. State, 815 So.2d 1209 (Miss.2002). *following remand.

Bishop v. State, 812 So.2d 934 (Miss.2002).

Stevens v. State, 806 So.2d 1031 (Miss.2002).

Grayson v. State, 806 So.2d 241 (Miss.2002).

Knox v. State, 805 So.2d 527 (Miss.2002).

Simmons v. State, 805 So.2d 452 (Miss.2002).

Berry v. State, 802 So.2d 1033 (Miss.2001).

Snow v. State, 800 So.2d 472 (Miss.2001).

Mitchell v. State, 792 So.2d 192 (Miss.2001).

Puckett v. State, 788 So.2d 752 (Miss.2001). * following remand.

Goodin v. State, 787 So.2d 639 (Miss.2001).

Jordan v. State, 786 So.2d 987 (Miss.2001).

Manning v. State, 765 So.2d 516 (Miss.2000). *following remand.

Eskridge v. State, 765 So.2d 508 (Miss.2000).

McGilberry v. State, 741 So.2d 894 (Miss.1999).

Puckett v. State, 737 So.2d 322 (Miss.1999). *remanded for *Batson* hearing.

Manning v. State, 735 So.2d 323 (Miss.1999). *remanded for *Batson* hearing.

Hughes v. State, 735 So.2d 238 (Miss.1999).

Turner v. State, 732 So.2d 937 (Miss.1999).

Smith v. State, 729 So.2d 1191 (Miss.1998).

Burns v. State, 729 So.2d 203 (Miss.1998).

Jordan v. State, 728 So.2d 1088 (Miss.1998).

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

Manning v. State, 726 So.2d 1152 (Miss.1998).

Woodward v. State, 726 So.2d 524 (Miss.1997).

Bell v. State, 725 So.2d 836 (Miss.1998).

Evans v. State, 725 So.2d 613 (Miss.1997).

Brewer v. State, 725 So.2d 106 (Miss.1998).

Crawford v. State, 716 So.2d 1028 (Miss.1998).

694Doss v. State,* 709 So.2d 369 (Miss.1996).

Underwood v. State, 708 So.2d 18 (Miss.1998).

Holland v. State, 705 So.2d 307 (Miss.1997).

Wells v. State, 698 So.2d 497 (Miss.1997).

Wilcher v. State, 697 So.2d 1087 (Miss.1997).

Wiley v. State, 691 So.2d 959 (Miss.1997).

Brown v. State, 690 So.2d 276 (Miss.1996).

Simon v. State, 688 So.2d 791 (Miss.1997).

Jackson v. State, 684 So.2d 1213 (Miss.1996).

Williams v. State, 684 So.2d 1179 (Miss.1996).

Davis v. State, 684 So.2d 643 (Miss.1996).

Taylor v. State, 682 So.2d 359 (Miss.1996).

Brown v. State, 682 So.2d 340 (Miss.1996).

Blue v. State, 674 So.2d 1184 (Miss.1996).

Holly v. State, 671 So.2d 32 (Miss.1996).

Walker v. State, 671 So.2d 581 (Miss.1995).

Russell v. State, 670 So.2d 816 (Miss.1995).

Ballenger v. State, 667 So.2d 1242 (Miss.1995).

Davis v. State, 660 So.2d 1228 (Miss.1995).

Carr v. State, 655 So.2d 824 (Miss.1995).

Mack v. State, 650 So.2d 1289 (Miss.1994).

Chase v. State, 645 So.2d 829 (Miss.1994).

Foster v. State, 639 So.2d 1263 (Miss.1994).

Conner v. State, 632 So.2d 1239 (Miss.1993).

Hansen v. State, 592 So.2d 114 (Miss.1991).

* *Shell v. State,* 554 So.2d 887 (Miss.1989); *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding; *Shell v. State,* 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

Davis v. State, 551 So.2d 165 (Miss.1989).

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* *Pinkney v. State,* 538 So.2d 329 (Miss.1989); *Pinkney v. Mississippi,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990) vacating and remanding; *Pinkney v. State,* 602 So.2d 1177 (Miss.1992) remanding for new sentencing hearing.

* *Clemons v. State,* 535 So.2d 1354 (Miss.1988); *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) vacating and remanding; *Clemons v. State,* 593 So.2d 1004 (Miss.1992) remanding for new sentencing hearing.

Woodward v. State, 533 So.2d 418 (Miss.1988).

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* *Jones v. State,* 517 So.2d 1295 (Miss.1987); *Jones v. Mississippi,* 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988)***695** vacating and remanding; *Jones v. State,* 602 So.2d 1170 (Miss.1992) remanding for new sentencing hearing.

Wiley v. State, 484 So.2d 339 (Miss.1986).

Johnson v. State, 477 So.2d 196 (Miss.1985).

Gray v. State, 472 So.2d 409 (Miss.1985).

Cabello v. State, 471 So.2d 332 (Miss.1985).

Jordan v. State, 464 So.2d 475 (Miss.1985).

Wilcher v. State, 455 So.2d 727 (Miss.1984).

Billiot v. State, 454 So.2d 445 (Miss.1984).

Stringer v. State, 454 So.2d 468 (Miss.1984).

Dufour v. State, 453 So.2d 337 (Miss.1984).

Neal v. State, 451 So.2d 743 (Miss.1984).

Booker v. State, 449 So.2d 209 (Miss.1984).

Wilcher v. State, 448 So.2d 927 (Miss.1984).

Caldwell v. State, 443 So.2d 806 (Miss.1983).

Irving v. State, 441 So.2d 846 (Miss.1983).

Tokman v. State, 435 So.2d 664 (Miss.1983).

Leatherwood v. State, 435 So.2d 645 (Miss.1983).

Hill v. State, 432 So.2d 427 (Miss.1983).

Pruett v. State, 431 So.2d 1101 (Miss.1983).

Gilliard v. State, 428 So.2d 576 (Miss.1983).

Evans v. State, 422 So.2d 737 (Miss.1982).

King v. State, 421 So.2d 1009 (Miss.1982).

Wheat v. State, 420 So.2d 229 (Miss.1982).

Smith v. State, 419 So.2d 563 (Miss.1982).

Johnson v. State, 416 So.2d 383 (Miss.1982).

Edwards v. State, 413 So.2d 1007 (Miss.1982).

Bullock v. State, 391 So.2d 601 (Miss.1980).

Reddix v. State, 381 So.2d 999 (Miss.1980).

Jones v. State, 381 So.2d 983 (Miss.1980).

Culberson v. State, 379 So.2d 499 (Miss.1979).

Gray v. State, 375 So.2d 994 (Miss.1979).

Jordan v. State, 365 So.2d 1198 (Miss.1978).

Voyles v. State, 362 So.2d 1236 (Miss.1978).

Irving v. State, 361 So.2d 1360 (Miss.1978).

Washington v. State, 361 So.2d 6*l* (Miss.1978).

Bell v. State, 360 So.2d 1206 (Miss.1978).

*Case was originally affirmed in this Court but on remand from U.S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

DEATH CASES REVERSED AS TO GUILT PHASE AND SENTENCING PHASE

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

Flowers v. State, 947 So.2d 910 (Miss.2007).

Flowers v. State, 842 So.2d 531 (Miss.2003).

***696** *Randall v. State,* 806 So.2d 185 (Miss.2002).

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Duplantis v. State, 644 So.2d 1235 (Miss.1994).

Harrison v. State, 635 So.2d 894 (Miss.1994).

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Jenkins v. State, 607 So.2d 1171 (Miss.1992).

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Balfour v. State, 598 So.2d 731 (Miss.1992).

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Bevill v. State, 556 So.2d 699 (Miss.1990).

West v. State, 553 So.2d 8 (Miss.1989).

Leatherwood v. State, 548 So.2d 389 (Miss.1989).

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Moffett v. State, 456 So.2d 714 (Miss.1984).

Lanier v. State, 450 So.2d 69 (Miss.1984).

Laney v. State, 421 So.2d 1216 (Miss.1982).

DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT

Reddix v. State, 547 So.2d 792 (Miss.1989).

697Wheeler v. State,* 536 So.2d 1341 (Miss.1988).

White v. State, 532 So.2d 1207 (Miss.1988).

Bullock v. State, 525 So.2d 764 (Miss.1987).

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DEATH CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY

Fulgham v. State, 46 So.3d 315 (Miss.2010).

Rubenstein v. State, 941 So.2d 735 (Miss.2006).

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* *Shell v. State,* 554 So.2d 887 (Miss.1989); *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990) reversing, in part, and remanding; *Shell v. State,* 595 So.2d 1323 (Miss.1992) remanding for new sentencing hearing.

* *Pinkney v. State,* 538 So.2d 329 (Miss.1989); *Pinkney v.Mississippi,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990) vacating and remanding; *Pinkney v. State,* 602 So.2d 1177 (Miss.1992) remanding for new sentencing hearing.

* *Clemons v. State,* 535 So.2d 1354 (Miss.1988); *Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) vacating and remanding; *Clemons v. State,* 593 So.2d 1004 (Miss.1992) remanding for new sentencing hearing.

* *Jones v. State,* 517 So.2d 1295 (Miss.1987); *Jones v. Mississippi,* 487 U.S. 1230, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) vacating and remanding; *Jones v. State,* 602 So.2d 1170 (Miss.1992) remanding for new sentencing hearing.

Russell v. State, 607 So.2d 1107 (Miss.1992).

Holland v. State, 587 So.2d 848 (Miss.1991).

Willie v. State, 585 So.2d 660 (Miss.1991).

Ladner v. State, 584 So.2d 743 (Miss.1991).

Mackbee v. State, 575 So.2d 16 (Miss.1990).

Berry v. State, 575 So.2d 1 (Miss.1990).

Turner v. State, 573 So.2d 657 (Miss.1990).

State v. Tokman, 564 So.2d 1339 (Miss.1990).

Johnson v. State, 547 So.2d 59 (Miss.1989).

Williams v. State, 544 So.2d 782 (Miss.1989); *sentence aff'd*684 So.2d 1179 (1996).

Lanier v. State, 533 So.2d 473 (Miss.1988).

Stringer v. State, 500 So.2d 928 (Miss.1986).

***698** *Pinkton v. State,* 481 So.2d 306 (Miss.1985).

Mhoon v. State, 464 So.2d 77 (Miss.1985).

Cannaday v. State, 455 So.2d 713 (Miss.1984).

Wiley v. State, 449 So.2d 756 (Miss.1984); resentencing affirmed, *Wiley v. State,* 484 So.2d 339 (Miss.1986); *cert. denied, Wiley v. Mississippi,* 479 U.S. 906 (1988); resentencing ordered, *Wiley v. State,* 635 So.2d 802 (Miss.1993) following writ of habeas corpus issued pursuant to *Wiley v. Puckett,* 969 F.2d 86, 105–106 (5th Cir.1992); resentencing affirmed.

Williams v. State, 445 So.2d 798 (Miss.1984). *Case was originally affirmed in this Court but on remand from U.S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

All Citations

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Footnotes

1 The record shows that Dr. McGarry is a forensic pathologist, licensed in Mississippi and Louisiana. He has been licensed for fifty years. He is board-certified in general pathology, forensic pathology, and neuropathology. He is a professor at LSU School of Medicine. He has performed more than 13,000 autopsies, and he has testified as an expert hundreds of times in both state and federal courts.

2 *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

3 *See Box v. State,* 437 So.2d 19, 22–26 (Miss.1983) (Robertson, J. specially concurring), setting forth the procedure trial courts should follow when confronted with a discovery violation. That procedure is now reflected in Rule 9.04 of the Uniform Rules of Circuit and County Court Practice.

4 According to the record, such questions were posed to Dubourg by defense counsel. Dubourg explained the cautionary procedures the lab employs to guard against contamination. Dubourg also stated that if a DNA sample did get contaminated, it could "cause the DNA to break down."

5 The Federal Bureau of Investigation's (FBI) national DNA database is known as the Combined DNA Indexing System.

6 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

7 " 'Pen packs,' or prison packages, 'are the records maintained on inmates sentenced to the custody of the Department of Corrections.' " *Edwards v. State,* 75 So.3d 73, 75 n. 1 (Miss.Ct.App.2011) (quoting *Jasper v. State,* 858 So.2d 149, 152 (Miss.Ct.App.2003)).

8 In *Russell,* the defendant had previous convictions for armed robbery, escape, and kidnapping, and he was under a sentence of imprisonment when he committed the capital offense at issue in that case. *Russell,* 670 So.2d at 829.

9 *Girton v. State,* 446 So.2d 570, 572 (Miss.1984) ("*Unless it is necessary to give another instruction for clarity* or to cover an omission, it is necessary that no further instruction be given.") (emphasis added).

10 In *Grim* and *Melendez–Diaz,* the substance the defendant had possessed was in fact cocaine, and the certification of that fact went directly to the defendant's guilt. So too in *Bullcoming,* where the certification that the defendant's blood alcohol level was above the legal limit directly incriminated him.

11 A physician, for example, bases his medical diagnosis of his patient on many sources. Most of his sources are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. Since these sources provide the doctor with information that he utilizes in making life-and-death decisions, his validation of them ought to be sufficient for trial, especially since he can be cross-examined.

M.R.E. 703 cmt. (quoted in *Gray,* 728 So.2d at 57).

12 Furthermore, a lay witness's opinion testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." M.R.E. 701. The comment to Rule 701 clarifies that the lay opinion must be the product of first-hand knowledge or observation. M.R.E. 701 cmt.

13 The majority claims that Lieutenant McClenic testified only as to his "belief" and that his past personal observations and experience were adduced by defense counsel questioning. The testimony at issue is as follows:

> Q. An alarm go off that night?
>
> A. The only other person who would have gone in the building is [sic] if he got any more wrecker calls that night.
>
> MR. RISHEL [defense counsel]: Your Honor, we object to the speculation.
>
> THE WITNESS: Well, ***I know it to be a fact.***
>
> THE COURT: Overruled.

(Emphasis added.) As is also quoted by the majority, Lieutenant McClenic did not testify as to his belief, but rather affirmatively asserted that he was testifying as to fact. Part of this testimony was not adduced by defense counsel questioning, but interrupted a colloquy between defense counsel and the judge.

14 The majority seems to suggest that this first factor is merely a triggering mechanism. Maj. Op. ¶ 103. The majority does not actually weigh the factor in the defendant's favor, as it should. *See* *Flores v. State,* 574 So.2d 1314, 1322 (Miss.1990); *see also* *Barker,* 407 U.S. at 530, 92 S.Ct. 2182 ("The length of delay is *to some extent* a triggering mechanism." (emphasis added)).

15 *Bailey v. State,* 463 So.2d 1059 (Miss.1985).

16 The majority claims that lengthy incarceration alone does not constitute prejudice, citing the plurality opinion in *Johnson.* Maj. Op. ¶ 108. The United States Supreme Court places no such limitations on our analysis of prejudice, but rather mandates consideration of *all* three interests identified, including incarceration.

17 In *Johnson,* Presiding Justice Dickinson noted that this Court has applied the *Barker* factors to speedy-trial issues in fifty-eight cases since 1992, and all fifty-eight cases were decided in favor of the State. *Johnson,* 68 So.3d at 1248–49 (Dickinson, P.J., dissenting). Assuming that Presiding Justice Dickinson did not count *Johnson* itself in his calculations, that number has risen to sixty-two cases applying the *Barker* factors to speedy-trial issues, all sixty-two being resolved in favor of the State. *See Ben,* 95 So.3d 1236;*Hardison v. State,* 94 So.3d 1092 (Miss.2012); *Bailey v. State,* 78 So.3d 308 (Miss.2012); *Johnson,* 68 So.3d at 1239;*see also Havard v. State,* 94 So.3d 229 (Miss.2012) (foregoing a full *Barker* analysis because the defendant did not raise his speedy-trial rights at trial, and finding no plain error).

18 Galloway frames this issue as an ineffective-assistance-of-counsel claim. I agree with the majority that, given the confusing nature of the state of the law on this issue in

Mississippi, Galloway's counsel was not ineffective for failing to demand an *ex parte* hearing. However, I believe that the underlying issue, whether a defendant is entitled to an *ex parte* hearing on the issue of expert funding, is important to address. I disagree with the majority's conclusion that a defendant is not entitled to an *ex parte* hearing.

19 While the Court in *McGilberry* ultimately found McGilberry's assignment of error regarding the lack of an *ex parte* hearing without merit, it did so because McGilberry was relying on an expert regarding the defense of insanity, and such a defense of insanity statutorily requires notice to the State, thus "McGilberry's strategy would have been revealed to the State prior to trial." *McGilberry,* 741 So.2d at 917. The Court likewise found that McGilberry "was not prematurely forced to reveal the results of the psychological evaluation to the State." *Id.*

20 The United States Supreme Court acknowledged that dismissal is an "unsatisfactorily severe remedy" and means that "a defendant who may be guilty of a serious crime will go free, without having been tried." *Strunk,* 412 U.S. at 439, 93 S.Ct. 2260 (internal quotations omitted). However, the Supreme Court concluded that "such severe remedies are not unique in the application of constitutional standards" and that "[i]n light of the policies which underlie the right to a speedy trial, dismissal must remain ... the only possible remedy." *Id.* at 439–40, 93 S.Ct. 2260 (internal quotations omitted).

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Serial: 201673

IN THE SUPREME COURT OF MISSISSIPPI

No. 2013-DR-01796-SCT

LESLIE GALLOWAY, III A/K/A LESLIE GALLOWAY A/K/A LESLIE "BO" GALLOWAY, III — *Appellant*

v.

STATE OF MISSISSIPPI — *Appellee*

ORDER

Now before the Court, *en banc*, comes the Motion to Stay Post-Conviction Proceedings filed by counsel for Leslie Galloway, III. Also before the Court is the response filed by counsel for the State of Mississippi. Galloway seeks to have the post-conviction proceedings stayed pending the outcome of a separate post-conviction matter related to his 2007 carjacking conviction in Jackson County. After due consideration, the Court finds that the motion should be granted. The Court further finds that counsel for both parties shall update this Court on the status of the trial court proceedings every ninety (90) days until they are resolved.

IT IS THEREFORE ORDERED that the Motion to Stay Post-Conviction Proceedings is hereby granted.

IT IS FURTHER ORDERED that counsel for both parties shall file with this Court a status update of the trial court proceedings. The status reports are to be filed every ninety (90) days, beginning with the entry date of this order and continuing until the trial court enters its disposition on the post-conviction matter.

SO ORDERED, this the 19 day of October, 2015.

RANDY GRANT PIERCE, JUSTICE

TO GRANT: DICKINSON, P.J., KITCHENS, CHANDLER, PIERCE, AND KING, JJ.

TO DENY: WALLER, C.J., RANDOLPH, P.J., LAMAR, AND COLEMAN, JJ.

298 So.3d 966
Supreme Court of Mississippi.

Leslie GALLOWAY, III a/k/a Leslie Galloway a/k/a Leslie "BO" Galloway, III
v.
STATE of Mississippi

NO. 2018-CA-01427-SCT
|
05/07/2020
|
Rehearing Denied August 13, 2020

Synopsis

Background: Defendant who had pled guilty to carjacking filed motion for postconviction relief based on ineffective assistance that he had allegedly received due to his attorney's alleged conflict of interest. The Circuit Court, Jackson County, Robert P. Krebs, J., denied motion, and defendant appealed.

Holdings: The Supreme Court, appearing en banc, Beam, J., held that:

defense counsel who had previously worked on defendant's case as assistant district attorney was not suffering from actual conflict of interest, and

while former assistant district attorney turned criminal defense counsel failed to take appropriate measures when taking on representation of defendant, circuit court did not clearly err in finding that she had not knowingly failed to disclose her previous involvement with case.

Affirmed.

Kitchens, P.J., filed dissenting opinion, in which King, P.J., joined.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***968** JACKSON COUNTY CIRCUIT COURT, HON. ROBERT P. KREBS, JUDGE

Attorneys and Law Firms

ATTORNEYS FOR APPELLANT: ANNA MARIE ARCENEAUX, THOMAS M. FORTNER, Jackson, OLIVIA ENSIGN, BRIAN W. STULL

ATTORNEYS FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: CAMERON LEIGH BENTON, Jackson, ASHLEY LAUREN SULSER, MATTHEW WYATT WALTON

EN BANC.

Opinion

BEAM, JUSTICE, FOR THE COURT:

¶1. Leslie Galloway appeals from the Jackson County Circuit Court's denial of his 2015 petition for post-conviction relief (PCR) pertaining to his 2007 guilty plea to carjacking, a conviction that was used as an aggravating circumstance in Galloway's 2010 capital-murder trial at which Galloway received a death sentence.

¶2. Galloway claimed in the petition that his defense counsel Wendy Martin had an actual conflict of interest because, before becoming his defense counsel, Martin had served as an assistant district attorney in the same case, unbeknownst to Galloway. Galloway asserted that this deprived him of due process and effective assistance of counsel, requiring automatic reversal of his carjacking conviction. Galloway further asserted that, if the court found that Martin's representation created only a potential conflict of interest, reversal is still required because he was prejudiced by

Martin's failing to conduct a reasonable investigation before advising him to plead guilty.

¶3. The trial court ruled that Galloway's PCR claim was time barred under Mississippi's Uniform Post-Conviction Collateral Relief Act (UPCCRA), having been filed more than seven years after Galloway's conviction for carjacking. The trial court alternatively found no merit to Galloway's PCR claim, time bar notwithstanding. Accordingly, the trial court denied Galloway's PCR petition.

¶4. We agree with the trial court that Galloway's PCR claim is time barred under the UPCCRA. *See* Miss. Code Ann. § 99-39-5(2) (Rev. 2015) ("A motion for relief under the this article shall be made ... within three (3) years after entry of the judgment of conviction" in the case of a guilty plea.).

¶5. We also agree with the trial court that, time bar notwithstanding, there is no merit to Galloway's PCR claim. The trial court found that, at the time Martin represented Galloway as his defense attorney, Martin did not realize that she had previously worked on the same case as an assistant ***969** district attorney. Thus, according to the trial court, no actual conflict existed.

¶6. We affirm.

FACTS AND PROCEDURAL HISTORY

1. Events Before Galloway's 2007 Carjacking Guilty Plea

¶7. Galloway was arrested in July 2001 by Jackson County authorities for a carjacking that had occurred two nights before in Moss Point, Mississippi. Galloway was indicted for the offense in April 2002.[1] Galloway failed to appear for his

arraignment, and the trial court issued a bench warrant in August 2002 for Galloway's arrest.[2]

¶8. On September 27, 2002, a waiver of arraignment was entered in Galloway's case, and an agreed trial date was set for November 25, 2002. At the time, assistant district attorney Wendy Martin represented the State in the matter. And Brenda Locke from the Jackson County Public Defender's Office represented Galloway. An agreed order signed by Martin and Locke to set aside the bench warrant was also entered on September 27, 2002.

¶9. On October 4, 2002, Locke filed a motion for discovery and a speedy-trial demand. A notice of trial was filed on December 16, 2002, setting the cause for trial on March 3, 2003.

¶10. On March 3, 2003, an order for continuance was entered at the request of the "defendant/State." The order was signed by Martin and public defender Brice Kerr.[3]

¶11. In May 2003, at the request of Martin, subpoenas were filed for the following individuals: Monica Simmons, Erica Fairley, Carlton Logan, Anthony Cooley, and William Trussell.

¶12. At a May 13, 2003 docket hearing, Martin informed the trial court that "a plea recommendation has been made, and the State could be ready for a trial, if necessary." Locke, however, informed the trial court that she was unable to "get in touch" with Galloway after having made repeated attempts. Martin then requested a bench warrant for Galloway, which the trial court granted. The case sat idle on the docket from May 2003 until January 2004.

¶13. In January 2004, Anthony N. Lawrence, III, took office as the new district attorney. Martin had run unsuccessfully against Lawrence for the position, and she left the district attorney's office soon after.

¶14. In March 2004, the trial court entered an order passing Galloway's case to the inactive files. Tanya Hasbrouck, the new assistant district attorney assigned to the case, signed the order.

¶15. In October 2006, Hasbrouck informed the trial court that Galloway was in the Pascagoula city jail for an unrelated matter. Galloway was then transported to the Jackson County courthouse, at which time public defender Robert Rudder informed the trial court that he would be representing Galloway. Rudder requested a continuance to the next term of court, which the trial court granted, continuing the case to January 25, 2007.

***970** ¶16. On January 25, 2007, Hasbrouck informed the trial court that Galloway had "a couple of unindicted cases," and she requested that the court pass the case to the next court term. Rudder also informed the court at that time that Galloway had "two possession cases out of Pascagoula from early in the Fall" for which Rudder was trying to obtain police reports.

¶17. On February 22, 2007, Martin entered an appearance as defense counsel for Galloway, at which time she filed a request for discovery and a demand for speedy trial. The record does not show who hired Martin to represent Galloway. Martin later testified at the evidentiary hearing on March 22, 2018, that she could not

remember who had hired her to represent Galloway; she said, "It was probably a family member or a girlfriend."

¶18. In March 2007, Galloway entered a plea of not guilty to the carjacking charge, and a trial date was set for early May 2007.[4] In April 2007, Martin requested a continuance on Galloway's behalf, which the trial court granted.

2. Galloway's 2007 Guilty-Plea Hearing

¶19. On May 17, 2007, represented by Martin, Galloway appeared before the trial court after signing a petition to plead guilty to the crimes of carjacking and possession of a controlled substance.

¶20. During the plea colloquy, Galloway informed the trial court that he was twenty-three years of age, that he had graduated from high school, and that he could read and write. Galloway acknowledged that he had fully discussed the plea petition with Martin and that it was his signature on the plea petition.

¶21. Galloway stated that he had received his indictment and that he understood he was charged with "carjacking and possession of a controlled substance, crack cocaine." Galloway told the trial court that Martin had discussed with him the elements of the crimes the State had to prove. Galloway also said that he knew the maximum and minimum sentences and the fines for each charge.

¶22. Galloway said he understood that by pleading guilty, he was admitting that he was guilty. Galloway stated that no one had threatened him in order to make him plead guilty. And other than plea negotiations with the district attorney's office,

Galloway said that no one, including his attorney, had promised him anything for his guilty plea.

¶23. Galloway told the trial court that he was satisfied with Martin's services, that she properly advised him of his best interests, and that he had no complaints about Martin's representation. Galloway further stated that he understood the constitutional rights he would be waiving by pleading guilty.

¶24. When asked by the trial court, "what[,] in your own mind[,] makes you think you're guilty?" Galloway responded, "I had possession of a controlled substance in my pocket, and I took a car by force."

¶25. Afterwards, Hasbrouck submitted to the trial court the following plea recommendation:

> 8 years in the Mississippi Department of Corrections, on each charge to run concurrent, recommendation for the [Regimented Inmate Discipline] program, retain jurisdiction, 4 years of Post-Release supervision, with a condition that [Galloway] complete the Adult Challenge Program, *971 $1,000 fine on each case, $250 restitution[,] ... lab fees[,] ... [c]ourt costs, and we're going to ask that he be required to stay away from the victim ....

¶26. The trial court asked Galloway if there was anything he or Martin would like to say regarding any mitigating circumstances before rendering Galloway's sentence. Martin stated the following:

> Yes, Your Honor. Mr. Galloway [had] just turned 18 when this carjacking happened. He was in high school. Basically, Your Honor, what happened is they had been drinking a little, they had gotten in the car with the girls. They had been riding around. The girls decided that they wanted them to get out. Mr. Galloway agreed to put $5 worth of gas in the car. They drove around a little more, and they got into an

> argument. He pulled the girl out of the car and drove home, because he didn't want to walk. This is what the argument started over, about him getting out of the car and walking. He was very young. When he got into this trouble, - - Your Honor, his mother is here. She's been here all day, and his sisters. She moved. She took him out of high school and moved to Greene County, because she wanted to get him away from his friends. ... [T]he next year, his senior year, he graduated with honors from Green County, and had not been in any trouble. He worked for many years after this happened. This was in 2001, this incident, Your Honor. There was a bench warrant taken out. He never left Jackson County. He worked for three years at the Brass Hanger Cleaners as a presser right when this happened. And he can show you his hand when he got caught with possession.
>
> Basically, Your Honor, after working at Brass Hanger Cleaners, he severely burned his hand while pressing. He was out on workers' compensation. He was taking pain meds, and he started experimenting with crack cocaine, Your Honor.
>
> He had not been in any trouble, or any arrests at all, since the time he was 18 until this last incident, Your Honor. We would ask the Court for some mercy. His mother and family are here in support of him. And he's been in jail for 7 months, Your Honor. We would [ask] that you, because of his age, consider time served, and putting him on 5 years Post-Release Supervision. He says that he learned his lesson. He's never been in jail before. He's never been in jail before this, and he is pretty adamant that he doesn't like it, and he's not going back. And he's just asking for a chance, Your Honor.

¶27. The State then responded as follows:

> Your Honor, first off, I did make an error on restitution. It should be $680. I was just looking at the cost to get the car out of impound. I think there were some other items that was [sic] never returned.
>
> Your Honor, the reason for the recommendation initially is because this case happened in 2001, and the bench warrant was put out for the defendant in 2002, and it had not come up until now, and a substantial amount of time had passed. But the victim, at the time, not only did he drag her out of the car, but force was used. I mean, she had bruises on her legs. She had a black eye. There was a struggle involved. And we feel that that is a very serious charge. And we do understand that he did graduate with honors, with what his attorney has said; but we still feel that it is a crime of violence and a serious charge.

> He also has the new charge in 2006, a drug charge, that indicates that he may ***972** have a drug problem, which is initially why we had talked about drug treatment, which is what the victim had indicated that she would have like to have seen him get is [sic] drug treatment, and we thought that the Adult Challenge Program would be good to help get his in order after that, concerning what was involved initially on the carjacking case, as well as the drug case. And we feel it's a very fair recommendation in light of the circumstances. He's looking at doing up to 15 years if he went to trial on it, and [the victim] is willing to go forward. She does not want to. She doesn't have to. She is still scared. She's recently had a baby, and all that comes into play for the recommendation.

¶28. The trial court found that Galloway's guilty plea was "freely, voluntarily, and intelligently made" and accepted it. The court sentenced Galloway to eight years in the Mississippi Department of Corrections (MDOC) on each charge, the sentences to run concurrently, with four years of post-release supervision. The court said it would recommend Galloway's participation in the Regimented Inmate Discipline (RID) program and that the court would retain jurisdiction of the case pending Galloway's completion of it. The court ordered Galloway to attend the "Adult Challenge" program, to pay a $1,000 fine for each charge, to pay $680 in restitution along with lab fees and court costs, and to stay away from the victim.

¶29. Galloway returned back to court nine months later on February 15, 2008. The State advised the trial court that Galloway had completed the RID program. And the State requested that the remainder of Galloway's sentence, apart from the four years of post-release supervision, be suspended on the condition that Galloway complete the "Adult Challenge" program and pay the fines, fees, and court costs listed in the sentencing order.

¶30. Martin agreed to the State's recommendation, but she requested that the "Adult Challenge" program requirement be excluded. The trial court declined the request. The trial court, however, found that Galloway had met the prerequisites for post-release supervision and issued an order adjudicating Galloway guilty of carjacking and possession of a controlled substance. The court suspended the remainder Galloway's original eight-year sentence, except for the four years to be served on post-release supervision and the requirement that Galloway pay the fines, fees, and court costs required by the original sentencing order.

3. Post-Conviction Relief

¶31. On May 1, 2015, Galloway filed a PCR motion to vacate his conviction and sentence for carjacking. Galloway asserted that when Martin transitioned from Galloway's prosecutor to his defense attorney in the very same case without disclosing her conflict or seeking a waiver from him, she deprived Galloway of his Sixth Amendment right to conflict-free counsel. Galloway claimed that the result created an actual conflict of interest that adversely affected Martin's representation of him and denied him his right to due process. Citing ***Cuyler v. Sullivan***, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed. 2d 333 (1980), and ***Kiker v. State***, 55 So. 3d 1060 (Miss. 2011), Galloway contended that this requires reversal of his carjacking conviction.

¶32. Galloway also asserted that if it were found that Martin's representation created only a potential conflict of interest, reversal is still required because Martin's conflict prejudiced him. Citing ***Strickland v. Washington***, Galloway

contended that Martin failed to conduct a reasonable investigation ***973** before advising him to plead guilty. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). Galloway claimed that a reasonable investigation would have uncovered substantial evidence that severely undermined the credibility of the State's witnesses and created a reasonable doubt as to his guilt for the carjacking charge. And, Galloway continued, there was a reasonable probability that this evidence would have altered Galloway's decision to plead guilty.[5] Galloway further claimed that the State violated ***Brady v. Maryland*** because it failed to disclose favorable, exculpatory, and material evidence to the defense.[6]

¶33. The trial court conducted an evidentiary hearing, at which the trial court heard testimony from, among others, Martin, Locke, Hasbrouck, and Professor Benjamin Cooper, an expert on legal ethics. Afterwards, the trial court issued a detailed opinion order denying Galloway's PCR petition. The trial court, as mentioned, held that Galloway's PCR claim is time barred and otherwise without merit.

¶34. The trial court found credible Martin's testimony that she did not realize, at the time she represented Galloway at his guilty plea hearing in 2007 and at the follow-up sentencing hearing in 2008, that she had worked as a prosecutor in the same carjacking case in 2002 and 2003. The trial court concluded as follows:

> Nine months elapsed between Galloway's arraignment and his case being passed to the inactive files. Almost four years later, Martin entered her appearance. Martin's caseload of thousands in a four year period at the D.A.'s office coupled with the lack of substantive activity in the case such that it was passed to the inactive files lends credence

> to Martin's testimony that she had no memory of Galloway or the facts of his case. The [c]ourt is unable to find that Martin consciously chose between or blended the competing interests of the State and Galloway based on speculation and generous inferences.

¶35. Accordingly, the trial court ruled that Galloway failed to demonstrate that his Sixth Amendment right to counsel was violated by an actual conflict of interest.

¶36. The trial court also denied Galloway's claim that he was prejudiced by Martin's failure to conduct a reasonable investigation in the case before advising Galloway to plead guilty to carjacking. And the trial court rejected Galloway's contention that substantial evidence existed that would have severely undermined the State's witnesses in the carjacking case, or that would have showed that a ***Brady*** violation had occurred or that would have created a reasonable doubt as to Galloway's guilt for carjacking.

¶37. The trial court found that, although Galloway submitted affidavits from several people whom Martin never contacted, none of the affiants were fact witnesses with personal knowledge of the crime that occurred ***974** on July 15, 2001. The trial court noted that shortly after Galloway's arrest for carjacking, Galloway admitted to the police that he had ridden in Simmons's vehicle with Simmons on the night Simmons said she was carjacked. The trial court also noted that Simmons had acknowledged that she initially had told the police that an individual named Paul Martin was the perpetrator, but she said the perpetrator had identified himself to her as Paul Martin. The trial court pointed out that in

Simmons's handwritten statement to the police, the name Paul Martin was written in quotation marks.

¶38. Citing ***Strickland***, 466 U.S. at 681, 104 S.Ct. 2052, the trial court said that an attorney can still be constitutionally effective without investigating every plausible line of defense. Time limitations and money may "force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence." ***Id.*** And an attorney's decision to forego an investigation to pursue a plea deal rather than defend at trial can be reasonable under the circumstances. ***Id.***

¶39. The trial court noted that Galloway was facing up to fifteen years in prison if convicted of carjacking. But he was sentenced to eight years with four years of post-release supervision and was recommended to the RID program. Less than one year later, after successfully completing the program, the remainder of Galloway's sentence was suspended apart from the four years of post-release supervision.

¶40. The trial court found that Martin's decision to forego an investigation to pursue a plea deal, that included the opportunity for release and significant reduced prison time was reasonable. The trial court rejected Galloway's assertion that his lenient sentence is irrelevant since Galloway was a first-time offender and could have possibly been acquitted. The trial court stated, "It is a matter of public record in Jackson County that first-time offenders of violent crimes rarely receive such a lenient sentence."

DISCUSSION

¶41. At the outset, we agree with the trial court that Galloway's PCR claim is time barred under the UPCCRA's three-year statute of limitations. *See* Miss. Code Ann. § 99-39-5(2); ***Jordan v. State***, 268 So. 3d 570, 571 (Miss. 2018) (barring PCR claim asserting ineffective assistance of counsel based on a conflict of interest because the claim did not "surmount the time, waiver, and successive-writ bars" set forth by the UPCCRA).

¶42. Time bar notwithstanding, the trial court also concluded, in a thorough and detailed order containing the court's factual findings, that Galloway failed to demonstrate a violation of his Sixth Amendment rights under either the ***Crawford*** standard or the less burdensome ***Cuyler*** standard. We affirm the trial court's decision.

¶43. Conflict-of-interest claims involving attorneys in criminal cases are a species of ineffective assistance of counsel under the Sixth Amendment. ***Strickland***, 466 U.S. at 688, 104 S.Ct. 2052 ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."). Such claims are evaluated under one of two separate standards: the ***Strickland*** standard or the standard from ***Cuyler***, 446 U.S. 335, 100 S.Ct. 1708. ***Crawford v. State***, 192 So. 3d 905, 917-18 (Miss. 2015) (citing ***Strickland***, 466 U.S. at 687-92, 104 S.Ct. 2052).

¶44. The ***Strickland*** standard requires a showing of deficient performance that prejudiced the defense. ***Strickland***, 466 U.S. at 687, 104 S.Ct. 2052. The ***Cuyler*** standard relieves the burden of showing ***975** prejudice when a claimant can show

that "an actual conflict of interest adversely affected his lawyer's performance." ***Id.*** at 692, 104 S.Ct. 2052 (internal quotation marks omitted) (quoting ***Cuyler***, 446 U.S. at 350, 100 S.Ct. 1708). "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " ***Id.*** (quoting ***Cuyler***, 446 U.S. at 350, 100 S.Ct. 1708).

¶45. ***Strickland*** explained that the ***Cuyler*** standard provides a "more limited[ ] presumption of prejudice[ ]" than in instances in which there is "[a]ctual or constructive denial of the assistance of counsel altogether[ ] " or in which the "state interfere[s] with counsel's assistance." ***Strickland***, 466 U.S. at 692, 104 S.Ct. 2052. "Prejudice in th[o]se circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." ***Id.*** (citing ***United States v. Cronic***, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed. 2d 657 (1984)).

¶46. The ***Cuyler*** standard "is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above[:]" denial of counsel altogether or interference by the State with counsel's assistance. ***Id.*** Rather, the ***Cuyler*** standard "sets a lower threshold for reversal of a criminal conviction than does the ***Strickland*** test ...." ***Crawford v. State***, 192 So. 3d at 917-18 (citing ***Strickland***, 466 U.S. at 687-88, 104 S.Ct. 2052).

¶47. As ***Crawford*** recognized, four seminal United States Supreme Court cases deal with conflict-of-interest claims under the Sixth Amendment. ***Crawford***, 192 So. 3d at 917-18 (citing ***Holloway v. Arkansas***, 435 U.S. 475, 98 S. Ct. 1173, 55

L.Ed. 2d 426 (1978); ***Cuyler***, 446 U.S. 335, 100 S.Ct. 1708; ***Wood v. Georgia***, 450 U.S. 261, 101 S. Ct. 1097, 67 L.Ed. 2d 220 (1981); ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed. 2d 291 (2002)). Each case concerned a lawyer's conflict of interest based solely on representation of multiple clients. ***Crawford***, 192 So. 3d at 918. And each case dealt with a trial court's duty to inquire into the possible conflict.[7] ***Id.***

¶48. As the trial court explained, "[a] mere possibility of a conflict does not raise a presumption of prejudice ...." ***Hernandez v. Johnson***, 108 F.3d 554, 560 (5th Cir. 1997); *see also* ***Stringer v. State***, 485 So. 2d 274, 275 (Miss. 1986) ("[A] potential for conflict or hypothetical or speculative conflicts will not suffice for reversal."). "[U]ntil a defendant shows that his counsel actively represented conflicting interest, he has not established the constitutional predicate for his claim of ineffective assistance." ***Hernandez***, 108 F.3d at 560 (internal quotation marks omitted) (quoting ***Cuyler***, 446 U.S. at 350, 100 S.Ct. 1708). An actual conflict exists "when defense counsel is compelled to compromise ***976** his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client." ***Perillo v. Johnson***, 205 F.3d 775, 781 (5th Cir. 2000). And "[i]t must be demonstrated that the attorney made a choice between possible alternative courses of action .... If [counsel] did not make such a choice, the conflict remained hypothetical." ***United States v. Garcia-Jasso***, 472 F.3d 239, 243 (5th Cir. 2006) (internal quotation marks omitted) (quoting ***Stevenson v. Newsome***, 774 F.2d 1558, 1561-62 (11th Cir. 1985)).

¶49. Based on all of the evidence presented, the trial court concluded that Galloway failed to demonstrate an actual conflict of interest. The trial court found that Martin had no memory of Galloway or the facts of his case, and the trial court was unable to find, beyond speculation and generous inferences, that Martin "consciously chose between or blended the competing interests of the State and Galloway." Accordingly, Galloway's conflict-of-interest claim remained hypothetical.

¶50. The trial court reached this conclusion based on factual findings drawn from the evidence, which we are not permitted to second guess. *See* ***Walker v. State***, 230 So. 3d 703, 704 (Miss. 2017) (trial court's factual finding(s) may not be disturbed on appeal unless shown to be clearly erroneous). Accordingly, we must affirm the trial court's decision.

¶51. In so holding, however, we must express our great consternation with the obvious lack of diligence on Martin's part in this case. Irrespective of Martin's memory or recollection of Galloway and the facts of his criminal case, a former prosecutor such as Martin should have spotted and properly acted on indisputable red flags here before taking on Galloway's representation. Martin certainly knew that she had been employed in the district attorney's office at the time of Galloway's crime and indictment. And while, as the trial court found, the activity in Galloway's criminal case in which Martin was involved as a prosecutor had not been substantial, it was enough that a former prosecutor could have discovered it.

¶52. We point out that some states have dealt with these type of situations as a *per se* conflict of interest warranting automatic reversal. *See, e.g.*, ***People v. Lawson***,

163 Ill.2d 187, 206 Ill.Dec. 119, 644 N.E.2d 1172, 1183 (1994); ***Skelton v. State***, 672 P.2d 671 (Ok. 1983); ***State v. Gibbons***, 1 Or.App. 374, 462 P.2d 680 (1969). Other courts adhere to a prejudicial-showing requirement but condemn such practice nonetheless. *E.g.*, ***Flaherty v. State***, 221 So. 3d 633, 637 (Fla. Dist. Ct. App. 2017).

¶53. We also note that the Supreme Court of Wisconsin has spoken to such circumstances as follows:

> In all these situations, the court must be empowered to disqualify attorneys in the interest of justice. In ***State v. Miller***, 160 Wis. 2d [646] at 653, 467 N.W.2d 118 [(1991)], this court stated that "An actual conflict or serious potential for conflict of interest imperils the accused's right to adequate representation and jeopardizes the integrity of the adversarial trial process and the prospect of a fair trial with a just, reliable result."

State v. Love, 227 Wis.2d 60, 594 N.W.2d 806, 816 (1999). ***Love*** reiterated what the United States Supreme Court enumerated in ***Wheat v. United States***, 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988), "when a criminal defense attorney has an actual or serious potential conflict of interest[:]"

> First, a court's institutional interest in ensuring that "criminal trials are conducted within the ethical standards of the profession." ***977** ***Wheat***, 486 U.S. at 160[, 108 S.Ct. 1692]. Second, a court's institutional interest in ensuring that "legal proceedings appear fair to all who observe them." ***Id.*** Third, a court's institutional interest that the court's "judgments remain intact on appeal" and be free from future attacks over the adequacy of the waiver or fairness of the proceedings. ***Id.*** at 161[, 108 S. Ct. 1692].

Love, 594 N.W.2d at 816-17 (quoting ***Miller***, 467 N.W.2d at 120 n.2).

¶54. ***Love*** also took into consideration circumstances in which such serial-representation claims are alleged for the first time in a post-conviction proceeding, stating,

> In a post-conviction motion, the institutional factors are different. If a defendant has received a fair trial, the court has an institutional interest in protecting the finality of its judgment. Moreover, theoretical imperfections and potential problems ought not be treated more seriously than real deficiencies and real problems, for such skewed values would undermine public confidence in the administration of justice.

Id. at 817.

¶55. In striking a balance, ***Love*** issued the following rule:

> We hold that in order to establish a Sixth Amendment violation on the basis of a conflict of interest in a serial representation case, a defendant who did not raise an objection at trial must demonstrate by clear and convincing evidence that his or her counsel converted a potential conflict of interest into an actual conflict of interest by (1) knowingly failing to disclose to the defendant or the circuit court before trial the attorney's former prosecution of the defendant, or (2) representing the defendant in a manner that adversely affected the defendant's interests. If either of these factors can be shown, the circuit court should provide the defendant with appropriate relief. If an attorney knowingly fails to disclose to a defendant or the circuit court his or her former role in prosecuting the defendant, the attorney is subject to discipline from the Board of Attorneys Professional Responsibility.

Id.

¶56. Here, we decline to issue a specific rule to govern this type of situation. Again, Galloway's PCR claim is time barred. And as the trial court found, at Galloway's own doing, the carjacking charge filed against him in 2002 failed to proceed and was passed to the inactive files in 2004, and it was not reinstituted until 2006 after

Galloway's arrest for new drug charges. Further, Galloway did not file a PCR claim alleging his conflict-of-interest claim until 2015.

¶57. Thus, even though we conclude that Martin failed to take appropriate measures when taking on legal representation of Galloway, we cannot conclude that Martin knowingly failed to disclose to Galloway and the trial court that she had prior involvement with Galloway's criminal case during her time at the district attorney's office. This is what the trial court ultimately concluded to be the case based on credibility determinations and other factual findings.

¶58. Finding no clear error with the trial court's findings, we affirm the trial court's denial of post-conviction relief.

CONCLUSION

¶59. For these reasons, the trial court's denial of Galloway's motion for post-conviction relief is affirmed.

¶60. **AFFIRMED.**

RANDOLPH, C.J., COLEMAN, MAXWELL, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

***978** ¶61. I respectfully dissent. The majority finds that Galloway's motion for post-conviction relief (PCR) is time barred and that Galloway failed to show that he suffered from an actual conflict of interest. I find that Galloway's claim involves a fundamental constitutional right, which overcomes the time bar, and that Attorney

Martin's later representation of Galloway was a *per se* actual conflict of interest. As such, Galloway is entitled to an automatic reversal of his conviction. I would grant his motion for PCR and would reverse and remand for a new trial.

¶62. The majority is correct that Galloway filed his PCR claim more than seven years after his conviction; but it does not consider whether his fundamental right to effective assistance of counsel suffered any adverse effect. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defence." U.S. Const. amend. VI; U.S. Const. amend XIV. The Sixth Amendment right to counsel protects a defendant's "fundamental right to a fair trial." ***Strickland v. Washington***, 466 U.S. 668, 684, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). The "right to counsel, conflict free, is attendant to the Sixth Amendment right to effective assistance of counsel." ***Armstrong v. State***, 573 So. 2d 1329, 1334 (Miss. 1990); *see also* ***Sykes v. State***, 624 So. 2d 500, 503 (Miss. 1993) ("It is axiomatic that the Sixth Amendment right to counsel encompasses a right to effective assistance from an attorney who is conflict-free."). Mississippi's constitution and case law guarantee a defendant's right to effective assistance of counsel, providing that "[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both ...." Miss. Const. art. 3, § 26; *see also* Miss. Const. art 3, § 14 ("No person shall be deprived of life, liberty, or property except by due process of law."). "It is conceivable that under the facts of a particular case, this Court might find that a lawyer's performance was so deficient, and so prejudicial to the defendant, that the defendant's fundamental

constitutional rights were violated." ***Bevill v. State***, 669 So. 2d 14, 17 (Miss. 1996). Additionally, this Court has held "unequivocally, that errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA." ***Rowland v. State***, 42 So. 3d 503, 506 (Miss. 2010). Galloway's claim concerns an actual conflict of interest that affects his fundamental right to conflict-free counsel and is "excepted from the procedural bars of the UPCCRA." ***Id.***

¶63. I disagree also with the majority's application of federal standards over Mississippi's standard for determining the existence of conflicts of interest. The majority focuses on the federal standards articulated by the United States Supreme Court in ***Strickland*** and ***Cuyler v. Sullivan***. Maj. Op. ¶ 43 (citing ***Strickland***, 466 U.S. 668, 104 S.Ct. 2052; ***Cuyler v. Sullivan***, 446 U.S. 335, 100 S. Ct. 1708, 64 L.Ed. 2d 333 (1980)). While these federal standards have some applicability to this case, they merely pronounce the "minimum standard that the federal government has set for itself;" this Court is "empowered by our state constitution to exceed federal minimum standards of constitutionality[.]" ***Downey v. State***, 144 So. 3d 146, 151 (Miss. 2014); *see also* ***Penick v. State***, 440 So. 2d 547, 551 (Miss. 1983) ("We ... reserve for this Court the sole and absolute right to make the final interpretation of our state Constitution ...."). This Court exercised its ***979** state constitutional authority by establishing for Mississippi a higher standard for the determination of actual conflicts of interests than that required by ***Cuyler*** in ***Kiker v. State***, 55 So. 3d 1060 (Miss. 2011).

¶64. In ***Kiker***, while recognizing the ***Cuyler*** standard, we made clear the higher standard that our state courts are to apply when an accused person is represented by an attorney who has a conflict of interest. ***Kiker***, 55 So. 3d at 1065-66. The lower federal standard explained in ***Cuyler*** is that "prejudice is presumed when counsel is burdened by an actual conflict of interest[,]" but the "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " ***Strickland***, 466 U.S. at 692, 104 S.Ct. 2052 (quoting ***Cuyler***, 446 U.S. at 350, 100 S.Ct. 1708). In ***Kiker***, this Court reinforced its holding in ***Armstrong*** that, "[w]hen the accused is represented by an attorney with an actual conflict of interest, the accused has received ineffective assistance of counsel as a matter of law, and 'reversal is automatic irrespective of a showing of prejudice unless [the accused] knowingly and intelligently waived his constitutional right to conflict free representation.' " ***Id.*** at 1066 (alteration in original) (quoting ***Armstrong***, 573 So. 2d at 1335). Unlike ***Cuyler***, our standard, as set out in ***Kiker***, does not require a showing that the attorney's performance was adversely affected by the conflict of interest, but it requires only a showing that an actual conflict of interest exists. The standard set forth in ***Kiker*** embraces this Court's rationale that

> Once an actual conflict is demonstrated, a showing of specific prejudice is not necessary, for to hold otherwise would engage a reviewing court in unreliable and misguided speculation as to the amount of prejudice suffered by a particular defendant. An accused's constitutional right to effective representation of counsel is too precious to allow such imprecise calculations.

Id. (quoting ***Littlejohn v. State***, 593 So. 2d 20, 25 (Miss. 1992)). This Court has stated plainly that the prejudice standard of ***Strickland*** does not apply to Mississippi state court cases in which an actual conflict of interest exists. ***Id.***

¶65. The ***Kiker*** standard "turns on whether there was an actual, as opposed to a potential, conflict of interest." ***Id.*** at 1067. Only when the conflict of interest is a potential one is a defendant required to show that "a conflict of interest actually affected the adequacy of his representation" as enunciated in ***Cuyler***. ***Id.*** at 1066 (internal quotation marks omitted) (quoting ***Mickens v. Taylor***, 535 U.S. 162, 168, 122 S. Ct. 1237, 152 L.Ed. 2d 291 (2002)). Thus, the Mississippi standard differs from the federal standard articulated in ***Cuyler***: when a lawyer's representation creates an actual conflict of interest, this constitutes "*per se* ineffective assistance of counsel," requiring automatic reversal, regardless of the defendant's ability to demonstrate prejudice. ***Rowsey v. State***, 188 So. 3d 486, 498 (Miss. 2015) (citing ***Kiker***, 55 So. 3d at 1067)).

¶66. The majority expresses "great consternation with the obvious lack of diligence on Martin's part in this case" but finds, nevertheless, that the conflict of interest in this case was purely hypothetical. Maj. Op. ¶¶ 49, 51. While I share the majority's consternation, the facts and the applicable law compel my respectful rejection of its conclusion that Martin's conflict does not rise above the level of a mere hypothesis.

¶67. As an assistant district attorney Martin was representing the State, as was ***980** her duty, when this case arrived in the Office of the District Attorney for the 19th Circuit Court District. From the record it is indisputable that, as a prosecutor,

she did considerable work on the case, which included agreeing—on behalf of the State—to a continuance, requesting the issuance of witness subpoenas for Galloway's scheduled trial, informing the court of a plea recommendation, announcing to the court that the State was ready for trial, obtaining from the court a bench warrant for Galloway's arrest, and signing—on behalf of the State—an agreed order setting aside the bench warrant and a judgment *nisi*. The court documents and the transcript of pretrial proceedings lead to the conclusion that Martin actually was in charge of the prosecution, and this is acknowledged by the majority. Maj. Op. ¶ 8. For this work and more, Martin was paid by the state of Mississippi, as she should have been.

¶68. Years later, after she had been an unsuccessful candidate for district attorney for the same district in which she had worked as an assistant district attorney,[8] Galloway, who had disappeared for a few years, reappeared in her life when, as a private practitioner, Martin was offered employment, either by him or by someone acting on his behalf, to serve Galloway as his defense attorney in the very same case. When offered that opportunity, if Martin actually conducted a routine conflicts check before accepting the employment, she either made an extraordinarily careless oversight, or she accepted the case without regard to the glaringly obvious conflict of interest. It appears that Martin chose an attorney fee over diligent and ethical conduct. Sadly, this attorney created the ultimate conflict of interest. No two legal interests could be more fundamentally adverse than those of the prosecution versus

the defendant in criminal litigation. There is nothing hypothetical about such a conflict.

¶69. As the majority has said, an actual conflict of interest exists when an attorney "is compelled to compromise his or her duty of loyalty or zealous advocacy to the accused by choosing between or blending the divergent or competing interests of a former or current client." Maj. Op. ¶ 48 (internal quotation mark omitted) (quoting ***Perillo v. Johnson***, 205 F.3d 775, 781 (5th Cir. 2000)); *see also* ***Kiker***, 55 So. 3d at 1067 ("Barnett owed a duty of loyalty both to Kiker and to Crawford, a duty that was impossible to fulfill if one of his clients was offering testimony against the other. ... Therefore, we find that Barnett was under an actual conflict of interest, and Kiker need not demonstrate any specific prejudice to his defense."). This Court has held that, "[u]nder our system of jurisprudence, if a lawyer is not one hundred percent loyal to his client, he flunks." ***Littlejohn***, 593 So. 2d at 22. Thus, I would find that Attorney Martin's switching sides[9] created a situation in which her duty of loyalty was compromised and was split between Galloway and the State, resulting in an actual conflict of interest. Galloway is not required to show that he was prejudiced.

¶70. Regarding duties owed by lawyers to criminal defendants, this Court has held that

> Even if we begin with the proposition that counsel's conduct is presumed to be within the wide range of reasonable professional ***981** conduct, certain indispensable duties are required of an attorney representing a criminal

> defendant. ***Leatherwood v. State***, 473 So. 2d 964, 969 (Miss. 1985). These duties include, but are certainly not limited to, assisting the defendant, informing her of important decisions and developments, asserting the client's position with zeal. ***Id.***

Armstrong, 573 So. 2d at 1334. Martin owed a duty of loyalty both to Galloway and to the State. *See* Miss. R. Prof'l Conduct 1.7 cmt. ("Loyalty is an essential element in the lawyer's relationship to a client."). Martin owed Galloway not only a duty of loyalty, but also a duty to act as his zealous advocate. As a prosecutor, Martin could have acquired knowledge about Galloway's case—perhaps even confidential or personal information about the crime victim—that no defense counsel would have been entitled to have. Martin could not use this sort of information for Galloway's benefit because she was under a duty of loyalty to the State to keep such information confidential. *See* Miss. R. Prof'l Conduct 1.6 cmt. ("The duty of confidentiality continues after the client-lawyer relationship has terminated."). Her possession of such knowledge is one of the circumstances that breaches her duties of loyalty and zeal to Galloway. Martin cannot satisfy her duty of being one hundred percent loyal to Galloway or her duty to be a zealous advocate for Galloway if she is bound to keep certain information from her client or if she is limited in her ability to use it for his benefit.

¶71. In order to advocate zealously for Galloway, Defense Attorney Martin would have to attack the work she had done on the case as a prosecutor. Galloway supported his position by providing expert opinions on Mississippi legal ethics. One

expert, Professor Donald Campbell, submitted an affidavit in which he attested that a lawyer could not be a zealous advocate in this type of situation because the lawyer would have to attack his or her own work product done as a prosecutor. Another expert on Mississippi legal ethics, Professor Benjamin Cooper, testified in agreement with Professor Campbell. The two of them opined that any attack Martin would make on her own work as a prosecutor would be against the interest of her former client, the State, and any failure or reluctance to attack her prosecutorial work would be detrimental to Galloway. The State provided no evidence to the contrary.

¶72. Because Attorney Martin switched sides, she compromised her professional relationship not only with Galloway, but also with the State, making it impossible to fulfill her duties to both. Thus, Attorney Martin created an actual conflict of interest when she signed on as Galloway's lawyer.

¶73. Martin was constrained by several ethical duties. *See* Miss. R. Prof'l Conduct 1.7(b); Miss. R. Prof'l Conduct 1.9(a). Under Mississippi Rule of Professional Conduct 1.7(b), she had a duty to avoid representation of a client, such as Galloway, when the representation might "be materially limited" by her duties to "another client or a third person," here, the State. She had a duty to her former client, the State, to refrain from "represent[ing] another in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client" without the former client's consent. Miss. R. Prof'l Conduct 1.9(a). Clearly, the interests of the State and Galloway did not change from the beginning

of this case to its end. They always were, and they always will be, adverse, each to the other.

¶74. The Mississippi Court of Appeals has dealt with a case in which a former prosecutor represented a defendant after ***982** having prosecuted that defendant years earlier for an unrelated crime, not for the *same* crime, as here. *See* ***Gregory v. State***, 96 So. 3d 54, 56-57 (Miss. Ct. App. 2012). In ***Gregory***, Attorney T.R. Trout, who had prosecuted Gregory six years earlier on an unrelated drug charge, agreed to defend Gregory for possession of cocaine. ***Id.*** The Court of Appeals, although it did not cite ***Kiker***, nevertheless applied the standard set forth in ***Kiker*** and applied Rule 1.9 in determining whether an actual conflict of interest existed. ***Id.*** at 57-58. The court found that, although "Trout had represented the State where Gregory's (his current client) interests were materially adverse to the State's (his former client) interests," there was no evidence that Trout's duty of loyalty was compromised. ***Id.*** at 58. Unlike Attorney Trout, Martin's representation of Galloway was for the same, exact matter in which she had represented the State. Rule 1.9(a) clearly prohibited Attorney Martin's representation of Galloway.

¶75. In ***Gray v. State***, a defense attorney, Robert Taylor, met with Gray at a jail for approximately forty-five minutes with a view toward employment as his defense lawyer, but Taylor "subsequently joined the district attorney's office and actively participated in the prosecution of [Gray]." ***Gray v. State***, 469 So. 2d 1252, 1254 (Miss. 1985). Although Taylor testified that "he had no independent recollection" of his conversation with Gray, the Court reversed and remanded the case,

disqualifying the entire district attorney's office without regard to whether there had been an actual breach of Gray's confidential information. ***Id.*** at 1255. The Court reasoned that its holding "[was] not grounded upon the demonstration of any actual abuse but rather on the duty to eliminate the *very serious appearance of impropriety* present in this case." ***Id.*** (emphasis added).

¶76. Similarly, Martin testified that she did not remember prosecuting or defending Galloway. This Court's firm position is that, once an actual conflict has been demonstrated, the conviction shall be reversed automatically. ***Kiker***, 55 So. 3d at 1066. There is no need to show specific prejudice because doing so would require courts to engage in "unreliable and misguided speculation" and "[a]n accused's constitutional right to effective representation of counsel is too precious to allow such imprecise calculations." ***Id.*** at 1066-67 (quoting ***Littlejohn***, 593 So. 2d at 25). Therefore, as in ***Gray***, we are not to engage in speculation about what Martin truly knew, but instead we must perform this Court's duty to eliminate the extreme appearance of impropriety caused by Martin's having switched sides.

¶77. The defendant need only demonstrate that the duty of loyalty has been compromised to establish the existence of an actual conflict of interest. ***Id.*** at 1067. Here, Galloway demonstrated that an actual conflict of interest existed by establishing that Martin was the assistant district attorney handling the carjacking charge before she swapped sides to defend Galloway on the same charge. The majority concentrates on whether Martin was aware of the existence of the conflict of interest rather than on whether her duty of loyalty was compromised by her

prior, hands-on representation of the State in the same case. Even though Martin testified she did not remember prosecuting or defending Galloway, she did acknowledge that, as she reviewed the documents while on the witness stand, she started to remember some of the facts regarding Galloway's case. This testimony establishes that Martin had failed to consider whether a conflict of interest existed before agreeing to represent Galloway. The date of the offense alone should have triggered, at the very least, her memory that she was an assistant ***983** district attorney at that time. Even if she had neglected to engage in a pre-employment conflicts check, her review of the court file should have made her own name jump out at her, at which point she should have withdrawn as Galloway's lawyer. It is inconceivable that Martin, in the normal course of handling this case, would not have realized that she had a major conflict. Upon such realization she should have informed Galloway, the judge, and the prosecutor. In the absence of an informed waiver by Galloway she should have withdrawn, although I think it highly probable that the district attorney would have opposed her continued involvement as Galloway's attorney.

¶78. In the ***Gray*** case this Court reversed and remanded a conviction, and in the process disqualified, on remand, every lawyer in the largest district attorney's office in the state,[10] "to eliminate the very serious appearance of impropriety in this case." ***Gray***, 469 So. 2d at 1255. The appearance of impropriety is of equal, if not greater, seriousness in the present case. Let us not overlook that, in addition to the general public, the judiciary, and the Bar, this impropriety may well have appeared

especially egregious to the crime victim, who undoubtedly had interaction with the prosecutor in charge, Assistant District Attorney Martin, in the early stages of the case. At the beginning of this case Martin was Assistant District Attorney Martin, which stands in stark contrast to the end of the case when Defense Attorney Martin stood beside the defendant, Galloway, imploring the sentencing judge to deal leniently with him. It is hard to think of any aspect of this scenario that would instill in anyone an abiding confidence in the fairness of Mississippi's criminal justice system. It is far less difficult to imagine how it could have had a drastically opposite effect.

¶79. The ethical rules about conflicts of interest and the myriad judicial decisions that apply them to real-life criminal cases, such as this one, exist to protect the integrity of our system of justice and of the legal profession, and to assure, insofar as is humanly possible, that the courts, consistently and reliably, are fair, and that they *look* fair. It therefore is not surprising that this Court was so deeply concerned about the very *appearance* of impropriety that moved it to reverse in the ***Gray*** case. We should be as concerned today. The affirmance of Galloway's conviction, under these circumstances, will not reflect favorably upon the integrity and fairness of this Court.

¶80. Attorney Martin's prosecution of Galloway in the carjacking case, followed by her switching sides to defend him in the same case, created a *per se* conflict of interest that mandates automatic reversal. Galloway was deprived of his fundamental right to effective, conflict-free counsel and of the prospect of a fair

trial. This Court should grant Galloway's motion for post-conviction relief, reverse his conviction, and remand for a new trial.

KING, P.J., JOINS THIS OPINION.

All Citations

298 So.3d 966

Footnotes

1 The indictment alleged that Galloway "knowingly by force and violence" took a motor vehicle "from Monica Simmons's immediate actual possession ...."

2 The order was signed by Circuit Court Judge James Backstrom.

3 This order was signed by Circuit Court Judge Robert Krebs. Judge Krebs presided over Galloway's 2007 guilty-plea hearing. Judge Krebs also presided over the underlying PCR.

4 Galloway also stood charged with possession of a controlled substance, for which he had been arrested in 2006. Galloway, however, seeks relief only from his carjacking conviction.

5 Galloway also cites ***Hill v. Lockhart***, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed. 2d 203 (1985), which held that the two-part test announced in ***Strickland*** also applies to guilty-plea proceedings. *see also* ***Coleman v. State***, 483 So. 2d 680, 683 (Miss. 1986) (adopting ***Hill***'s test in the context of guilty pleas and holding that the defendant must show that were it not for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial).

6 In ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

7 In ***Holloway***, the Supreme Court applied an automatic-reversal rule only when defense counsel is forced to represent codefendants over a timely objection, unless the trial court has determined that there is no conflict. ***Holloway***, 435 U.S. at 488, 98 S.Ct. 1173. ***Cuyler*** declined to extend ***Holloway***'s automatic-reversal rule to a situation in which no one objected to a multiple representation by the same counsel. ***Cuyler***, 446 U.S. at 337-38, 100 S.Ct. 1708. In ***Wood***, the record suggested that the trial court knew or should have known that an actual conflict existed, and the ***Wood*** Court remanded the case for a determination of whether an actual conflict existed. ***Wood***, 450 U.S. at 272-73, 101 S.Ct. 1097. In ***Mickens***, the Court clarified that even if the trial court knew or should have known potential conflict existed, a defendant still must establish that the conflict adversely affected counsel's performance. ***Mickens***, 535 U.S. at 167-73, 122 S.Ct. 1237.

8 Martin ran for district attorney in 2003. She left the district attorney's office after the new district attorney, who had defeated her in the election, took office at the beginning of 2004.

9 "Switching sides occurs when an attorney starts out representing one party, then represents an adverse party in the same or related litigation." ***Vega v. Johnson***, 149 F.3d 354, 357 (5th Cir. 1998).

[10] The 7th Circuit Court District, then comprised of Hinds and Yazoo Counties.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LESLIE GALLOWAY, III — PETITIONER

VERSUS — CIVIL ACTION NO. 1:20CV271-HSO-RPM

BURL CAIN — RESPONDENT

REPORT & RECOMMENDATIONS

Leslie Galloway, III has filed a 28 U.S.C. § 2254 petition for writ of habeas corpus challenging his 2007-08 carjacking conviction and sentence.[1] In his petition, he asserts that (1) defense counsel who represented him during the guilty plea operated under a conflict of interest; and (2) the prosecution withheld *Brady*[2] material related to a photographic line-up. Galloway did not file a motion for post-conviction relief with the state trial court until May 1, 2015; nearly seven years after the carjacking sentence was imposed. Doc. [8-1] at 16-54. He then filed the instant § 2254 petition on August 20, 2020.

Galloway is currently sentenced to death arising out of a 2010 capital murder conviction. *See Galloway v. State of Mississippi*, 122 So.3d 614 (2013). In the instant petition, he challenges only the carjacking conviction. As he makes clear in his petition, it is "directed solely at the 2007 carjacking conviction." Doc. [1] at 2. Galloway points out that post-conviction proceedings remain pending on his death sentence and have not yet been exhausted in State court. *Id.*; Doc. [9] at 9 n.2. He acknowledges that if he were attempting to challenge the capital sentence, the instant claims could be dismissed as unexhausted; and any later-filed habeas

[1] Galloway initially entered a guilty plea in 2007, but the final sentencing order was not entered until February 15, 2008. Doc. [8-1] at 61-63.
[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

petition raising additional claims related to the death conviction may be deemed successive. Doc. [9] at 9 n.2.

Respondent has filed a motion to dismiss the petition and argues that (1) Galloway does not meet the in-custody requirement for federal habeas corpus jurisdiction; and (2) the petition is time barred by the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitations period. Doc. [7]. In his reply, Galloway counters that the prior conviction was used as an aggravating circumstance for his death sentence in 2010; and he did not discover the factual predicates of the claims related to the carjacking conviction until much later. Doc. [9].

Carjacking Conviction

Galloway was arrested initially in 2001 for a carjacking in Moss Point, Mississippi. *Galloway v. State of Mississippi*, 298 So.3d 966, 969 (Miss. 2020). Shortly after the incident, the crime victim (Monica Simmons), identified the perpetrator as Paul Martin, but she later identified Galloway as the assailant. After being arrested, Galloway admitted that he had ridden in Simmons' vehicle the night of the carjacking. *Galloway*, 298 So.3d at 974. At the guilty plea hearing, he also admitted to taking her car by force. *Id.* at 970; Doc. [8-15] at 493.

During the initial criminal proceedings against Galloway, attorney Wendy Martin served as the assistant district attorney representing the State. *Id.* at 969. Charges were formally brought in April 2002; however, in March 2004, the carjacking charge was passed to the inactive file in part because Galloway failed to appear for arraignment and later failed to appear for a docket hearing. *Ibid.* In January 2004, after an unsuccessful run for office, Martin left the district attorney's employ. *Ibid.* In October 2006, Galloway was arrested on unrelated drug charges, at which time, Galloway was brought before the court on the dormant carjacking

charges. *Ibid.* On February 22, 2007, Wendy Martin entered an appearance as defense counsel for Galloway, despite having served as the prosecutor on the same charges. *Id.* at 970.

On May 17, 2007, Galloway entered a guilty plea to carjacking and possession of a controlled substance. *Ibid.* The trial court imposed an eight-year sentence, with the sentence to be suspended upon completion of the Regimented Inmate Discipline Program (RID). *Id.* at 972. The trial court retained jurisdiction over the matter. On February 15, 2008, Galloway appeared before the trial court following successful completion of the RID program. *Ibid.* The trial court adjudicated Galloway guilty and suspended the remainder of his original sentence with four years to be served under post-release supervision. *Ibid.* The record demonstrates that Galloway completed the carjacking sentence on February 14, 2012. Doc. [7-1].

Capital Murder Conviction

In December 2008, approximately ten months after the trial court suspended the remainder of his carjacking sentence, Galloway sexually assaulted and murdered seventeen-year-old Shakeylia Anderson.[3] *See Galloway*, 122 So.3d at 625. Evidence introduced at trial indicated that Galloway knew the victim and had been "seeing her" since November 2008. The evidence further indicated that he committed forcible anal sex on the victim, cut her throat, doused her with a flammable liquid and set her on fire while she was still alive, and ultimately killed her by running over her multiple times with a car. *Id.* at 630-31, 675-76. Galloway was charged with capital murder and eventually tried by a jury, found guilty, and sentenced to death on September 24, 2010. *Id.* at 627; Doc. [8-15] at 407. The 2007-08 carjacking conviction was used as an aggravating circumstance during the sentencing phase of Galloway's murder trial.

[3] The record reflects that Galloway also has been charged with two counts of sexual battery and one count of residential burglary, which were alleged to have occurred on May 4, 2003. These charges arose after a "hit from the CODIS database that DNA gave on an unsolved rape". Doc. [8-15] at 407. The sexual battery charges were not resolved, and later passed to the file, because Galloway was already facing the capital murder charge. *Id.* at 408.

Galloway, 298 So.3d at 968. Galloway's instant § 2254 petition does not purport to challenge his murder conviction, which is the subject of separate proceedings. *See* Doc. [1] at 2.; Doc. [9] at 9 n.2. He contends that he challenges only the carjacking conviction. Presumably, if successful in undermining the carjacking conviction, this will open the door for a future challenge to the death sentence on habeas review.

State Court Post-Conviction Proceedings

With respect to the carjacking conviction, Galloway filed a motion for post-conviction relief in the trial court on May 1, 2015, raising the conflict-of-interest and *Brady* claims. On March 22-23, 2018, the trial court conducted an evidentiary hearing. *See* Doc. [14-7] [14-8]. Wendy Martin testified at the hearing and indicated that she did not remember who hired her in 2007 to represent Galloway on the carjacking charges, but she said, "[i]t was probably a family member or a girlfriend." *Galloway*, 298 So.3d at 970. She further testified that she did not realize at the time she represented Galloway that she had worked as a prosecutor in the same carjacking case in 2002 and 2003. *Id.* at 973. The trial court pointed out that "Martin's case load of thousands in a four-year period at the D.A.'s office coupled with the lack of substantive activity in the case such that it was passed to the inactive files lends credence to Martin's testimony that she had no memory of Galloway or the facts of his case." *Ibid.* The trial court further noted that Galloway would have faced up to fifteen years in prison if convicted of carjacking. *Id.* at 974. The trial court rejected Galloway's assertion that the lenient sentence was irrelevant to the conflict-of-interest claim and concluded that "Martin's decision to forego an investigation to pursue a plea deal, that included the opportunity for release and significant reduced prison time was reasonable." *Ibid.* On post-conviction review, the trial court concluded,

and the Mississippi Supreme Court agreed, that Galloway failed to demonstrate an actual conflict of interest. *Id.* at 973, 976.

The trial court also addressed Galloway's *Brady* claim. In an affidavit, dated September 8, 2017, more than 16 years after the incident, Simmons stated she initially told police officers that the man who attacked her was "Paul Martin", "because that was the name the man told" her. Doc. [8-14] at 37. According to Simmons, an officer showed her several photographs. She picked out one of the photos in the lineup. *Ibid.* "The officer told [her] that was Paul Martin". *Ibid.* Simmons' handwritten statement to police at the time of the incident had the name Paul Martin in quotation marks. *Galloway*, 298 So.3d at 974. A few days after the incident, when she saw Galloway in person, Simmons stated that she knew he was the person who had attacked her and not Paul Martin. Doc. [8-14] at 37. She later went to the Moss Point Police Department and changed the name of the assailant from Paul Martin to Leslie Galloway. *Ibid.*

The police records from the 2001 carjacking incident did not contain any reference to a photo line-up. When questioned at a hearing in 2018 whether such a line-up occurred, Detective William Trussell indicated he had no independent recollection of the carjacking investigation from 17 years ago. Doc. [8-15] at 249. However, he testified that any photo identification lineup would have been noted in his report. Doc. [8-15] at 229. He further indicated that he could not say with certainty whether a lineup occurred or did not occur; but if a photo lineup had been performed, it would have been included in the police report narrative. *Id.* at 238, 245-46. As the trial court noted in its findings when ruling on Galloway's post-conviction motion, "[t]he only evidence before the Court as to the existence of a photo line-up is the victim's assertion that she picked Paul Martin out of a photo line-up at the police station." Doc. [8-13] at 169. Furthermore, as noted by the trial court, Paul Martin and his sister both submitted affidavits

indicating that it was his sister who showed the photo line-up to Simmons. *Ibid.*; Doc. [8-14] at 33-35, 39-40.[4] The trial court was "loathe to find a *Brady* violation on such scant evidence." Doc. [8-13] at 169. Even assuming that the photo line-up did occur and that the State failed to disclose it, the trial court concluded that Galloway was precluded from asserting a *Brady* claim because he had entered a guilty plea. *Id.* at 169-70.

The trial court denied Galloway's motion for post-conviction relief. Doc. [8-13] at 141-70. The Mississippi Court of Appeals affirmed the trial court's decision. *See* Doc. [7-2]. Galloway then filed the instant petition on August 20, 2020. Respondent's motion to dismiss is now ripe for consideration.

LAW AND ANALYSIS

Motion to Strike Response

As an initial matter, Respondent argues that Galloway's response in opposition to the motion to dismiss is untimely and therefore should be stricken. Doc. [10] at 1. The undersigned agrees that the response was filed late. Respondent filed the motion to dismiss on December 7, 2020. Doc. [7]. Galloway, while represented by counsel, did not file his reply until January 7, 2021—31 days after the motion to dismiss was filed. Rule 5(e) of the Federal Rules Governing Section 2254 Cases permits a petitioner to file a reply to respondent's answer or other pleading; however, "[t]he judge must set the time to file unless the time is already set by local rule." Here, Local Rule 7(b)(4) governs motion practice and provides 14 days to file responses to motions.

In a surreply, Galloway points out that Respondent's motion to dismiss does not strictly conform with the Local Rules. *See* Doc. [11]. Specifically, he argues Respondent did not file a

[4] The trial court erroneously indicated that it was one of Paul Martin's other sisters, Kim Martin, who showed the line-up to Simmons; however, the affidavits both identify Stephanie Cowan as the sister who allegedly showed the photos to Simmons.

separate memorandum, as required by Local Rule 7(b)(4). Moreover, Respondent's motion and rebuttal total 56 pages and therefore exceed the 35-page limit established in Local Rule 7(b)(5). Nevertheless, by operation of Local Rule 7(b)(4), Galloway's reply was due 14 days after Respondent filed his motion to dismiss. Thus, his reply was late by more than two weeks. He does not offer any explanation for this late filing. Nor does he identify any provision in the federal or local rules establishing a 31-day deadline for responding to motions to dismiss within the § 2254 context.

In addition to filing an untimely reply, Galloway filed an unauthorized surreply. *See* Doc. [11]. The Local Rules do not contemplate the filing of surreplies. *See United States ex rel. Rigsby v. State Farm Fire & Cas. Co.*, No. 1:06CV433-HSO-RHW, 2014 WL 12713070, at *1 (S.D.Miss. Oct. 24, 2014). "[S]urreplies are heavily disfavored by courts." *Warrior Energy Servs. Corp. v. ATP Titan M/V*, 551 F.App'x 749, 751 n.2 (5th Cir. 2014) (quotation omitted). They are permitted only in exceptional or extraordinary circumstances. *See Lacher v. West*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001). Respondent raised for the first time in his rebuttal that Galloway's reply to the motion to dismiss was untimely. Thus, it would be an abuse of this Court's discretion to consider Respondent's arguments unless the Court "gives 'the non-movant an adequate opportunity to respond prior to a ruling.'" *Thompson v. Dall. City Attorney's Office*, 913 F.3d 464, 471 (5th Cir. 2019) (quoting *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 292 (5th Cir. 2004)). Galloway filed his surreply without first seeking leave of Court. Nevertheless, the undersigned will consider the arguments raised in his surreply. Setting aside these procedural deficiencies, the undersigned recommends that Respondent's motion to dismiss be granted, even when giving due consideration to Galloway's untimely reply and unauthorized surreply.

"In Custody" Requirement

In the motion to dismiss, Respondent first argues that Galloway does not meet the "in custody" requirement of § 2254. Galloway's carjacking sentence expired on February 14, 2012. He did not file the instant petition until August 20, 2020. Accordingly, Respondent contends Galloway is no longer in custody for the conviction being challenged in the instant petition. Galloway does not dispute that the carjacking sentence expired on February 14, 2012; but he counters that the carjacking conviction was not used against him until the 2010 capital trial. Doc. [1] at 2. He argues that "the ultimate consequence of Galloway's unconstitutional conviction being allowed to stand would be his unconstitutional execution." Doc. [9] at 6. In effect, Galloway is arguing that he had no reason to challenge the constitutionality of the prior carjacking conviction *until* the state used it against him at his capital murder trial in 2010. Although not addressed by the parties, the undersigned notes that Galloway's carjacking conviction had not yet expired at the time of his 2010 conviction and sentence for murder. Thus, he could have initiated habeas proceedings on the carjacking conviction prior to the expiration of his sentence and avoided the jurisdictional issue now confronting the Court. Instead, Galloway waited until May 1, 2015, to challenge the carjacking conviction in a motion for post-conviction relief.

The habeas corpus statute gives this Court jurisdiction to hear habeas corpus claims from persons who are "in custody pursuant to the judgment of a State court". 28 U.S.C. § 2254(a). A petitioner cannot bring a federal petition directed solely at an expired conviction. *See Lackawanna County District Attorney v. Coss*, 532 U.S. 394, 401 (2001); *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989). Whether a petitioner is "in custody" is determined as of the date on which the habeas petition is filed. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998). A federal court

lacks subject matter jurisdiction to entertain a section 2254 action if, at the time the habeas petition is filed, the prisoner is not "in custody" for the conviction and sentence he seeks to attack. 28 U.S.C. § 2254(b)(1); *Maleng*, 490 U.S. at 490-92; *see also Coss*, 532 U.S. at 401. However, a habeas petitioner can assert a challenge on a current sentence enhanced by an allegedly invalid prior conviction, despite the full expiration of petitioner's prior sentence. *Coss*, 532 U.S. at 401-02 (2001); *Maleng*, 490 U.S. at 493-94. In both *Maleng* and *Coss*, the Supreme Court concluded that the petitions in question could be construed as asserting an attack on the subsequent enhanced sentence (not solely the expired conviction that provided the enhancement); therefore, the Court found that the petitioners in those cases could be deemed to be "in custody." *See Coss*, 532 U.S. at 401. When a prior conviction that has been used to enhance a sentence is "no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid." *Id.* at 403.

Galloway explicitly asserts that the instant petition is "directed solely at the 2007 carjacking conviction". Doc. [1] at 2. He recognizes potential procedural pitfalls, related to exhaustion of claims and limits on successive petitions, if the Court were to deem this as a challenge to his current capital sentence. Doc. [9] at 9 n.2. Galloway frankly admits that he "is no longer in custody on the carjacking sentence". Doc. [1] at 2. Thus, to the extent Galloway attempts to challenge the carjacking conviction in its own right, he fails to meet the in-custody requirement; and the Court lacks jurisdiction. *See Lee v. Cain*, No. 12-1185, 2013 WL 2458831, at *1 (E.D.La. May 30, 2013) (finding petitioner not "in custody" based on petitioner's assertion that he challenges only a prior expired sentence and not the current sentence as enhanced by the prior conviction).

A limited exception to the in-custody rule is where an indigent defendant was denied his Sixth Amendment right to counsel as set forth in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Coss*, 532 U.S. at 404. Although Galloway argues that defense counsel operated under a conflict of interest, this does not implicate the *Gideon* exception. *See Tatarinov v. Superior Court of the State of Calif.*, No. 07-7985604, 2008 WL 7985604, at *8 (S.D.Calif. July 10, 2008) (finding that attorney conflict of interest does not constitute basis for *Gideon* exception). Galloway was represented by counsel at the guilty plea hearing and at all critical stages of the proceedings for the carjacking charge. Thus, this exception does not apply. Nor do the other exceptions identified in *Coss* appear to have any application, *i.e.*, a state court's improper refusal to hear a claim and actual innocence of the crime charged. *Coss*, 532 U.S. at 404.

On the other hand, if Galloway's petition is construed as a challenge to his death sentence as enhanced by the carjacking conviction, rather than as a challenge to the carjacking conviction in its own right; then Galloway could be considered "in custody" for purposes of the AEDPA. *See Coss*, 532 U.S. at 401-02 (2001); *Maleng*, 490 U.S. at 493-94. Contrary to Galloway's assertion, the instant petition does appear to challenge the death sentence, at least indirectly. In his petition, he points out that the carjacking conviction was used as an aggravating circumstance at his capital sentencing; and he asserts that "he remains subject to the consequences of [the murder] conviction because the State of Mississippi is using it at [sic] as an aggravating circumstance to support his execution." *See* Doc. [1] at 2. In the alternative, the undersigned recommends that Galloway's petition be deemed as a challenge to his death sentence. *See. Thomas v. Tanner*, No. 10-3013, 2011 WL 5042088, at *2 (E.D. La. Aug. 30, 2011) (construing petition, "out of an abundance of caution," as a challenge to the use of prior convictions for purposes of enhancing a sentence currently being served by petitioner). However, the

undersigned recommends that the motion to dismiss be granted, but without prejudice so that Galloway may assert claims related to the carjacking conviction in a properly filed § 2254 petition challenging the unexpired death sentence. *See Guerrero v. Thaler*, No. A-11-CA-1073-SS, 2012 WL 1885023 (W.D.Tex. May 23, 2012).

Timeliness—Factual Predicate

In addition to not meeting the in-custody requirement on the expired carjacking sentence, Galloway's petition is clearly barred by the AEDPA's one-year limitation period; at least insofar as he challenges the carjacking conviction in its own right. The AEDPA provides, in relevant part, that:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of–
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or the laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1).

Respondent argues that for purposes of the AEDPA limitations period Galloway's carjacking conviction became final on March 16, 2008. Doc. [7] at 8-9. The trial court entered a judgment of conviction and sentence on February 15, 2008. Under Mississippi law (Miss. Code Ann. § 99-35-101) there is no direct appeal from a guilty plea; therefore, the judgment became final on March 16, 2008, thirty days after the trial court entered sentence. *See Roberts v. Cockrell*, 319 F.3d 690, 694 (5th Cir. 2003). Absent statutory or equitable tolling, Galloway had one year from that date, or until March 16, 2009, to file a timely federal habeas petition. He did not file a state post-conviction motion challenging the carjacking conviction until May 1, 2015, long after the one-year deadline for filing a timely § 2254 petition. Consequently, the May 1, 2015, motion for post-conviction relief had no effect on tolling the AEDPA's one-year limitation period. *See Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). He did not file the instant § 2254 petition until August 20, 2020, more than eleven years too late.

Galloway asserts that he was not aware of the factual predicates of his conflict-of-interest and *Brady* claims until habeas counsel discovered them in 2015 and 2017 respectively; therefore, he argues that his petition should be deemed timely under 28 U.S.C. § 2244(d)(1)(D). Pursuant to § 2244(d)(1)(D), a habeas petitioner's AEDPA limitations period begins to run from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." "[T]his means the date a petitioner is on notice of the facts which would support a claim, not the date on which the petitioner has in his possession evidence to support his claim." *In re Davila*, 888 F.3d 179, 189 (5th Cir. 2018) (quoting *In re Young*, 789 F.3d 518, 528 (5th Cir. 2015)). Section 2244(d)(1)(D) does not "convey a statutory right to an extended delay ... while a habeas petitioner gathers every possible scrap of evidence that might ... support his claim." *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). The

burden to prove due diligence rests with the petitioner. *DiCenzi v. Rose*, 452 F.3d 465, 471 (6th Cir. 2006).

Galloway argues that his defense attorney in the criminal proceeding, Wendy Martin, had a conflict of interest, because she served as the assistant district attorney on the same criminal charges to which he later entered a guilty plea. He asserts that he did not discover this conflict of interest until March 4, 2014, when habeas counsel obtained the court file for the carjacking conviction. Doc. [1] at 50. Moreover, it was not until April 10, 2015, that counsel discovered that Martin had not advised Galloway of this conflict at the time she represented him. *Id.* at 51.

Although Galloway may not have discovered the conflict until 2014-15, he was on notice of the facts regarding Martin's conflict of interest from the moment she made an entry of appearance on his behalf. *See In re Osborne*, 934 F.3d 428, 434 (5th Cir. 2019) ("the AEDPA clock starts running from the 'date a petitioner is on notice of the facts which would support a claim, not the date on which the petitioner had in his possession evidence to support his claim.'"); *Starns v. Andrews*, 524 F.3d 612 (5th Cir. 2008). The state court record is replete with references to "W. Martin" or "Wendy Martin" as the prosecuting attorney dating back to 2002 and 2003. Doc. [8-1] at 66-67, 78-80, 129-35, 140-41, 146. Through due diligence, Galloway could have discovered this claim at the very outset of the AEDPA's limitation period. Galloway concedes in his petition that "even a cursory review" of the state court record would have revealed Martin's name listed as prosecutor "more than a dozen times." Doc. [1] at 18. There is no reasonable excuse for Galloway's six-year delay before investigating and developing a habeas claim based on a conflict of interest that was facially apparent in the state court record. Even if the Court were to use the 2010 murder conviction as the relevant start date, Galloway still failed to timely investigate or develop facts. Instead, he waited until 2014 to begin to develop these

facts—approximately 3½ years *after* the state had used the prior carjacking conviction at the 2010 capital sentencing. Moreover, it was not reasonable to wait until May 1, 2015, over a year after discovering the conflict of interest on March 4, 2014, before filing his motion for post-conviction relief in State court.

With respect to the alleged *Brady* violation, Galloway does not adequately explain why he failed to assert the claim earlier. He contends he only learned of a photographic lineup when habeas counsel interviewed the victim, Monica Simmons, on May 12, 2017. Doc. [1] at 53. As noted by the trial court, other than the victim's 2017 affidavit, approximately 16 years after the incident, the record contained no evidence of a police-initiated photographic lineup. Doc. [8-13] at 169. Paul Martin and his sister both submitted affidavits suggesting that his sister showed a photo line-up to Simmons shortly after the incident. The trial court expressed skepticism as to whether the State possessed any undisclosed *Brady* material with respect to the photo line-up, and stated it was "loathe to find a *Brady* violation on such scant evidence." *Ibid.*

Regardless, Galloway does not identify what efforts, if any, he undertook between 2008 and 2017 (when he interviewed Simmons) to discover whether there was any reason to question the validity of his guilty plea based on Simmons initial identification of Paul Martin as the assailant; or what efforts, if any, he undertook subsequent to 2010, when the carjacking conviction was actually used against him as an aggravating circumstance at the capital sentencing. Galloway was spurred to investigate only by virtue of the death sentence handed down in 2010. Even then, Galloway apparently waited until much later to search for possible errors in his 2007-08 guilty plea and sentence. He did not interview the victim until 2017, even though the victim's name appeared in 2001 police reports and was listed in pretrial documents dating back to 2003. Doc. [8-1] at 129-32; Doc. [8-14] at 21-23; Doc. [8-15] at 9-14, 18. The

police reports contained multiple instances where the victim initially identified "Paul Martin", rather than Galloway, as the individual who committed the crime against her. Doc. [8-15] at 10-12, 14, 22-23. Although there were no references in the police records to a photographic lineup, Galloway knew or should have known from the time of his 2007 guilty plea that the victim initially identified someone other than Galloway as the perpetrator of the crime; yet he failed to investigate this possible claim until nearly a decade later. *See Johnson v. Dretke*, 442 F.3d 901, 910-11 (5th Cir. 2006) ("petitioner urging a *Brady* claim may not rely solely upon the ultimate merits of the *Brady* claim in order to demonstrate due diligence").

Even assuming *arguendo* that Galloway's *Brady* claim could be construed as timely, the claim is foreclosed by his guilty plea. *See United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009) (holding that a claim that a guilty plea was involuntary because the government withheld allegedly exculpatory evidence in violation of *Brady* was "foreclosed by our precedent holding that a guilty plea precludes the defendant from asserting a *Brady* violation"); accord *Orman v. Cain*, 228 F.3d 616, 620-21 (5th Cir. 2000); *Matthew v. Johnson*, 201 F.3d 353, 360–62, 364 (5th Cir. 2000); *Walton v. State of Mississippi*, 165 So.3d 516, 524-25 (Miss.Ct.App. 2015); *see also Brady v. United States*, 397 U.S. 742, 757 (1970) ("[w]e find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought ..."). Based on the foregoing, the undersigned finds that Galloway's petition, insofar as he challenges the carjacking conviction in its own right, is time-barred by the AEDPA's one-year limitation period.

Equitable Tolling

Galloway also asserts that he is entitled to equitable tolling of the limitations period. The Supreme Court has recognized that, in appropriate cases, the limitations period may be equitably tolled. *See Holland v. Florida*, 560 U.S. 631 (2010). A petitioner is entitled to equitable tolling only if he shows (1) he has been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented timely filing. *Id.* at 649. "'Courts must consider the individual facts and circumstances of each case in determining whether equitable tolling is appropriate.'" *Mathis v. Thaler*, 616 F.3d 461, 474 (5th Cir. 2010) (quoted case omitted). Galloway argues that defense counsel's misconduct of laboring under a conflict of interest is an extraordinary circumstance that warrants equitable tolling. Attorney misconduct may support equitable tolling in certain circumstances; for example, when the misconduct involves repeated affirmative misrepresentations to, and failure to communicate with, a client or repeated promises to file a petition, followed by a failure to file anything. *Holland*, 560 U.S. at 652.

As explained earlier, Galloway failed to pursue his rights diligently. The record contains multiple references to Wendy Martin serving first as prosecutor and later as defense counsel on the same charges. Through due diligence, Galloway easily could have discovered this conflict merely by reviewing the state court record. Instead, he waited until 2014, some six years later, before looking for and discovering the conflict of interest. There is no indication as to what, if anything, Galloway did in those intervening six years to pursue his rights. "[E]quity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). Moreover, there is no causal connection between the alleged conflict of interest and the tardiness of the habeas filing. Galloway does not explain how Martin's conflict of interest somehow stood in his way and prevented him from filing a timely petition. *See Chester v.*

Comm'r of Pennsylvania Dep't of Corr., 598 F.App'x 94, 102-03 (3d Cir. 2015); *Saenz-Jurado v. People of Colorado*, 329 F.App'x 197, 200 (10th Cir. 2009); *Barrios v. Borders*, No. CV 18-7195-DOC(JPR), 2019 WL 5107097, at *6 (C.D.Calif. June 7, 2019); *Parra Hernandez v. Ryan*, 2019 WL 1425604, at *4 (D.Az. Mar. 29, 2019); *Scott v. Director, TDCJ-CID*, No. 4:17cv779, 2019 WL 2273756, at *2 (E.D.Tex. Mar. 4, 2019); *Martino v. Berbary*, No. 03-CV-0923S, 2005 WL 724133, at *7 (W.D.N.Y. Mar. 30, 2005). Galloway has not carried his burden of establishing that equitable tolling is warranted in this case. *See Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002) (the party seeking equitable tolling has the burden of showing entitlement to such tolling).

RECOMMENDATION

Based on the foregoing, the undersigned recommends that Respondent's [8] Motion to Dismiss be GRANTED and that Leslie Galloway, III's 28 U.S.C. § 2254 petition for writ of habeas corpus be dismissed.

NOTICE OF RIGHT TO APPEAL/OBJECT

Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to this report must serve and file written objections within fourteen (14) days after being served with a copy unless the time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions and recommendations to which objections are being made; the District Court need not consider frivolous, conclusive or general objections. Such party shall file the objections with the Clerk of the Court and serve the objections on the District Judge and on all other parties. A party's failure to file such objections to the proposed findings, conclusions and recommendation contained in this report shall bar that party from a de novo determination by the District Court. Additionally, a party's failure to file written objections to the proposed

findings, conclusions, and recommendation contained in this report within fourteen (14) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the proposed factual findings and legal conclusions that have been accepted by the district court and for which there is no written objection. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).

SO ORDERED AND ADJUDGED, this the 26th day of July 2021.

/s/ *Robert P. Myers, Jr.*
ROBERT P. MYERS, JR.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LESLIE GALLOWAY, III	PETITIONER
V.	CIVIL ACTION NO. 1:20CV271-HSO-RPM
BURL CAIN	RESPONDENT

PETITIONER'S NOTICE OF VOLUNTARY DISMISSAL

UNDER FEDERAL RULE OF CIVIL PROCEDURE 41

Now comes Petitioner, Leslie Galloway, III, and files this notice of voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(i). Voluntary dismissal under this rule is appropriate because the requirements of Rule 41(a)(1)(A)(i) are satisfied, given the Respondent has not yet served "an answer or a motion for summary judgement." FED. R. CIV. P. 41(a)(1)(A)(i).

The Magistrate Judge agrees with Respondent's argument that Petitioner fails to satisfy the requirement, under 28 U.S.C. § 2254 (a), that he be in custody on the 2007 judgment of conviction for carjacking under attack with this petition. Doc. [12] at 9. On studying of the Magistrate Judge's report and recommendation, Petitioner does not dispute this finding and accordingly

voluntarily dismisses his petition to avoid the need for the Court expending further resources on this case.

Respectfully Submitted,

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August 9, 2021

EXCERPT

IN THE SUPREME COURT OF MISSISSIPPI

Mississippi Supreme Court Case No. 2013-DR-01796-SCT
Harrison Circuit Court No. B2401-09-468

LESLIE GALLOWAY III, Petitioner

v.

STATE OF MISSISSIPPI, Respondent

Motion For Leave To Proceed In The Trial Court
With Amended Petition For Post-Conviction Relief

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stage, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in Mr. Galloway's favor. *See Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003). Unless it appears beyond a doubt that Mr. Galloway cannot prove any set of facts entitling him to relief, this Court must grant an evidentiary hearing at which Mr. Galloway may introduce the plethora of evidence supporting his claims. *Sanders v. State*, 846 So. 2d 230, 234 (Miss. Ct. App. 2002) ("'[A] post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond a doubt that the petitioner can prove no set of facts in support of his claim[.]'") (quoting *Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996)); *see also Billiot v. State*, 515 So. 2d 1234, 1237 (Miss. 1987) (explaining that where a petition for post-conviction relief meets the pleading requirements articulated in Miss. Code Ann. § 99-39-9 and presents a live claim evidencing a denial of a state or federal right, the petitioner is entitled to an evidentiary hearing). The abundant, reliable, and relevant evidence submitted in support of Mr. Galloway's Petition demonstrates that he is entitled to post-conviction relief, or in the alternative, an evidentiary hearing in the trial court.

FACTUAL BACKGROUND

1. The life story that the jury never heard: Mr. Galloway's struggles to survive abject poverty, domestic violence, parental neglect and abandonment, and family dysfunction.

Leslie Galloway, known by all as "Bo," entered this world in pain. His mother, Ollie Taylor,[3] suffered complications during his birth and Bo had to be

[3] Later known as Ollie Varghese.

delivered by emergency C-section. Upon delivery, Bo struggled to breath and was diagnosed with neonatal asphyxia. Ex. 21 (Galloway – SRHS Records, at Bates 29). Ollie suffered her own complications as her blood pressure soared to a level that risked a stroke. Ex. 22 (Aff. of O. Varghese, ¶ 9). These bouts of terror would be far from the last either would face.

Ollie brought baby Bo home to a house sorely lacking in food, clothing, and stability. *See* Ex. 23 (Aff. of M. Stanton, ¶¶ 8, 10); Ex. 22 (Aff. of O. Varghese, ¶ 23); Ex. 24 (Aff. of L. Taylor, ¶ 16). Bo's father, Leslie Galloway Jr., or "Red," loomed large during Bo's childhood as a frightening and destructive figure, who drank heavily and "beat the holy hell" out of Ollie, whose screams would reverberate throughout the cramped house. Ex. 24 (Aff. of L. Taylor, ¶ 9); Ex. 22 (Aff. of O. Varghese, ¶ 16); Ex. 23 (Aff. of M. Stanton, ¶ 12). The children would wait in terror for Red to turn his violence towards them. He whipped Bo and his sister, Mary, with a belt and with an anger so raw that sometimes Mary would wet her pants. Ex. 22 (Aff. of O. Varghese, ¶ 18). Bo's brother Melvin, five years older, endured not only the lash of Red's belt, but also Red's assaults with whatever household objects he found handy, including extension cords that left lasting scars across Melvin's body. Ex. 22 (Aff. of O. Varghese, ¶ 18); Ex. 25 (O. Galloway – Youth Court Records, at Bates-8443); Ex. 24 (Aff. of L. Taylor, ¶ 20); Ex. 63 (Aff. of T. Norman, ¶ 12). Only Bo's eldest sister, San, escaped Red's beatings, but she paid a terrible price in return: from around five to elven years old, at every opportunity, Red repeatedly

sexually molested her. Ex. 24 (Aff. of L. Taylor, ¶¶ 17, 20); Ex. 26 (Aff. of K. Taylor, ¶ 6).

When Bo was around seven, Red beat Ollie bloody, as the children watched in horror, fearful that he would kill her. *See* Ex. 24 (Aff. of L. Taylor, ¶ 12). Finally, one of the children called the police, and Red was taken to jail. *Id.* Soon after would mark the end of the marriage and the beginning of Red's abandonment of his children: he became a mere fleeting presence for the rest of Bo's life. Even on the rare occasions when Red would see them, he would be too drunk or high to provide the parental love and support that Bo and his siblings both craved and deserved. Ex. 22 (Aff. of O. Varghese, ¶ 25). *See also* Ex. 27 (M. Anderson SHR Mental Health, at Bates 8995) (Melvin "has minimal contact with his father."). Bo would spend the rest of his childhood in search of substitute father figures, yearning for the kind of family he saw when he looked at his friends. Ex. 28 (Aff. of P. McCorvey, ¶ 9); Ex. 29 (Aff. of S. Loper, ¶ 9).

Bo felt his sense of abandonment all the more deeply because his mother inflicted her own abuse, alternating between neglect, angry outbursts and moods that swung wildly back and forth from day to day. Ex. 24 (Aff. of L. Taylor, ¶¶ 15, 22, 47); Ex. 30 (Aff. of M. Anderson, Jr., ¶ 9). Ollie would often disappear for days on end, leaving Bo's eldest sister San to care for the other children overnight starting when she was in sixth grade. Ex. 24 (Aff. of L. Taylor, ¶¶ 21-22). The children would have no idea when she would return. Ex. 24 (Aff. of L. Taylor, ¶¶ 21-22); Ex. 31 (Aff. of R. Nathan, ¶ 9). Counselors and court personnel repeatedly

noted her neglect, but their notations never once triggered any action to save the children, to end the abuse and neglect, or to support this family in crisis.[4]

Even when Ollie was at home she would often withdraw to her room, sleeping for hours. Ex. 23 (Aff. of M. Stanton, ¶ 9); Ex. 24 (Aff. of L. Taylor, ¶ 47). These periods of neglect would periodically be punctuated by outbursts marked by screaming and threats of physical punishment. Ex. 22 (Aff. of O. Varghese, ¶ 19). These eruptions deeply wounded Bo, who was plagued by panic attacks by the time he was five or six years old, collapsing into a hyperventilating heap. *Id.*

In this household where violence was normalized and mental illness intergenerational, Bo's older siblings began to emulate their parents. Bo's sisters "used to beat him, to make him do things that were their responsibility around the house." Ex. 28 (Aff. of P. McCorvey, ¶ 8). Even more scarring, Bo's older brother Melvin terrorized the entire family when Bo was between the pivotal ages of 3 and 15.[5] Melvin would often physically assault his mother and his siblings,

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[4] *See, e.g.*, Ex. 32 (M. Anderson – Sand Hill Mem., at Bates-9842) (a psychologist noting that Ollie "is evidently working and possibly does not have the means to provide proper supervision . . . ."); Ex. 25 (O. Galloway – Youth Court Records, at Bates-8431) ("Ms. Galloway does not appear to be able to handle Melvin and often Melvin appears to be neglected as does his younger brother [Bo]"); Ex. 33 (M. Anderson – Youth Court Records, Bates-111121) (Melvin "appears to be neglected"); *id.* at 111166 ("The mother is minimally cooperative as she works from 12pm until 9pm and is unable to provide appropriate supervision in the afternoon and evening hours."); Ex. 34 (M. Taylor – Youth Court Records, at Bates-110812) (Ollie "apparently was not home overnight"); *id.* at 110814 ("It is not certain why [Mary's] mother was not home on Saturday night.").

[5] "Exposure to child physical abuse and parents' domestic violence can subject youth to pervasive traumatic stress and lead to Post-traumatic Stress Disorder (PTSD)." Gayla Margolin & Katrina Vickerman, *Post-traumatic Stress in Children and Adolescents Exposed to Family Violence*, Prof. Psychol. Res. Pr. 38(6), 613– 19 (2007); L.K. Gilbert et al., *Childhood Adversity and Adult Chronic Disease: An Update from Ten States and the District of Columbia, 2010*, 48(3) Am. J. of Preventive Med. 345, 345-349 (2015) (stating that individuals with adverse childhood experiences, such as witnessing domestic violence

demonstrating startling strength as when he repeatedly threw his mother across the room.[6] Melvin's reign of terror also included forcing Bo and their sister Mary to fight one another, beating them if they refused. Ex. 22 (Aff. of O. Varghese, ¶ 35); Ex. 23 (Aff. of M. Stanton, ¶ 17). Creating an impossible situation for the two, Melvin would also beat up whoever lost the fight. Ex. 24 (Aff. of L. Taylor, ¶ 31). Bo's anxiety about these fights consumed him. Ex. 23 (Aff. of M. Stanton, ¶ 17). Other of Melvin's disturbing actions ranged from torturing cats while forcing his horrified siblings to watch,[7] to setting fire to his sister's mattress and all her clothes. *See* Ex. 24 (Aff. of L. Taylor, ¶ 31); Ex. 27 (M. Anderson SRH Mental Health Records, at 8996).

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or experiencing physical abuse, face an increased risk of developing serious health problems). *See also Effects of Domestic Violence on Children*, Off. on Women's Health, U.S. Dep't of Health & Hum. Servs., https://www.womenshealth.gov/relationships-and-safety/domestic-violence/effects-domestic-violence-children (last visited Sep. 9, 2021) (stating that even if children do not witness domestic violence directly, they can "sense tension and fear" and "they can be negatively affected by the violence they know is happening").

[6] Ex. 25 (O. Galloway – Youth Court Records, at Bates-8442-43)(Melvin "has been physically aggressive towards his nine year old brother, his mother and other children"); Ex. 33 (M. Anderson – Youth Court Records, at Bates-111121, 111198) (Melvin assaulted Ollie, San, and police officer); Ex. 27 (M. Anderson SRMH, at Bates-8994) (Ollie reports several occasions during which Melvin has thrown her across the room); Ex. 32 (M. Anderson – Sand Hill, at Bates-9839, 9874) ("patient hits mom and siblings, has picked up mom and thrown her on the bed"); *id.* at 9879 (Melvin "has very violent outbursts and is capable of surprising strength during these times"); Ex. 25 (O. Galloway – Youth Court, at Bates-8443) (Melvin has thrown Ollie across the room, even though she weighs 230 pounds); Ex. 27 (M. Anderson SRHMH, at Bates-8999) (Melvin "has even broken a little boy's arm in a fight"); Ex. 35 (M. Anderson – EMSH, at Bates-111258) (Melvin "claimed to have busted the head of another boy using a brick.").

[7] Ex. 36 (Affidavit of T. Norman, ¶ 20); Ex. 31 (Affidavit of R. Nathan, ¶ 11); Ex. 37 (Affidavit of Porsche Bell, ¶ 8); Ex. 27 (M. Anderson SRH Mental Health Records, at Bates-8996); *id.* at 8999 ("the patient's siblings told the patient's mother that this boy threw a cat against a wall to see if he could make it bust"); Ex. 32 (M. Anderson – Sand Hill Records, at Bates 9874); Ex. 35 (M. Anderson – EMSH Records, at Bates-111258).

As Melvin aged, his violent attacks became increasingly dangerous, severe, and potentially lethal. He once chased his mother around the house with a garden tool until a neighbor heard her screams and intervened. Ex. 22 (Aff. of O. Varghese, ¶ 36). Ollie believed that if the neighbor had not intervened, Melvin would have killed her. *Id.* Melvin also once tried to push his sister, Mary, over the edge of a water tower, Ex. 22 (Aff. of O. Varghese, ¶ 36); Ex. 23 (Aff. of M. Stanton, ¶ 16), and pointed a gun at her while she slept. Ex. 23 (Aff. of M. Stanton, ¶ 16). Seizing the little control she had, Ollie would lock Bo and his sisters in the bedroom that they shared to shield them from Melvin's outbursts and violence. Ex. 23 (Aff. of M. Stanton, ¶ 19).

The only brief periods of respite from the family's chaos of living with Melvin came when he was periodically placed in juvenile detention centers and mental institutions, the latter following his diagnosis of schizophrenia and depression as a teenager.[8] Even still, these absences were a double-edged sword for Bo, who was devastated each time his big brother was taken away, crying every time the family would visit his brother at an institution. Ex. 22 (Aff. of O. Varghese, ¶ 40); Ex. 38 (Aff. of I. McMillian, ¶ 12). The final devastation for Bo came when Melvin was sentenced to life imprisonment for murder. Bo was 15, and as it sank in that his

[8] *See, e.g.*, Ex. 33 (M. Anderson – Youth Court Records, at Bates-111137) (noting a one year detention at Columbia Training School); 111167 (noting a hospitalization at Sand Hill Hospital in Gulfport); 111180 (noting a Singing River Hospital inpatient psychiatric admission; 111183 (will be transported for admission to East Mississippi State Hospital); 111223 (same); 111191 (Oakley Training School); 111213 (same); 111196 (Northshore Psychiatric Hospital); 111218 (same); 111207 (transporting from Singing River Hospital back to youth court detention facility); 111221 (Northshore to Singing River); Ex. 27 (M. Anderson – SRH Mental Health, at Bates-8994, 8998).

brother would never return home, Bo was overwhelmed with sadness.[9] Ex. 22 (Aff. of O. Varghese, ¶ 41); Ex. 63 (Aff. of T. Norman, ¶ 22); Ex. 31 (Aff. of R. Nathan, ¶ 12); Ex. 39 (Aff. of C. McCorvey, ¶ 10).

2. What the jury never heard about Mr. Galloway's serious mental illnesses

The violence and chaos Bo endured day to day took a steep toll on his mental health. He suffered from panic attacks beginning at five or six. Ex. 22 (Aff. of O. Varghese, ¶ 19). When he was eight, Ollie had to rush him to the hospital after an altercation with his siblings and a resulting panic attack that caused labored breathing and concerning chest pain. Ex. 21 (L. Galloway III – SRHS Records, at Bates-134). Then again at fourteen years old, Bo presented at the emergency department with his heart beating rapidly and his entire body shaking. *Id.* at 231-40.

[9] *See* Michael Adorjan, Tony Christensen, Benjamin Kelly & Dorothy Pawluch, *Stockholm Syndrome As Vernacular Resource*, 53 The Soc. Q. 454, 461-462 (2012) (discussing how Stockholm syndrome label has broadened to include circumstances beyond captor-victim, such as domestic violence and child abuse); Matthew H. Logan, *Stockholm Syndrome: Held Hostage by the One You Love*, 5 Violence and Gender 67, 68 (2018) ("Emotionally bonding with an abuser can actually be a strategy for survival for victims of abuse and intimidation...[because] the fear of outbursts from the abuser becomes a controlling factor in the victim's life."); Joan A. Reid et al., *Contemporary Review of Empirical and Clinical Studies of Trauma Bonding in Violent or Exploitative Relationships*, 8 Int'l J. of Psychol. Res. 38, 59 (2013) (experiences that involve interpersonal violence, such as family abuse, share factors that have the potential to result in a trauma bond; these factors include: 1) perceived threat to one's physical and psychological survival at the hands of the abuser, 2) perceived kindness from the abuser to the victim, 3) isolation, and 4) inability to escape).

Bo's family members and friends observed other strange behaviors that, upon expert review, were actually "dissociative symptoms" of PTSD. Ex. 2 (Aff. of Dr. Sautter, ¶¶ 25-26). Bo's close childhood friend, Calvin McCorvey, recalled Bo blacking out during a fight at the high school. Ex. 39 (Aff. of C. McCorvey, ¶ ¶ 16-17). Afterward, Bo couldn't remember what had happened, except that a fight had started. Ex. 39 (Aff. of C. McCorvey, ¶ 17); *see also* Exhibit 28 (Aff. of P. McCorvey, ¶¶ 13) ("Bo would get so mad that he would blank out and not remember what he did."). Another close friend, Marcus Jackson, recalled a similar incident where Bo blacked out when he was attacked by multiple men. Ex. 40 (Aff. of M. Jackson, ¶ 38). When the police arrived to break up the fight, Bo was confused and asked why they were putting him in the squad car. *Id.* When Marcus described the fight and what happened to Bo: "[H]e didn't recognize the event. He looked confused. His eyes got really big. Bo said it didn't happen." *Id.*

Bo also showed clear signs of "avoidance and emotional numbing" – also symptoms of PTSD – from "an early age and continuing through the time of the offense." Ex. 2 (Aff. of Dr. Sautter, ¶¶ 16-17). He would shut down whenever something bothered him. Ex. 41 (Aff. of P. Brandon, ¶ 9). He would isolate himself and wouldn't go out. Ex. 24 (Aff. of L. Taylor, ¶ 46); Ex. 26 (Aff. of M. Taylor, ¶¶ 31). He would stay inside the bathroom of his mother's bedroom all day and night and would even pass up food. Ex. 24 (Aff. of L. Taylor, ¶ 46). Sometimes he would drive aimlessly until the car ran out of gas. Ex. 22 (Aff. of O. Varghese, ¶ 49); Ex. 26 (Aff. of M. Taylor, ¶ 33).

Even starker, Bo's cousin, LaTerrance Nathan, once had to intervene when Bo locked himself in the bedroom and threatened to kill himself. Ex. 42 (Aff. of L. Nathan, ¶ 12). LaTerrance rushed over and pounded on the door and, upon entering, saw that Bo had placed two knives on his dresser. *Id.* So concerned was LaTerrance that he "took Bo with [him] that night to get him away from the house." *Id.*

To cope with the pain produced by his chaotic home life and mental health disturbances, Bo began to self-medicate. For example, he began smoking marijuana daily from the age of sixteen. Ex. 43 (L. Galloway III – MDOC Pen Pack at 5). After his arrest, Ollie discovered ten empty liquor bottles in the bathroom that Bo had used as his bedroom in the overcrowded house. Ex. 22 (Aff. of O. Varghese, ¶ 49). Significantly, his friends and family could tell that something was wrong with him in the days leading up to his arrest. Ex. 44 (Aff. of V. Bishop, ¶ 8); Ex. 31 (Aff. of R. Nathan, ¶ 26).

Every expert who has evaluated Mr. Galloway in post-conviction has found evidence of trauma and mental illness. Post-conviction counsel retained Frederic J. Sautter, Ph.D. to conduct a psychological evaluation of Mr. Galloway. This evaluation consisted of a review of the extensive social history records and witness affidavits easily obtained by post-conviction counsel; two in-person assessment sessions during which Dr. Sautter administered several psychological assessment instruments; and a review of testing results from a separate neuropsychological evaluation. Ex. 2 (Aff. of Dr. Sautter, ¶¶ 4-9, 27). Dr. Sautter determined that Mr.

Galloway met "current DSM-5 criteria for PTSD, in addition to meeting the DSM-IV-TR criteria,[10] at the time of his homicide trial," *id.* ¶ 22, and that "at the time of the offense Mr. Leslie Galloway's thinking and behavior were strongly influenced by his PTSD, complex post-traumatic stress, depression, and psychosis." *Id.* ¶ 32. Moreover, Dr. Sautter expressed the opinion that "the influence of complex trauma processes would decrease his ability to exercise conscious control over his own behavior and increase his perceptions of threat while rendering him less capable of controlling his trauma-related emotions and anger." *Id.* Dr. Sautter also found that Mr. Galloway suffers from a depressive disorder, and in the past met the criteria for the more severe Major Depressive Disorder. *Id.* ¶ 29; *see also* Ex. 5 (Aff. of Dr. Watson, ¶ 7)("Mr. Galloway is experiencing a severe degree of depression that appears to be sustained and long-standing."). He further found that Mr. Galloway "has experienced auditory hallucinations and that he meets DSM-IV-TR for Psychotic Disorder NOS."[11] *Id.* Neuropsychiatrist Dr. Agharkar similarly "found

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[10] "To meet DSM-IV-TR criteria for Post-traumatic Stress Disorder, an individual must (1) have been exposed to a traumatic event that meets DSM-IV-TR criteria for traumatic stress (Criterion A), (2) have intrusive memories of the trauma, or "re-experiencing" symptoms (Criterion B), (3) demonstrate avoidance of stimuli that remind the individual of the trauma and/or numbing of emotional responsiveness (Criterion C), (4) have symptoms of hyperarousal (Criterion D), (5) show a duration of trauma symptoms exceeding one month (Criterion E) and (6) show trauma symptoms that cause clinically significant levels of distress (Criterion F). . . The current diagnostic criteria for PTSD are found in the DSM-5, and they are slightly different than the criteria of DSM-IV-TR. The DSM-5 criteria for PTSD include one criterion not included in DSM-IV-TR, and that criteria includes "negative alterations in cognitions and mood associated with the traumatic event(s)." Ex. 2 (Affidavit of Dr. Sautter, ¶¶ 10, 22).

[11] Am. Psych. Ass'n, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000) ("This category includes psychotic symptomology (i.e., delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior) about which there is inadequate information to make a specific diagnosis or about which there is contradictory

substantial evidence of trauma." Ex. 7 (Aff. of Dr. Agharkar, ¶ 5). Dr. Agharkar found that Mr. Galloway reported "severe sleep disturbances" totaling only three hours of rest a night. *Id.* He further found that Mr. Galloway "exhibited slow processing speed whenever he had to call something from memory, indicating impaired verbal recall and fluency," stated that this could indicate serious mental health problems, including brain damage, and recommended a neuropsychological assessment. *Id.* at ¶¶ 5, 6.; *see also* Ex. 8 (Second Aff. of Dr. Agharkar, ¶¶ 5,8). This assessment was completed by Dr. Dale Watson who found "signs of a significant attentional disorder," possible "lateralized brain dysfunction," impairments in auditory processing, and short-term verbal recall in the "severely impaired range." Ex. 5 (Aff. of Dr. Watson, ¶ 7). Dr. Watson also concluded that Mr. Galloway's "pattern of performance on the battery was most similar to that of individuals with mild traumatic brain injury". *Id.* Post-conviction expert, Dr. Ruben Gur, analyzed the results of the neuropsychological testing by Dr. Watson and completed a behavioral imagining analysis. Ex. 6 (Aff. of Dr. Gur, ¶¶ 3, 5-6). Dr. Gur found that the results of the neuropsychologic tests suggested "left hemisphere dysfunction" and recommended an MRI and PET scan to "assess the structural and functional bases for brain abnormalities." *Id.* ¶¶6-7. Taking together the results of the behavioral imaging data and additional imaging, Dr. Gur found abnormalities which "implicate brain systems that are important for regulating behavior." *Id.* ¶

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information, or disorders with psychotic symptoms that do not meet the criteria for any specific Psychotic Disorder.").

12. He also found that "the abnormalities observed are consistent with several causes, including traumatic brain injury." *Id.*

Dr. Beverly Smallwood, the expert retained by trial counsel, initially interviewed Mr. Galloway in 2009. She noted that Mr. Galloway admitted to occasional suicidal thoughts in the past, trouble sleeping, some memory problems, trouble concentrating, and auditory hallucinations. Ex. 4 (Smallwood Evaluation at 4-5). When supplied with the affidavits and social history records collected by post-conviction counsel, Dr. Smallwood concluded that she "would have diagnosed Leslie with PTSD" had that information been provided to her pretrial. Ex. 3 (Aff. of Dr. Smallwood, ¶ 16). She similarly "would have testified that Leslie met the criteria for Major Depressive Disorder" and told the jury about his history of dissociation. *Id.* ¶¶ 17, 26. In her view these records "painted a very different picture of Leslie's social history and . . . family dynamics" than she was aware of at the time of her pretrial evaluation, when trial counsel gave her only a single page of school records and information from discovery related to the crime. *Id.* ¶¶ 7, 11.

3. Mr. Galloway's defense team did little investigation, and presented even less to the jury.

The jury deciding whether Mr. Galloway was guilty of capital murder and whether he would live or die heard none of this compelling social history and mental health evidence. That is not because the evidence was not available but because trial counsel failed to investigate.

Mr. Galloway was represented by the Glenn Rishel, the Harrison County Public Defender, along with two other attorneys in his office.

Mr. Rishel's office failed to seek assistance from the statewide capital defense office. *See* Ex. 10 (Aff. of A. de Gruy, ¶¶ 4, 9). They declined to assemble an ABA-compliant defense team by failing to request or hire a mitigation specialist. This was true even after the psychologist they did retain, Dr. Smallwood, instructed them of the need to do so. Ex. 3 (Aff. of Dr. Smallwood, ¶ 3).

Mr. Rishel and his associates failed to spend sufficient time with their client to obtain even a barebones social history. Trial counsel met with Mr. Galloway only two times in the seven months before the trial. Ex. 45 (ADC visitation log at 2-6). Never did trial counsel attempt to meet with their client one-on-one. *See* Ex. 19 (Aff. of R.C. Stewart, ¶ 13). It is no surprise, therefore, that they failed to establish any kind of rapport or trust with him. Instead, Mr. Galloway would mostly sit silently with his head down. Ex. 17 (Aff. of G. Rishel, p. 3); Ex. 20 (Aff. of D. Christensen, ¶ 10).

As for the handful of family members trial counsel met with, counsel asked only the most cursory questions about Mr. Galloway's background and life history. Ex. 22 (Aff. of O. Varghese, ¶ 72); Ex. 23 (Aff. of M. Stanton, ¶ 39); Ex. 44 (Aff. of V. Bishop, ¶ 19). Despite relying exclusively on Mr. Galloway and his mother to provide the names of potential mitigation witnesses, trial counsel failed even to meet with everyone the two named. *See* Ex. 17 (Aff. of G. Rishel, p. 3). For example, trial counsel never even attempted to speak with: Mr. Galloway's oldest sister, LaShandra Taylor, who raised him like her own child, Ex. 24 (Aff. of L. Taylor, ¶¶ 6, 59); Rufus Molden, one of Mr. Galloway's closest friends since childhood, Ex. 46 (Aff.

of R. Molden, ¶ 29); or Sabrya Thomas, one of Bo's closest friends, and a former girlfriend, who came to the trial every day. Ex. 22 (Aff. of O. Varghese, ¶ 69); Ex. 23 (Aff. of M. Stanton, ¶ 35).

Nor did trial counsel make any type of reasonable attempt to collect record evidence of Mr. Galloway's background. The team bafflingly ignored the abundance of publicly available records on Mr. Galloway and his family members, including his medical records, his Youth Court records, and his incarceration records. Indeed, despite the plethora of meaningful records available, the trial team collected only a single page of social history records on Mr. Galloway, a solitary transcript from Green County High School, from which he graduated. *See* Ex. 18 (Trial Counsel File Excerpts, at Bates-002). They failed to investigate the lead expert for the State's theory of capital murder, Dr. McGarry, and failed to prepare their own guilt and penalty phase experts Dr. Riddick and Dr. Smallwood.

Trial counsel's failures continued through the motions practice and voir dire. They failed to file a motion to exclude Dr. McGarry's testimony. Although they filed a request to conduct voir dire on mitigation, they failed to argue the motion or obtain a ruling on it, and bafflingly neglected to ask any questions about mitigation. In a capital murder case, with a sexual battery allegation and while representing a Black man, trial counsel nonetheless asked no questions about the jurors' potential racial biases or ability to consider a life sentence in a case with an alleged rape-murder. They further neglected to raise a *Batson* challenge even after the

prosecution struck Black jurors at more than ten times the rate it struck white jurors, resulting in an all-white jury.

With no meaningful penalty phase investigation, defense counsel had no developed themes or life history to share with the jury. Mr. Rishel previewed the defense as "eight or nine witnesses, but they're like five minutes each. They're going to talk about their relationship with the defendant, and you, basically say that they hope the jury won't kill him, you know, essentially." R. 795. The witness presentation was as limited as Mr. Rishel anticipated. The defense called a handful of witnesses, but asked few questions. Even combined with cross-examination, the penalty phase witness testimony spans only 21 pages of the transcript. R. 815-21; 826-40.

Mr. Rishel told the jury in his opening statement at the penalty phase that, they would hear from "Dr. Smallwood, who is a psychologist who will tell you some things about some tests and other things that she did with Leslie, intelligence tests and other things to give you some kind of idea into that part of it." R. 812. This promise went unkept. Defense counsel, without explanation, failed to call Dr. Smallwood, leaving the jury wholly in the dark about Mr. Galloway's traumatic childhood and mental health struggles. But for counsel's failures to provide her with Bo's social history and to call her, Dr. Smallwood would have diagnosed him with PTSD and told the jury about Bo's history of family dysfunction and abuse, trauma, and adverse childhood events, about his PTSD and dissociation, his Major

Depression Disorder, and his history of dissociation and the significance of his PTSD symptoms. Ex. 3 (Aff. of Dr. Smallwood, ¶¶ 16, 17, 21).

As Bo Galloway's life hung in the balance, these severe failures by counsel deprived him of his right to effective representation and a reliable capital trial, an injustice the Mississippi courts must now remedy by, at a minimum, granting Mr. Galloway's request for an evidentiary hearing at which the abundant evidence of trial counsel's failures and the other fundamental constitutional errors by Mr. Galloway's trial counsel may be fully presented.

GROUNDS FOR REVIEW

I. Leslie Galloway III was denied his constitutionally protected right to the effective assistance of counsel guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding state constitutional provisions.

   A. Mr. Galloway's jury was unfairly deprived of critical information about his harrowing childhood and other mitigating aspects of his life story because his trial counsel provided ineffective assistance of counsel during the penalty phase of the trial, including failing to investigate and present available mitigation evidence.

As this Court explained on direct appeal, the full extent of the mitigation presented by Mr. Galloway's lawyers at his capital sentencing was merely the following: "testimony from [his] friends and family members, who testified that he was a good father and that they would visit him if he was given life imprisonment. The jury also heard testimony from corrections officers explaining that Galloway had not caused any trouble during his prior incarceration." *Galloway v. State*, 122 So. 3d 614, 627 (Miss. 2013). That's it. This testimony spanned a paltry twenty-one pages of transcript. Counsel presented nothing more, because they knew nothing

more, having failed to conduct anything close to a constitutionally-adequate investigation of the facts and circumstances of Mr. Galloway's life.

A minimally competent investigation would have put before the jury the truer and fuller picture of his life presented in this petition. Competent counsel would have found and then presented the available evidence of a boy, and then young man, coming of age and surviving one of the most trying, tumultuous, and traumatic environments one could imagine, and yet still finding ways to be a loving father to his children and to contribute to his family. In addition to his being a good father who is loved by his family and friends and was well-behaved during his pretrial incarceration, a minimally adequate investigation would have easily uncovered evidence that his childhood and later years were marked by: 1) deep poverty; 2) domestic violence and dysfunction in a series of chaotic childhood homes; 3) abandonment by his father and chronic neglect by his mother; 4) dangerous criminal activity in his community; 5) a need as he grew older to fight to survive his dangerous environment; 6) a mentally ill older brother who conducted a reign of terror over the family; 7) his own serious mental illness, brain damage, and self-medication; 8) a turbulent relationship with the mother of one of his children; 9) resilience and positive contributions despite his many hardships; and 10) the effects of the difficult upbringing experienced by his parents involving familial patterns later to be imprinted on him. Because of trial counsel's performance, the jury did not hear a single sentence from any witness about any of these topics.

Trial counsel's only attempt to investigate Mr. Galloway's mental health was to hire a psychologist, Dr. Beverly Smallwood. But trial counsel failed even as to this expert: save for a single school transcript, they did not provide her with any of the necessary social history documents needed for her assessment. After her limited evaluation, Dr. Smallwood instructed the defense team to conduct the mitigation investigation required in every capital case, an instruction the defense team ignored. Had defense counsel conducted the necessary investigation and provided Dr. Smallwood with the plethora of available social history records, she would have testified that Mr. Galloway had PTSD and Major Depressive Disorder. Ex. 3 (Aff. of Dr. Smallwood, ¶¶ 16, 26). Trial counsel's below par performance continued at trial, where counsel informed the jury that Dr. Smallwood would tell them about Mr. Galloway's mental health, but then failed to call her. R. 812.

Had trial counsel fulfilled their obligation to provide effective assistance of counsel they would have uncovered a wealth of mitigation evidence. As a result, the jury would have seen and heard a truer and far fuller story of the petitioner's life. But for counsel's failures to uncover and tell this more complete story, there exists a reasonable probability that Mr. Galloway would have been sentenced to life rather than death. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

1. Trial counsel failed to conduct a reasonable mitigation investigation, to present all relevant and mitigating facts, and to tell Mr. Galloway's true-life story.

The duty to conduct a thorough investigation of the defendant's background and to present mitigating evidence on his behalf is well-established. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *Wiggins*, 539 U.S. at 524 (quoting Am. Bar Ass'n *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, [hereinafter "ABA Guidelines"] Section 11.4.1 (1989))); *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Davis v. State*, 87 So. 3d 465, 469 (2012); *Wilson v. State*, 81 So. 3d 1067, 1084 (2012); *see also* Ex. 70 (Aff. of R. Stetler, ¶ 2); Ex. 10 (Aff. of A. de Gruy, ¶¶ 6, 8); Ex. 11 (Aff. of R. Simons, ¶¶ 9-11).

This Court has consistently held that "at a minimum, counsel has a duty to interview potential witnesses and to make independent investigation of the facts and circumstances of the case." *Wilson*, 81 So. 3d at 1083 (quoting *Ferguson v. State*, 507 So. 2d 94, 96 (Miss. 1987)); *Davis v. State*, 743 So. 2d 326, 339 (1999) ("[W]hile attorneys will be granted wide discretion as to trial strategy, choosing defenses and calling witnesses, a certain amount of investigation and preparation is required."). In capital cases, the investigation must include meaningful interviews with the client, family members, and other mitigation witnesses, as well as the collection of life-history records. *See Sonnier v. Quarterman*, 476 F.3d 349, 358 (5th Cir. 2007) (finding trial attorneys' performance deficient where they "did not talk to [defendant's] family and acquaintances at the length or in the depth required" for mitigation purposes); *Porter*, 558 U.S. at 39 (finding counsel's failure to obtain the

defendant's school, medical, or military records was deficient); *Rompilla*, 545 U.S. at 389-90 (counsel's performance was deficient when they failed to obtain defendant's criminal records on prior convictions that would be used in aggravation by the State, which would have led to numerous leads on mitigation evidence). Without a minimally competent investigation, no reasonable strategic decision can be made. *See Powell v. Collins*, 332 F.3d 376, 398-401 (6th Cir. 2003) (there can be no strategic reason in failing to present mitigating evidence when counsel has failed to investigate); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) (explaining that tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum).

Counsel's unreasonable decisions to limit their investigation and not interview witnesses with information about their client's life amounts to deficient performance. *Wiggins*, 539 U.S. at 524-25; *Foust v. Houk*, 655 F.3d 524, 534-35 (6th Cir. 2011); *Mason v. Mitchell*, 543 F.3d 766, 774 (6th Cir. 2008). And the duty to investigate and present evidence is all the more important in a case, such as Mr. Galloway's, where counsel anticipates a guilty verdict and expects the case to proceed to a penalty phase.[12] In that circumstance it should be evident "that the sentencing phase [is] likely to be 'the stage of the proceedings where counsel can do his or her client the most good.'" *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995) (quoting *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989)).

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[12] Mr. Rishel informed Mr. Galloway's family members that the State had substantial evidence against Mr. Galloway, and that their focus would be to save his life. *See also* Ex. 44 (Affidavit of V. Bishop, ¶¶ 11-12); Ex. 22 (Affidavit of O. Varghese, ¶ ¶ 65-66).

This Court has repeatedly granted relief when counsel failed to meet their professional obligations to investigate and present mitigating evidence. *Wilson*, 81 So. 3d at 1083; *Davis*, 87 So. 3d at 474; *see also Woodward v. State*, 635 So. 2d 805, 809 (Miss. 1993); *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990); *Yarbrough v. State*, 529 So. 2d 659, 663 (Miss. 1988); *Neal v. State*, 525 So. 2d 1279, 1283 (Miss. 1987) (holding defendant was entitled to evidentiary hearing to establish his ineffective assistance of counsel claim when counsel refused to let him testify to present mitigating evidence); *Leatherwood v. State*, 473 So. 2d 964, 971 (Miss. 1985) (granting an evidentiary hearing where post-conviction counsel submitted affidavits of many mitigation witnesses who had not been contacted by trial counsel).

As shown below, counsel's utter failure both to seek the necessary resources and to conduct any meaningful mitigation investigation "so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Davis*, 87 So. 3d at 469; *see also Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982); *Fulgham v. State*, 46 So. 3d 315, 336 (Miss. 2010).

Harrison County Public Defender Glenn Rishel led Mr. Galloway's defense and had primary responsibility for the penalty phase. Ex. 17 (Aff. of G. Rishel, at 1); Ex. 19 (Aff. of R.C. Stewart, ¶ 6); Ex. 20 (Aff. of D. Christensen, ¶ 5). He knew or should have known of his duty to conduct a thorough mitigation investigation, having attended "every capital seminar" in Mississippi since the creation of the Public Defender's Office in 2007, including two around the time

of Mr. Galloway's arrest. Ex. 17 (Aff. of G. Rishel, at 1); *see also* Ex. 10 (Aff. of A. de Gruy, ¶ 11) (noting that members of the Harrison County Public Defender's Office attended a capital defense conference in January 2008); Ex. 15 (Making the Case for Life – Biloxi Conference) (listing Mr. Rishel, Mr. Stewart, Ms. Christensen, and Mr. Reese as attendees at September 2008 conference organized by the National Association of Criminal Defense Lawyers (NACDL)); Ex. 70 (Aff. of R. Stetler, ¶ 8) (discussing his presentation at the 2008 NACDL conference in Biloxi on mitigation guidelines). However, Mr. Rishel and the other defense counsel collectively failed to fulfill that duty.

What counsel did and didn't do: As reflected in this Court's direct-appeal recital of the brief mitigation offered at trial, trial counsel's mitigation investigation consisted of the following insufficient tasks: Mr. Rishel and Damon Reese, a fact investigator on staff with the Public Defender's Office, "worked on the mitigation." Ex. 17 (Aff. of G. Rishel, at 2). Mr. Rishel and the trial team met with Mr. Galloway on a handful of occasions. The meetings were short and unproductive. *See* Ex. 19 (Aff. of R.C. Stewart, ¶ 14). In the meetings, Mr. Galloway would sit quietly, with his head down. Ex. 17 (Aff. of G. Rishel, at 3); Ex. 20 (Aff. of D. Christensen, ¶ 10). He hardly said two sentences. Ex. 19 (Aff. of R.C. Stewart, ¶ 14). No attorney ever attempted to meet with Mr. Galloway one-on-one. *Id.* ¶ 13; *see also* Ex. 17 (Aff. of G. Rishel, at 3). Most meetings centered on trying to persuade Mr. Galloway to consider a plea to life imprisonment. *See* Ex. 17 (Aff. of G. Rishel, at 2); Ex. 20 (Aff. of D. Christensen, ¶ 10); Ex. 19 (Aff. of R.C.

Stewart, ¶ 13).

Lead counsel's entries from visits with Mr. Galloway in 2009 illustrate how little mitigation was discussed with Mr. Galloway. At a meeting on May 28, 2009, trial counsel "discussed case, procedures, and mitigation" with Mr. Galloway. Ex. 18 (Trial Counsel Excerpts, at 001). Five months later – apparently counsel's next meeting with Mr. Galloway – on October 27, 2009, trial counsel "discussed case, his version of facts." *Id.* In November 2009, investigator Damon Reese delivered a disc to Mr. Galloway. *Id.* On December 28, 2009,[13] Mr. Rishel and Mr. Stewart "reviewed cassette tapes" with Mr. Galloway, and on December 29, 2009, Mr. Rishel, Ms. Christensen, and Mr. Stewart "discussed motion hearings, possible plea, problems with discovery, and the events around his being stopped." *Id.*

In the seven months before Mr. Galloway's trial, counsel met with Mr. Galloway only two times, both for under an hour. Ex. 45 (ADC visitation log, at 4,5). Investigator Damon Reese met with Mr. Galloway only an additional three times in this time period, including a twenty-five-minute meeting at the jail, only a week before trial. *Id.* at 6-13.

To be sure, Mr. Rishel and Mr. Reese met with Mr. Galloway's mother, Ollie Varghese, a number of times at the Public Defender's office. Mr. Reese went to Ms. Varghese's home on a few occasions to speak with her and met Mr. Galloway's sister Mary Taylor, who also lived in the home. Ex. 17 (Aff. of G. Rishel, p. 3); Ex. 22 (Aff.

[13] At this time, a motions hearing was set for January 14, 2010, and trial was set for February 8, 2010. C. 44. The trial was later continued to May 10, 2010, C. 57, and held on September 21, 2010.

of O. Varghese, ¶ 67); Ex. 23 (Aff. of M. Stanton, ¶ 40). Yet at these meetings, Mr. Rishel and Mr. Reese asked only the most cursory questions about Mr. Galloway's background and life history. Ex. 22 (Aff. of O. Varghese, ¶ 72); Ex. 23 (Aff. of M. Stanton, ¶ 39); Ex. 44 (Aff. of V. Bishop, ¶ 19) Mr. Rishel's focus was on reviewing with the family the prosecution's evidence against Mr. Galloway and asking the family members to try to persuade Mr. Galloway to consider a plea to life imprisonment. Ex. 22 (Aff. of O. Varghese, ¶¶ 65, 67); Ex. 44 (Aff. of V. Bishop, ¶¶ 11-12). Mr. Rishel explained to them that at the penalty phase, he would ask witnesses to beg for Mr. Galloway's life. Ex. 23 (Aff. of M. Stanton, ¶ 39).

Trial counsel apparently relied exclusively on Mr. Galloway and his mother to provide them names of potential mitigation witnesses and others with information about their client's life. *See* Ex. 17 (Aff. of G. Rishel, at 2, 3 ("We relied on Mr. Galloway and his family to give us a history of Mr. Galloway's life. Based on what we were told, there no other records" than "his school records from Greene County."); *cf. Sears v. Upton*, 561 U.S. 945, 952-54 (2010) (noting that the state court's finding that trial counsel's performance was constitutionally deficient was unsurprising in light of the "cursory nature of counsel's investigation" which was "limited to. . . talking to witnesses selected by [the defendant's] mother") (quotation and citation omitted). However, had they even cursorily reviewed for mitigation leads the records provided by the State in discovery, trial counsel would have encountered the names of many other available mitigation witnesses. *See* Ex. 70 (Aff. of R. Stetler, ¶ 21) ("Careful review of records often discloses the existence of

collateral documentation, which in turn needs to be pursued.") For instance, the discovery contained Mr. Galloway's cell phone contact list, as well as his cell phone records dating back to November 1, 2008. *See* Ex. 47 (State File Excerpts, at 010-014). A quick scan of the phone records would have revealed the people with whom he was frequently in touch in the month prior to his arrest, such as Porter Bell, Precious Brandon, Rufus Molden, Terrance Norman, and LaShandra Taylor, all of whose numbers were listed in the directory, and all of whom would have been available and willing to testify on Mr. Galloway's behalf. *See* Ex. 48 (Aff. of Porter Bell, ¶ 22); Ex. 41 (Aff. of P. Brandon, ¶ 22); Ex. 46 (Aff. of R. Molden, ¶ 29); Ex. 63 (Aff. of T. Norman, ¶ 28); Ex. 24 (Aff. of L. Taylor, ¶ 60). As described in more detail below, these witnesses would have been able to speak, among other things, to the violence, abuse, and chaos Mr. Galloway experienced as a child and teenager and the devasting impact that his brother's mental illness and incarceration had on him. *See* Ex. 48 (Aff. of Porter Bell, ¶¶ 6, 8, 11); Ex. 41 (Aff. of P. Brandon, ¶¶ 7, 13-14); Ex. 46 (Aff. of R. Molden, ¶¶ 10-11, 19-21); Ex. 63 (Aff. of T. Norman, ¶¶ 8-9, 11-12, 14, 18, 22); Ex. 24 (Aff. of L. Taylor, ¶¶ 9-12, 14-17, 21-24, 31, 36-37, 42, 47). Trial counsel made no effort to contact these friends and other family members, whose contact information was at their fingertips without Mr. Galloway having to speak a word.

Trial counsel never even met with all of the mitigation witnesses named by their client and his mother. For instance, counsel never attempted to contact Mr. Galloway's sister LaShandra Taylor – the sibling with whom he was the closest and

who had practically raised him – though her boyfriend accompanied Ms. Varghese to several meetings at the Public Defender's Office and traveled from Missouri to testify at Mr. Galloway's trial. Ex. 24 (Aff. of L. Taylor, ¶¶ 5-6, 59-60). This was despite Ms. Taylor contacting Mr. Rishel by phone on January 12, 2009, and leaving the message that she "wants to talk about what will happen." Ex. 18 (Trial Counsel File Excerpts, 001663). As discussed in more detail below, Ms. Taylor would have been able to speak, among other things, to the food insecurity, domestic violence, and mental illness Mr. Galloway experienced, as well as to the sexual abuse that took place in their childhood home. Ex. 24 (Aff. of L. Taylor, ¶¶ 9-12, 16-20, 29-31, 36-37, 46). Similarly, trial counsel knew that that Rufus Molden was one of Mr. Galloway's closest friends but made no effort to contact him or interview him before trial. Ex. 46 (Aff. of R. Molden, ¶ 29). In fact, nearly a year before trial, Mr. Rishel sent a letter to Assistant District Attorney Huffman notifying the State that the defense intended to call Mr. Molden as a witness in mitigation. *See* Ex. 18 (Trial Counsel File Excerpts, 005). Mr. Molden had even attended Bo's preliminary hearing and one day of the trial. Ex. 46 (Aff. of R. Molden, ¶ 28). Still, trial counsel made no effort to contact him prior to trial, interview him, or call him as a witness in mitigation. *Id.* ¶ 29. Mr. Molden would have been able to speak, among other things, to the violence Mr. Galloway witnessed as a child. *Id.* ¶¶19-21. Other family members and friends came to the courthouse to observe Mr. Galloway's trial, but trial counsel had little to no contact with them. Mr. Galloway's Aunt Kaffie came to the courthouse for some of the trial, but no one from the defense team attempted to

interview her or ask her about testifying for her nephew. Ex. 26 (Aff. of K. Taylor, ¶ 22). Her daughter Nolanda Mitchell also came to the courthouse. *Id.* ¶ 25.[14] As explained below, Ms. Taylor would have been able to provide information on the physical and sexual abuse Mr. Galloway's father forced on his children and the poverty Mr. Galloway experienced growing up. *Id.* ¶¶ 6, 10-11. Sabriya Thomas, one of Bo's closest friends, and his former girlfriend, came to the trial every day. Ex. 22 (Aff. of O. Varghese, ¶ 69); Ex. 23 (Aff. of M. Stanton, ¶ 35). Even though Ms. Thomas would have been ready and willing to testify on Mr. Galloway's behalf, trial counsel made no effort to contact her, much less ask her about Mr. Galloway's background. Ex. 22 (Aff. of O. Varghese, ¶ 69). This failure had permanent consequences, as Ms. Thomas tragically died in a car accident following Mr. Galloway's trial, forever depriving the courts of any mitigation evidence she might have offered.[15]

The trial team collected a single page of records on Mr. Galloway's educational and medical history – a transcript from Green County High School from which he graduated. *Compare* Ex. 18 (Trial Counsel File Excerpts, at 002), *with Ronk v. State*, 267 So. 3d 1239, 1272 (Miss. 2019) (finding that counsel's mitigation investigation was "arguably deficient" where counsel collected "'records from a number of institutions regarding [Ronk's] past psychological treatment[,]'" including

[14] Kaffie Taylor's only contact with trial counsel occurred when she approached him about the lack of Black people on the jury. Counsel brushed off the question, responding, "Well, at least we have some women on there." Ex. 26 (Affidavit of K. Taylor, ¶ 23).

[15] *Four* Victims *Identified in Deadly I-10 Accident*, WLOX, (Sept. 1, 2011 4:12 AM), https://www.wlox.com/story/15372817/four-victims-identified-in-deadly-i-10-accident/.

"a 'big binder full'"). Had trial counsel obtained Mr. Galloway's school records from Moss Point school district – where he had attended all but one year of school – they would have been able to identify potential mitigation witnesses, such as Bo's fourth grade teacher Sandra Lewis, who was available and willing to testify on his behalf and who could have spoken to her impressions of Mr. Galloway and his family. *See* Ex. 66 (L. Galloway – Moss Point High School Records, at Bates 5357); Ex. 50 (Aff. of S. Lewis, ¶¶ 10-11).

The team ignored an abundance of readily available records on Mr. Galloway and his family members, including his educational, medical, Youth Court, and incarceration records. Simple requests for Mr. Galloway's readily available criminal records would have led counsel to Mr. Galloway's friends and family members who had lived their entire lives in neighboring Jackson County. Even after the Jackson County Public Defender's Office offered its file to Mr. Rishel, noting it contained potential mitigating evidence, he failed to follow through. Ex. 51 (Aff. of R. Rudder, ¶ 8); Ex. 52 (Aff. of A. Galle, ¶ 5). The records would have given counsel the names of Mr. Galloway's childhood friends Marcus Jackson and Calvin McCorvey, who were both available and willing to testify on his behalf. *See* Ex. 53 (Jackson Co. Public Defender File – carjacking); Ex. 40 (Aff. of M. Jackson, ¶ 42); Ex. 39 (Aff. of C. McCorvey, ¶ 25). Among other information, Mr. Jackson and Mr. McCorvey would have been able to speak to Mr. Galloway's history of blackouts. Ex. 40 (Aff. of M. Jackson, ¶ 38); Ex. 39 (Aff. of C. McCorvey, ¶ 16). Obtaining publicly available criminal records on Mr. Galloway's father would have revealed a history of

alcoholism, domestic violence, allegations of sexual abuse, and possession of marijuana. Ex. 54 (L. Galloway, Jr. – Pascagoula Mun. Ct., at 5634); Ex. 55 (L. Galloway, Jr. – Pascagoula Police Dept., at 9826); Ex. 56 (L. Galloway, Jr. – Gautier PD Incident, at Bates-8735); Ex. 57 (L. Galloway, Jr. – Jackson County Sheriff, at 8769); Ex. 58 (L. Galloway, Jr. – Possession Conviction, at 005566); Ex. 59 (L. Galloway, Jr. – Domestic Violence, at 5807). Similarly, publicly available records on Mr. Galloway's mother would have shown her own brushes with the law and inability to pay the associated fines. Ex. 129 (O. Galloway Pascagoula Police Dept. Rec. Search).

Obtaining Mr. Galloway's available medical records would have revealed numerous visits to the Singing River Hospital Emergency Department for suspicious injuries, as explained in greater detail below. Mr. Galloway's medical records would have also alerted counsel to the possible mental health impairments delineated below. Obtaining Mr. Galloway's youth court records would have alerted competent counsel to the relevant youth court history and records of both his older brother, Melvin Anderson, and sister, Mary Taylor. Ex. 34 (L. Galloway III – Youth Court Records, at Bates-004).

Obtaining Mr. Anderson's voluminous youth court records would, in turn, have exposed the chaos and terror that Mr. Galloway and his family experienced in the household with an extremely violent and mentally ill brother, as well as their parents' lack of supervision. Ex. 34 (M. Anderson – Youth Court Records, at 111105-06; 111125). The youth court records also would have led counsel to his voluminous

mental health records, which also documented Mr. Galloway's father's angry moods, violent behavior, and alcoholism, all witnessed by the children. *See, e.g.*, Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at 9841); *id.* at 9844 ("[T]he patient's father has a history of violent behavior including hitting the patient's mother in front of the patient, and abusing the patient three years ago which included DHS involvement."); *id.* at 9865 ("[H]is father had a history of violent behavior, and apparently his biological parents would get into physical fights from time to time. This also has occurred according to the patient between his mother and stepfather."[16]); *id.* at 9872 ("[B]io-father was court-ordered to attend anger management classes."); *id.* at 9873 ("[B]io-father has drunk heavily in the past."); *id.* at 9908 ("[T]he father . . . is known to be violent at times."). Youth court records on Ollie Varghese, in connection with Melvin's proceedings, also would have revealed domestic violence in the home. Ex. 25 (O. Galloway – Youth Court Records, at 8442) ("She did apparently experience some physical abuse during her marriage to Leslie Galloway [Jr.]."); *id.* at 8443 ("Leslie Galloway [Jr.] has been violent in front of all of the children."); *id.* at 8445 ("[Leslie, Jr.] apparently has been physically abusive of Melvin and of the mother."). Mr. Galloway's sister Mary's youth court records would have revealed to counsel their mother's neglect, her brother's history of criminal charges and mental health problems and provided a window into the violence the children dealt with in the community on a regular basis. Ex. 34 (M. Taylor – Youth Court Records, at 110812).

[16] Emmanuel McDonald was Mr. Anderson's stepfather. *See* Ex. 24 (Affidavit of L. Taylor, ¶ 14).

Trial counsel knew that Mr. Galloway had prior convictions, Ex. 17 (Aff. of G. Rishel, at 3-4), and thus that Mr. Galloway would have prior inmate classification records. Yet counsel made no attempt to obtain those records. Mr. Galloway's classification records from the Mississippi Department of Corrections would have provided leads to mitigation evidence. *See Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005) (finding that counsel's performance was deficient when they had failed to obtain prior conviction records that could have led to numerous leads on mitigation evidence). The records note, for instance, the mitigating evidence that Mr. Galloway had worked at Brass Hanger Cleaners for years. Ex. 43 (L. Galloway III – MDOC Pen Pack, at 7). Mr. Galloway's full court records from his carjacking conviction would also have revealed his work history with Brass Hanger Cleaners. Ex. 61 (L. Galloway III – Carjacking Conviction, at 5855); Ex. 62 (Galloway Plea Transcript – Carjacking, at 25-26). At any rate, a simple request for his employment records would have led counsel to his former employer Bruce Grimes, who would have been able to testify that Mr. Galloway was a good employee and hard worker. *See* Ex. 63 (Aff. of B. Grimes, ¶¶ 3, 5).

There can be no question that such performance was deficient. *See Doss v. State*, 882 So. 2d 176, 189 (Miss. 2004) (granting an evidentiary hearing because trial counsel's investigation fell short of the prevailing standard in failing to collect any school, medical, mental health, criminal, or other records on the client, among other failings); *Davis v. State*, 87 So. 3d 465, 474-75 (Miss. 2012) (Chandler, J., dissenting) ("[T]he failure of [counsel] to obtain his client's military, school, and

medical records was deficient performance."); *id.* at 471 ("[C]ounsel's failure to discover and introduce evidence of child abuse and the ability to cope in the structured environment of prison amounted to deficient performance."). Counsel's failure to obtain these available records and pursue the leads in mitigating evidence was not reasonable. "[A]ny reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses[.]" *Wiggins*, 539 U.S. at 525; *see also Neal v. Puckett*, 286 F.3d 230, 240 (2002) (finding ineffective assistance where lawyers had some indication of defendant's difficult life, but chose not to pursue those sources of evidence).

The following subsections set out the witnesses and records demonstrating the chaotic and dysfunctional childhood home life that shaped Mr. Galloway's development, and the trying trajectory his life took into young adulthood. These subsections illustrate the witnesses available and willing to testify on Mr. Galloway's behalf, their anticipated testimonies, and the relevant and readily available social-history records – all of which counsel deficiently failed to uncover. Counsel's failures to uncover and present relevant mitigation spanned every aspect of Mr. Galloway's life, including: 1) deep poverty; 2) domestic violence and dysfunction in his many childhood homes; 3) abandonment by his father and chronic neglect by his mother, 4) dangerous criminal activity in his community; 5) a need as he grew older to fight to survive his dangerous environment; 6) a mentally ill older brother who conducted a reign of terror over the family; 7) his own serious mental illness, brain damage, and self-medication; 8) a turbulent relationship with the

mother of one of his children; 9) a resilience and contributions despite his many hardships; and 10) the effects of the difficult upbringing experienced by his parents involving familial patterns later to be imprinted on him.[17] Because of trial counsel's abysmal performance, the jury did not hear a single sentence from any witness about any of these topics.

a. A competent investigation would have uncovered Mr. Galloway's history of deep poverty, family dysfunction, domestic violence, chaos, and childhood trauma.

As any minimally competent capital defense lawyer would have learned through a proper investigation, Leslie "Bo" Galloway's life was turbulent from the start. Ollie Taylor (later, Varghese) gave birth to Bo on May 21, 1983, at Singing River Hospital by emergency C-section, after the medical staff determined he was in fetal distress. Bo weighed 9 pounds at birth, but he had difficulties breathing and had to be intubated. Ex. 22 (Aff. of O. Varghese, ¶ 9); Ex. 21 (Galloway – SRHS Records, at Bates-37). He was diagnosed with neonatal asphyxia. *Id.* at 29. Ollie was not allowed to see her son for several days while he was in the ICU as the staff was trying to control her skyrocketing blood pressure. Ex. 22 (Aff. of O. Varghese, ¶ 9). After several days in the hospital, Bo came home to his family – a family mired in the dysfunction, chaos, and poverty that came to define much of his life.

Throughout his childhood, Bo endured the consequences of true poverty. He

[17] The information contained herein is intended as a summary of the affiants' testimony and the records collected in post-conviction. For a full recitation of the mitigating evidence available, please see the attached affidavits, Exhibits 2-3, 5-8, 22-24, 26, 28-31, 36-42, 44, 46, 48, 65-70, 75-80 and pertinent selections of Mr. Galloway and his family members' social history records. Exhibits 4, 21, 25, 27, 32-35, 43, 49, 54-62, 64, 71-74, 81-82.

and his siblings dressed in the discarded clothing of other children, and ate with the aid of government food stamps. *Id.* ¶ 16. His father, Leslie Galloway II, known as "Red," used the family home as a revolving door. When home, he drank away what little money the family had scraped together. Ex. 22 (Aff. of O. Varghese, ¶ 23); Ex. 17 (Aff. of P. Bell, ¶ 13). When Bo was very young, he and his mother and his three siblings were constantly on the move, scuffling between the projects in Moss Point and the projects in Pascagoula. Ex. 15 (Aff. of L. Bishop, ¶ ¶ 11,13-15). Extreme violence marred both neighborhoods, with drug dealers on every corner. *See, e.g.*, Ex. 52 (M. Anderson – Youth Court Records, at 111106) ("It appears that there is a great deal of conflict where the [family] live[s] in the project."). In their various residences, the four children often shared a single bed and a single bedroom. Ex. 24 (Aff. of L. Taylor, ¶ 14). And even though Ollie tried, there "wasn't always food around Bo's house." Ex. 28 (Aff. of P. McCorvey, ¶ 7); *see also* Ex. 29 (Aff. of S. Loper, ¶ 9); Ex. 23 (Aff. of M. Stanton, ¶ 10). Bo would often go to his grandmother Fannie Nettles' house for a meal; she lived just down the street from them when the family lived at the Ted B. Henson projects. Bo loved his grandmother's cooking. Ex. 31 (Aff. of R. Nathan, ¶ 7). Bo would also turn to his friends' mothers and other family members for a meal. Ex. 39 (Aff. of C. McCorvey, ¶ 8); Ex. 40 (Aff. of M. Jackson, ¶¶ 13-14); Ex. 26 (Aff. of K. Taylor, ¶ 10); Ex. 27 (Aff. of N. Dixon, ¶ 18). At one point, Bo's family was homeless and had to move in with Ollie's sister Kaffie Taylor in Gautier. Ex. 22 (Aff. of O. Varghese, ¶ 26).

Ollie's relationship with Bo's father, Red, was unstable and violent from the

start. It had been off and on since they met in 1976, when she was around fifteen and he twenty. Ex. 22 (Aff. of O. Varghese, ¶ 7). Red would "beat the holy hell" out of Ollie, often in front of the children. Ex. 24 (Aff. of L. Taylor, ¶ 9); Ex. 22 (Aff. of O. Varghese, ¶ 16); Ex. 23 (Aff. of M. Stanton, ¶¶ 12-13); Ex. 31 (Aff. of R. Nathan, ¶ 16); Ex. 25 (O. Galloway – Youth Court Records, at 8443) ("Leslie Galloway has been violent in front of all of the children."). Even when the fights were not in front of the children, they could still hear their mother's screams through the walls of their small home. Ex. 23 (Aff. of M. Stanton, ¶ 12). If Ollie wore lipstick, Red would smack her and wipe the lipstick off of her lips. He would get angry if she had her hair done. Bo and his siblings would see their mother with black eyes and blood all over her body. Ex. 22 (Aff. of O. Varghese, ¶ 17); Ex. 23 (Aff. of M. Stanton, at ¶ 13); Ex. 24 (Aff. of L. Taylor, ¶¶ 9, 12). On several occasions, she had to go to work with a black eye. Ex. 22 (Aff. of O. Varghese, ¶ 17). Bo and his siblings were helpless to protect their mother. They would huddle together, seeking refuge from their father's rage in each other's arms. Bo would often cry in the corner by himself, and his older sister San could not get him to leave the corner. Ex. 24 (Aff. of L. Taylor, ¶ 9); Ex. 23 (Aff. of M. Stanton, ¶ 13). Red's violence escalated when he was drinking. Ex. 22 (Aff. of O. Varghese, ¶ 16); Ex. 23 (Aff. of M. Stanton, ¶ 13); Ex. 17 (Aff. of P. Bell, ¶ 13). And he drank "a lot." Ex. 22 (Aff. of O. Varghese, ¶ 16).

Red's violence did not stop at Ollie. As a childhood friend of Bo put it, Red "was crazy and mean." Ex. 66 (Aff. of T. Tucker, ¶ 10). Bo also suffered violence at the hands of his father and he witnessed his father's violence against his older

siblings. Ex. 24 (Aff. of L. Taylor, ¶ 9); Ex. 30 (Aff. of M. Anderson, Jr., ¶ 19); Ex. 22 (Aff. of O. Varghese, ¶¶ 16, 18); Ex. 26 (Aff. of K. Taylor, ¶ 6). Bo's father terrified him. Red beat Bo with a belt. Ex. 22 (Aff. of O. Varghese, ¶ 18). Bo begged his mother for protection, but although Ollie tried to protect her baby boy, she could not protect him all the time. *Id.* As the oldest, and as a boy, Bo's brother Melvin got the worst of Red's physical abuse. From Red's regular beatings, Melvin developed visible scars on his back and his bottom. Ex. 22 (Aff. of O. Varghese, ¶ 18); Ex. 25 (O. Galloway – Youth Court Records, at 8443). Red would punch Melvin and tell him he better take it like a man. Ex. 22 (Aff. of O. Varghese, ¶18). Red would whip Melvin with an extension cord and hang him on the clothesline like a rag. Ex. 24 (Aff. of L. Taylor, ¶ 20); Ex. 30 (Aff. of M. Anderson, Jr., ¶ 19); Ex. 63 (Aff. of T. Norman, ¶ 12). Red would also beat Bo's sister Mary with a belt; sometimes she was so terrified of her father's rage that she would wet her pants. Ex. 22 (Aff. of O. Varghese, ¶ 18).

Only Bo's eldest sister, San, escaped Red's beatings, but it came at a tragic cost: from around five to eleven years old, Red sexually molested her. Ex. 24 (Aff. of L. Taylor, ¶¶ 17, 20); Ex. 26 (Aff. of K. Taylor, ¶ 6). Red's sexual abuse of San happened when Red was watching the children. Ex. 24 (Aff. of L. Taylor, ¶ 22). Ollie discovered hickies all over San's neck and chest when she was around eleven years old, and assumed she was being intimate with a boy. Ex. 22 (Aff. of O. Varghese, ¶ 33); Ex. 30 (Aff. of M. Anderson, Jr., ¶ 17); Ex. 24 (Aff. of L. Taylor, ¶ 17). Ollie pressured San to tell her who had given her the marks until San finally

admitted that Red had done it. When word got around, San's father Melvin came back from Texas where he had been working and threatened to kill Red in front of the police. Ex. 30 (Aff. of M. Anderson, Jr., ¶ 17).

When Ollie could no longer take the beatings of her and her children, she and Red would separate, but this would not always last. Ex. 68 (Aff. of E. Thompson, ¶ 10); Ex. 22 (Aff. of O. Varghese, ¶ 20). In the final fight the children witnessed, Red beat Ollie so hard that blood rained down her body, while Bo and his siblings watched in horror. One of the children called the police, and Red was taken to jail. Ex. 24 (Aff. of L. Taylor, ¶ 12). Ollie and Red separated for the final time when Bo was around seven years old. Ex. 22 (Aff. of O. Varghese, ¶ 22); Ex. 69 (Aff. of L. Galloway, Jr., ¶ 14).

After his separation from Ollie, Red would only see his children on rare occasions, and even then, would spend the whole-time drinking alcohol and smoking marijuana. Ex. 22 (Aff. of O. Varghese, ¶ 25); *see also* Ex. 27 (M. Anderson SRH Mental Health, at 8995) ("[Melvin] has minimal contact with his father."). Bo craved a father figure and "would compare his family to other families and feel sad." Ex. 28 (Aff. of P. McCorvey, ¶¶ 9, 12). He would see his friend Calvin McCorvey's father pick him up for visits and wish that he had a father who would pick him up. Ex. 39 (Aff. of C. McCorvey, ¶ 9). Red was so absent from Bo's life that Bo's childhood friends didn't even know he had a father until they were teenagers. Before that, Bo's friends never saw Bo with a father, and Bo never mentioned him. Ex. 70 (Aff. of A. Ash, ¶ 10); Ex. 38 (Aff. of I. McMillian, ¶ 8); Ex. 39 (Aff. of C. McCorvey, ¶ 9); Ex.

40 (Aff. of M. Jackson, ¶ 26). As Bo got older, his father would welcome him with a beer instead of a hug. Ex. 22 (Aff. of O. Varghese, ¶ 25). A psychologist who evaluated Bo in connection with proceedings in the Jackson County Youth Court noted his father's emotional unavailability and the importance of a male role model in Bo's life: "He needs more active participation on the part of his father or an appropriate male adult model." Ex. 55 (L. Galloway III – Youth Court Records, at 6). Bo's middle school girlfriend, Sophia Loper, also knew that "Bo did not have a relationship with his father," and that "Bo really struggled because he did not have any strong or caring role models, particularly male role models, to guide and support him when he was growing up. He was all alone." Ex. 29 (Aff. of S. Loper, ¶ 9).

Red left Ollie, a single mother, to raise four children on her own, and she tried her best to do so under the most difficult circumstances. But she often disappeared for days on end, and the children had no idea when she would return. Ex. 24 (Aff. of L. Taylor, ¶¶ 21-22); Ex. 31 (Aff. of R. Nathan, ¶ 9). Ollie "wasn't able to parent [Bo]" or "give him the time that he needed;" she "always had two or three jobs"; Ex. 28 (Aff. of P. McCorvey, ¶¶ 7, 12), and would spend her free time "go[ing] to clubs with her friends." Ex. 24 (Aff. of L. Taylor, ¶ 22). Ollie's absence from her child's life "was a heartache for Bo." Ex. 28 (Aff. of P. McCorvey, ¶ 7). For years, youth court counselors and psychologists involved in the children's lives noted Ollie's neglect of her children. *See, e.g.*, Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at 9842) (a psychologist noting that Ollie "is evidently working and possibly

does not have the means to provide proper supervision . . . ."); Ex. 25 (O. Galloway – Youth Court Records, at 8431) ("Ms. Galloway does not appear to be able to handle Melvin and often Melvin appears to be neglected as does his younger brother [Bo]."); Ex. 52 (M. Anderson – Youth Court Records, at 111121) ("[Melvin] appears to be neglected."); Ex. 71 (M. Taylor – Youth Court Records, at 110812) ("[Ollie] apparently was not home overnight."); *id.* at 110814 ("It is not certain why [Mary's] mother was not home on Saturday night."); *id.* at 111166 ("The mother is minimally cooperative as she works from 12pm until 9pm and is unable to provide appropriate supervision in the afternoon and evening hours.").

Only four years older than her baby brother, San began to try to care for Bo and their sister Mary in her mother's absence. She would cook and try to watch after Bo and Mary. Ex. 23 (Aff. of M. Stanton, ¶ 8); Ex. 68 (Aff. of E. Thompson, ¶ 11); Ex. 24 (Aff. of L. Taylor, ¶ 21); Ex. 26 (Aff. of K. Taylor, ¶ 5); Ex. 39 (Aff. of C. McCorvey, ¶ 7). The burden on San – a mere child herself – to take care of her younger siblings and the household grew heavy. Ex. 30 (Aff. of M. Anderson, Jr., ¶ 15); Ex. 24 (Aff. of L. Taylor, ¶ 21). Bo's sisters "used to beat him, to make him do things that were their responsibility around the house." Ex. 28 (Aff. of P. McCorvey, ¶ 8).

The children had no structure and could do what they wanted without repercussion. Ex. 17 (Aff. of P. Bell, ¶ 11). Ollie simply was not home enough to follow through on discipline. *Id.*; *see also* Ex. 31 (Aff. of R. Nathan, ¶ 9). His mother's absence was hard on Bo. His friends saw how sad he was that his mother

was not home with them. Ex. 39 (Aff. of C. McCorvey, ¶ 7).

Like Red, Ollie also had a temper of her own. Her moods would swing wildly from day to day. *See* Ex. 30 (Aff. of M. Anderson, Jr., ¶ 9). Her children knew that she was depressed because she wanted only to sleep once she was home and would withdraw to her room for hours, and sometimes days, at a time. Ex. 23 (Aff. of M. Stanton, ¶ 9); Ex. 24 (Aff. of L. Taylor, ¶ 47); *see also* Ex. [ ] (O. Galloway- SRHS Records at 111265)("The patient actually states that upon arrival she is working two jobs and she is just sleepy, and she really would just rather go home and sleep.") Ollie would scream and threaten her children with punishment. Her screams and threats terrified Bo. He would start hyperventilating and could not catch his breath. Ex. 22 (Aff. of O. Varghese, ¶ 19). Ollie was ultimately diagnosed with major depressive affective disorder in 2008, Ex. 64 (O. Galloway - Coastal Family Health, at 20-21) and with bipolar disorder in 2011. *Id.* at 12.

When Bo was around eleven years old, Ollie finally fulfilled her goal of securing her family a home of their own, out of the projects, a two-bedroom house on Frederick Street in Moss Point. But this neighborhood proved even more dangerous than their prior residences in the projects. Ex. 24 (Aff. of L. Taylor, ¶ 24); Ex. 63 (Aff. of T. Norman, ¶ 14). Out in the street, drugs and fighting were rampant. Ex. 63 (Aff. of T. Norman, ¶ 14). Bo and his family would hear gunshots regularly. Ex. 46 (Aff. of R. Molden, ¶ 19); Ex. 23 (Aff. of M. Stanton, ¶ 27); Ex. 27 (Aff. of N. Dixon, ¶ 17). On one occasion, someone shot at the Frederick Street house, and the bullets came through the living room, narrowly missing Bo. Ex. 23 (Aff. of M. Stanton, ¶

27); Ex. 24 (Aff. of L. Taylor, ¶ 24). No one called the police over the incident; it was just the way of life for their family. Ex. 24 (Aff. of L. Taylor, ¶ 24); Ex. 66 (Aff. of T. Tucker, ¶ 18) ("[G]rowing up . . . Bo and I heard gunshots a lot. Shootings and drugs were very common.").

Sometimes the children would stay with Otis Taylor, whom they believed to be their grandfather. Otis would beat Bo. Ex. 26 (Aff. of K. Taylor, ¶ 20). He was a mean man, and the children were terrified of him. They would huddle together under his house, cloaked in their deceased grandmother's blankets, hoping to stay out of his way and escape his violence. Ex. 24 (Aff. of L. Taylor, ¶¶ 37-38). One time when Bo was eight years old, Otis hit Bo's arm with his cane so hard that Bo had to go to the emergency room for fear that it was broken (although it turned out not to be). Ex. 24 (Aff. of L. Taylor, ¶ 37); Ex. 21 (L. Galloway III – SRHS Records, at 147, 150) (describing an "accident" at the grandfather's home). Other times, Ollie would drop Bo off with a babysitter in the Village – a particularly dangerous housing project in Pascagoula. As a childhood friend of Bo described this area, "[i]t was bad in the Village. There was prostitution, drugs and shootings." Ex. 66 (Aff. of T. Tucker, ¶ 19).

Growing up in Moss Point, Bo and his family and friends would have to fight to defend themselves. Ex. 39 (Aff. of C. McCorvey, ¶ 12) ("When [Bo and I] were growing up in Moss Point, there was a lot of violence. You had to fight to defend yourself.") (Ex. 24 (Aff. of L. Taylor, ¶ 44); Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at 9905) (Melvin reports that he "gets in constant fights with his neighbor . .

. when he walks down the street, this other kid is always trying to push him around."); Ex. 25 (O. Galloway – Youth Court Records, at 8443) ("At school it once took three teachers to pull Melvin off of a boy who was the school bully."); Ex. 71 (M. Taylor – Youth Court Record, at 110812) (at fourteen years old, Mary hit another girl on the head with a bottle, requiring stitches, because the girl had tried to cut her with a razor blade); Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at 9865) (Melvin fought another boy to stop him from messing with him); Ex. 42 (Aff. of L. Nathan, ¶ 7) (describing the area as "a high crime neighborhood. People would steal anything and take advantage of you if you didn't defend yourself."); Ex. 52 (M. Anderson – Youth Court Records, at 111106) (a psychologist who evaluated Melvin suspected that one or both parents were encouraging him to defend himself by fighting).

At home, a different danger emerged. Bo's brother Melvin started to have serious behavioral problems when he was seven or eight years old. Ex. 23 (Aff. of M. Stanton, ¶ 15); Ex. 52 (M. Anderson – Youth Court Records, at 111105). He was constantly getting into trouble. Ex. 30 (Aff. of M. Anderson, Jr., ¶ 20); Ex. 31 (Aff. of R. Nathan, ¶ 11). *See generally* Ex. 52 (M. Anderson – Youth Court Records). He tortured cats and threw them in the air, often in front of Bo and his sisters. Ex. 63 (Aff. of T. Norman, ¶ 20); Ex. 31 (Aff. of R. Nathan, ¶ 11); Ex. 17 (Aff. of P. Bell, ¶ 8); Ex. 27 (M. Anderson – SRH Mental Health Records, at 8996); *id.* at 8999 ("[T]he patient's siblings told the patient's mother that this boy threw a cat against a wall to see if he could make it bust."); Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at

9874); Ex. 35 (M. Anderson – EMSH Records, at 111258). He engaged in other destructive behavior. He punctured the tires on Ollie's car. Ex. 22 (Aff. of O. Varghese, ¶ 37). He set fire to Mary's mattress and then her closet, burning all her clothes. *See* Ex. 27 (M. Anderson – SRH Mental Health Records, at 8996). The fire department came to put the fire out, and Melvin had to go to the hospital because he had inhaled so much smoke. Ex. 23 (Aff. of M. Stanton, ¶ 18); Ex. 22 (Aff. of O. Varghese, ¶ 11). Melvin began stealing from family members and others. Ex. 68 (Aff. of E. Thompson, ¶ 8); Ex. 20, (Aff. of K. Taylor, ¶ 8); Ex. 63 (Aff. of T. Norman, ¶ 19); Ex. 52 (M. Anderson – Youth Court Records, at 111108, 111113, 111128, 111135).

Ollie would lock Bo, Mary, and San in the bedroom that they shared to make sure that Melvin did not harm them. They were all afraid of what Melvin might do to them. Ex. 23 (Aff. of M. Stanton, ¶ 19). When Melvin was twelve or thirteen, he was often staying up all night. Ex. 22 (Aff. of O. Varghese, ¶ 38); Ex. 23 (Aff. of M. Stanton, ¶ 19); Ex. 35 (M. Anderson - EMSH records, at 111257). Melvin eventually started to disappear for days at a time, and no one could find him. Ex. 22 (Aff. of O. Varghese, ¶ 34); Ex. 27 (Aff. of N. Dixon, ¶ 11); Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at 9844, 9866). Bo would worry about his older brother and cry when he would not come home. Ex. 22 (Aff. of O. Varghese, ¶ 34). Bo looked up to his big brother, but he was also terrified of him. Ex. 23 (Aff. of M. Stanton, ¶ 18).[18]

[18] Ollie's sister Barbara Thompson finally had to tell Ollie to keep Melvin at home and away from her son Terrance, as Melvin was such a bad influence. Barbara was devastated that she had to tell her own sister to keep her son away, but Melvin was out of control. Ex. 68 (Affidavit of E. Thompson, ¶ 8).

As Melvin's behavior worsened, Bo, his sisters, and his mother lived in chaos and fear. Their fears were well-founded. Melvin would attack Bo, Ollie, his sisters, and others. Ex. 25 (O. Galloway – Youth Court Records, at Bates-8443) ("[Melvin] has been physically aggressive towards his nine-year-old brother [Bo], his mother and other children."); Ex. 34 (M. Anderson – Youth Court Records, at Bates-111121, 111167, 111198) (noting that Melvin assaulted Ollie, San, and a police officer); Ex. 27 (M. Anderson – SRH Mental Health Records, at Bates-8994) (describing several occasions where Melvin has thrown Ollie across the room); Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at Bates-9839, 9865, 9874) ("[P]atient hits mom and siblings, has picked up mom and thrown her on the bed."); *id.* at 9879 ("[Melvin] has very violent outbursts and is capable of surprising strength during these times."); Ex. 25(O. Galloway – Youth Court, at Bates-8443) (stating that at thirteen years old, Melvin has thrown Ollie across the room, even though she weighs 230 pounds); Ex. 27 (M. Anderson – SRH Mental Health Records, at Bates-8999) ("[Melvin] has even broken a little boy's arm in a fight."); Ex. 25 (M. Anderson – EMSH, at 111258) ("[Melvin] claimed to have busted the head of another boy using a brick.").[19] Melvin would make Bo and Mary fight, and if they refused, he would beat them up. Ex. 22 (Aff. of O. Varghese, ¶ 35); Ex. 23 (Aff. of M. Stanton, ¶ 17). Then, when they did fight, Melvin would beat up whichever one lost. Ex. 24 (Aff. of L. Taylor, ¶ 31). Bo's anxiety about the fights would consume him. Ex. 26, (Aff. of M.

[19] A Youth Court psychologist later suspected "a history of neglect and/or abuse" as a partial explanation for some of his behavioral problems. Ex. 33 (M. Anderson – Youth Court Records, at Bates-111126).

Stanton, ¶ 17).

Melvin's attacks on his family members became increasingly terrifying and bizarre. Melvin scratched Ollie in the chest with a fork so hard that it left marks. Ex. 30 (Aff. of M. Anderson, Jr., ¶ 20). Melvin also attacked Ollie with a garden tool. She came screaming and running from him outside the house, saved only when a man from the neighborhood intervened. But for this man, Ollie believed, Melvin would have killed her. Ex. 22 (Aff. of O. Varghese, ¶ 36). Melvin also attempted to kill Mary: he talked her into climbing the Moss Point water tower, and when they got to the top, he tried to push her over the edge. *Id.*; Ex. 23 (Aff. of M. Stanton, ¶ 16). On another occasion, Mary awoke one morning to Melvin pointing a gun straight at her face. Ex. 23 (Aff. of M. Stanton, ¶ 16).

The family would have brief periods of respite from the chaos of living with Melvin, as he was in and out of mental institutions and juvenile detention centers. *See, e.g.*, Ex. 33 (M. Anderson – Youth Court Records, at Bates-111137) (noting a one-year detention at Columbia Training School); *id.* at 111167 (noting a hospitalization at Sand Hill Hospital in Gulfport); *id.* at 111180 (noting a Singing River Hospital inpatient psychiatric admission); *id.* at 111183 (noting Melvin will be transported for admission to East Mississippi State Hospital); *id.* at 111223 (same); *id.* at 111191 (noting Melvin's stay at the Oakley Training School); *id.* at 111213 (same); *id.* at 111196 (noting Melvin's stay at the Northshore Psychiatric Hospital); *id.* at 111218 (same); *id.* at 111207 (noting transport from Singing River Hospital back to youth court detention facility); *id.* at 111221 (noting transport from

Northshore to Singing River); Ex. 27 (M. Anderson – SRH Mental Health, at Bates-8994, 8998). For these brief periods of time, the family would know they were at least safe in their home.

After Melvin returned from one of his institutionalizations, his girlfriend moved in with the family and shared a bed with Bo and their other siblings. Soon after, Ollie found Melvin on top of his girlfriend, threatening her with a screwdriver, and had to stop him. Ex. 23 (Aff. of M. Stanton, ¶ 20); *see also* Ex. 27 (M. Anderson – SRH Mental Health, at 9027) (stating that Melvin was admitted to the hospital on a Chancery Court writ following his attack and assault on his girlfriend.).

Melvin also had severe crying spells and was often suicidal. He would tell Bo and his sisters "that when they woke up in the morning, they would no longer have to worry about him." *See* Ex. 27 (M. Anderson – SRH Mental Health Records, at 8994, 8996, 9001); Ex. 32 (M. Anderson – Sand Hill Mem. Hosp., at 9839, 9874); Ex. 25 (O. Galloway – Youth Court, at 8445); Ex. 35 (M. Anderson – EMSH Records, at 111257). His suicidal threats hurt his siblings, especially Bo, who craved a male role model and couldn't stand the thought of losing his older brother. When he was a teenager, Melvin was diagnosed with schizophrenia and depression. Ex. 52 (M. Anderson – Youth Court Records, at 111180); Ex. 27 (M. Anderson – SRH Mental Health Records, at 9027, 9030). Bo was young and didn't understand his brother's mental illness. He was devastated each time his big brother was taken away, and

he would cry every time the family would visit his brother at an institution. Ex. 22 (Aff. of O. Varghese, ¶ 40); Ex. 38 (Aff. of I. McMillian, ¶ 12).

When Melvin was eighteen years old (and Bo thirteen), he was charged and ultimately convicted of armed robbery. Ex. 72 (M. Anderson – Robbery Conviction). He served a brief stint in prison and was out for only a few months when he was arrested for capital murder in Jefferson Davis County. Ex. 78 (M. Anderson – Murder Conviction). Ollie was so devastated upon learning the news her son had been accused of this crime that she was admitted to the emergency room with heart palpitations, headaches, nausea, persistent crying and insomnia. Ex. 74 (Singing River Microfiche at 8). She admitted during a psychiatric consultation that she had almost taken an entire bottle of painkillers and "her grandchild walk[ing] into the room . . . is the only thing that prevented her from taking the overdose." *Id.* at 13. She was later admitted to inpatient psychiatric care for a week and discharged with a diagnosis of "major depressive episode." *Id.* at 3. Melvin was ultimately sentenced to life imprisonment. *Id.* Bo had become used to his brother's absences, but he always knew Melvin would eventually come home. When Melvin was sentenced to life, Bo was devastated that his brother would never return home again. Ex. 22 (Aff. of O. Varghese, ¶ 41); Ex. 63 (Aff. of T. Norman, ¶ 22); Ex. 31 (Aff. of R. Nathan, ¶ 12); Ex. 24 (Aff. of Calvin McCorvey, ¶ 10). Bo wanted so badly to have an older brother to look up to, one who would look out for him. Ex. 29 (Aff. of S. Loper, ¶¶ 8, 10); *see also* Ex. 42 (Aff. of L. Nathan, ¶ 8); Ex. 66 (Aff. of T. Tucker, ¶¶ 11, 19).

The violence Bo endured from Melvin and others in his dangerous world left physical reminders. He had numerous visits to the Singing River Hospital Emergency Department for suspicious injuries as well as several documented violent encounters in the community. *See, e.g.*, Ex. 21 (L. Galloway III – SRHS Records, at 65) (Bo arrived to the Emergency Department at 11 P.M., when he was four years old, for pain to his elbow; reportedly, his right arm was caught between the cushions of the couch and his brother tried to pull it out); *id.* at 101 (Bo, at four years old, was diagnosed with a "contusion/abrasion of head" after reportedly being knocked down by a cyclist; the doctor observed some frontal swelling and he was given a neurological assessment); *id.* at 150 (after an "accident" at his grandfather's home, Bo was seen at the emergency department because he "hurt his left arm [and] woke up and could hardly move it this morning;" Bo was discharged with an arm sling); *id.* at 115-16 (at seven years old, Bo was taken to the hospital with a puncture wound to upper right leg done with a pencil); *id.* at 170-72 (at twelve years old, Bo was involved in an altercation, resulting in scratches to his face and neck; he was scratched with fingernails); *id.* at 195-96 (at thirteen years old, Bo cut his left eyebrow after he reportedly "fell onto concrete" or "hit it on the side of a pool"); *id.* at 221 (at thirteen years old, Bo is seen for chest pain after a friend reportedly fell on his back while playing five days prior and may have kneed him in the back); *id.* at 245-53 (at fifteen years old, Bo is seen after getting punched in the ribs and possibly vomiting up blood); *id.* at 254-57 (at seventeen years old, Bo seen after being assaulted, complains of neck and back pain); *id.* at 300 (at seventeen years old, Bo

seen for back pain after "running into a fence four days ago"); *id.* at 495 (at twenty-three years old, Bo seen for facial pain after being kicked in the jaw).

b. A competent investigation would have uncovered Mr. Galloway's evidence of mental illness.

The violent and traumatic chaos in the home took a toll on Bo and profoundly damaged his mental health. He began to have panic attacks by the time he was five or six years old and did not want to be left alone. *See* Ex. 22 (Aff. of O. Varghese, ¶ 19). He was terrified that he would be taken away like his brother, and he would desperately cling to Ollie when she was home. *Id.* ¶ 34. Bo would get scared and cry when anyone was screaming. Ex. 65 (Aff. of N. Dixon, ¶ 13). Ollie rushed Bo to the hospital at eight years old because he was having an anxiety attack after an altercation with his siblings. He was having trouble breathing, and his chest hurt. Ex. 21 (L. Galloway III – SRHS Records, at 134). Then at fourteen years old, Bo was seen at the emergency department because his heart was beating heavy and fast, and he was shaking. *Id.* at 231-40.

Middle school girlfriend Sophia Loper recalled that, "Bo's family problems caused Bo a lot of emotional pain and made it hard for Bo to manage his emotions. Bo experienced so much loss for such a young person, and I think that it was too much for him." Ex. 29 (Aff. of S. Loper, ¶ 9). His childhood friend's mother, Pamela McCorvey, recalled that "Bo had a hard life, he looked sad a lot and I know that he was depressed as a child. He had a difficult time expressing himself and his feelings. Mom was not able to give him the time that he needed and his father was not in his life." Ex. 28 (Aff. of P. McCorvey, ¶12). *See also* Ex. 42 (Aff. of L. Nathan,

¶ 4) ("Bo had a way of holding things in . . . It's possible that a lot of the time he was depressed, but found a way to hide it."). Bo could also get so upset that "it would take a long time to calm him down. His whole face would get red and he would be heaving up and down . . . Sometimes he would start crying, and I would tell him it's going to be okay." Ex. 42 (Aff. of L. Nathan, ¶ 11). *See also* Ex. 29 (Aff. of S. Loper, ¶ 16). Bo's cousin, LaTerrance Nathan, once had to go to Bo's home after Bo locked himself in a room and threatened to kill himself, and he found Bo in a room with two knives on his dresser. Ex. 42 (Aff. of L. Nathan, ¶ 12). LaTerrance, was so concerned, that he "took Bo with [him] that night to get him away from the house." *Id.*

Bo's family members and friends observed other strange behavior. Bo's close childhood friend Calvin McCorvey recalled Bo blacking out during a fight at the high school. It was like Bo wasn't even there. Afterward, Bo couldn't remember what had happened at all, except that a fight had started. Ex. 39 (Aff. of C. McCorvey, ¶¶ 16-17); *see also* Exhibit 28 (Aff. of P. McCorvey, ¶¶ 13, 14) ("Bo would get so mad that he would blank out and not remember what he did."). Another close friend, Marcus Jackson, remembered a similar incident where Bo blacked out when he was attacked by multiple men. When the police arrived at the scene to break up the fight, Bo was confused and asked why they were putting him in the car. Ex. 40 (Aff. of M. Jackson, ¶ 38). When Marcus described the fight and what had happened to Bo, "he didn't recognize the event. He looked confused. His eyes got really big. Bo said it didn't happen." *Id.*

Bo would also often retreat into himself. He would shut down whenever something bothered him. Ex. 41 (Aff. of P. Brandon, ¶ 9). He would isolate himself and wouldn't go out. He would stay inside a room all day and night and would even refuse food. Ex. 24 (Aff. of L. Taylor, ¶ 46); Ex. 23 (Aff. of M. Stanton, ¶¶ 31, 33). Sometimes he would drive without a destination until the car was out of gas. Ex. 22 (Aff. of O. Varghese, ¶ 49); Ex. 23 (Aff. of M. Stanton, ¶ 33). His Aunt Kaffie recalled Bo, already in his twenties, immaturely locking himself in the bathroom and hiding from a girl. She found it odd. Ex. 26 (Aff. of K. Taylor, ¶ 13). After Bo's brother was sent to prison, he wouldn't come out of the house and didn't want to have anything to do with his close friend Marcus Jackson. Ex. 40 (Aff. of M. Jackson, ¶ 28). He spent a lot of time playing video games alone. Ex. 22 (Aff. of O. Varghese, ¶ 46). His friends and family could tell that something was wrong with him in the days leading up to his arrest. Ex. 44 (Aff. of V. Bishop, ¶ 8); Ex. 31 (Aff. of R. Nathan, ¶ 26).

To cope with his chaotic environment and mental health issues, Bo self-medicated throughout his life. He began smoking marijuana daily when he was sixteen years old. Ex. 43 (L. Galloway III – MDOC Pen Pack, at 4). For his twenty-fifth birthday, he drank so much that he passed out, and Mary had to help get him to bed. Ex. 23 (Aff. of M. Stanton, ¶ 26). The next day, Bo couldn't remember how he had gotten to bed or how much he had drunk. *Id.* After his arrest, Ollie discovered ten empty liquor bottles in the bathroom he had used as his room. Ex. 22 (Aff. of O. Varghese, ¶ 49).

This easily obtainable evidence of Bo's symptoms of mental distress would have been powerfully mitigating to the jury and would have greatly assisted the mental-health experts that trial counsel should have utilized. *See infra* pp. 95-117. Counsel deficiently and prejudicially failed in the investigation and presentation of Mr. Galloway's mental health mitigation (incorporated herein in its entirety).

c. Counsel failed to uncover and present evidence of Mr. Galloway's resilience, his search for love and happiness, and his efforts to be a good father.

Even within this chaotic environment surrounded by violence, drugs, trauma, and poverty, Bo drew on a reservoir of inner strength, showed potential for growth, and even found happiness from time to time. Bo, his friends, and his cousins would ride bikes around Moss Point and go swimming together. Ex. 63 (Aff. of T. Norman, ¶ 6); Ex. 40 (Aff. of M. Jackson, ¶¶ 9-10). Bo and his friend Marcus loved to race bottle caps in the ditch after it rained, and they set up their own play area behind Bo's grandmother's house in the projects. Ex. 40 (Aff. of M. Jackson, ¶¶ 6-8). Bo and his friends collected baseball cards. Ex. 63 (Aff. of T. Norman, ¶ 6). Bo and his cousin Terrance Norman would go fishing and sometimes would catch enough for his Aunt Barbara to fillet and cook the fish for dinner. Ex. 63 (Aff. of T. Norman, ¶ 7). Bo loved to play sports video games with his friends. Ex. 46 (Aff. of R. Molden, ¶ 17); Ex. 70 (Aff. of A. Ash, ¶ 7). They played basketball together every day. Ex. 75 (Aff. of J. Jackson, ¶ 10); Ex. 46 (Aff. of R. Molden, ¶ 18). Bo also enjoyed sports and played football from elementary through high school. Ex. 70 (Aff. of A. Ash, ¶ 11); Ex. 46 (Aff. of R. Molden, ¶ 14); Ex. 76 (Aff. of J. Alexander, ¶ 4). He was

very talented at football, as well as at drawing and writing. Ex. 29 (Aff. of S. Loper) at ¶¶ 5, 14, 19; Exhibit 112 (Aff. of P. McCorvey, ¶ 5).

Sandra Lewis, Bo's fourth grade teacher at East Park Elementary, remembered Bo as a quiet boy who never caused her any trouble. Ex. 50 (Aff. of S. Lewis, ¶ 5). Bo's tenth grade English teacher Jansie Butler remembered that he was always respectful to her and never caused her any problems. Ex. 77 (Aff. of J. Butler, ¶ 6). Moss Point High School football coach Jerry Alexander remembered Bo as hardworking and that he enjoyed playing football. Bo was quiet and never gave him any problems. Ex. 76 (Aff. of J. Alexander, ¶¶ 4-5).

Ollie was so proud of her baby boy when he graduated from Green County High School – the only one of her children to do so. Ex. 22 (Aff. of O. Varghese, ¶ 26). His graduation was a cause for a major celebration in the family. Ex. 31 (Aff. of R. Nathan, ¶ 25). Ollie rented a limo for his family and friends and hung his diploma proudly on her bedroom wall. Ex. 31 (Aff. of R. Nathan, ¶ 25). Bo's family and friends remembered him as a fun-loving person who loved to joke around and make people laugh. Ex. 68 (Aff. of E. Thompson, ¶¶ 5-6); Ex. 67 (Aff. of S.R., ¶ 9); *see also* Ex. 42 (Aff. of L. Nathan, ¶¶ 9, 18) ("Bo would give anybody the shirt off his back. Bo cared about people. Bo was helpful and trustworthy.").

Bo was the protector in his family and would do anything for them. *See* Ex. 63 (Aff. of T. Norman, ¶ 27); Ex. 31 (Aff. of R. Nathan, ¶ 24); Ex. 67 (Aff. of S.R., ¶ 8); Ex. 39 (Aff. of C. McCorvey, ¶¶ 6,12). For instance, when Mary was eight months pregnant at fifteen years old, her P.E. teacher still wanted her to run during gym

class. Bo got upset with her teacher. Ex. 23 (Aff. of M. Stanton, ¶ 5). Similarly, when the convenience store where Bo's mother was working was robbed, Bo watched the surveillance tape and found out who had done it. He fought the man responsible because of how he had endangered his mother. Ex. 40 (Aff. of M. Jackson, ¶ 27).

Bo's close friends and family members always knew him to be working, or looking for work. Ex. 68 (Aff. of E. Thompson, ¶¶ 5-6). And he worked hard. Ex. 63 (Aff. of B. Grimes, ¶ 5); *See also* Ex. 66 (Aff. of T. Tucker, ¶¶ 24, 26) ("Bo worked very hard. Bo always had a job."). He worked for Brass Hangers Cleaners in Gautier for several years. Ex. 66 (Aff. of T. Tucker, ¶ 26). At the cleaners, Bo kept quiet and to himself, reliably completing his work. Ex. 78 (Aff. of M. Tucker, ¶ 4); Ex. 38 (Aff. of Y. Broadus, ¶¶ 4-5). Bo then started working at the Community Cleaners in Moss Point, where he burned his hand badly with the presser and had to go to the hospital. Ex. 70 (Aff. of A. Ash, ¶ 21); Ex. 63 (Aff. of B. Grimes, ¶ 8); Ex. 21 (L. Galloway III – SRHS Records, at Bates-368-91). Later, he worked for a moving company and then Burger King. Ex. 70 (Aff. of A. Ash, ¶ 21); Ex. 46 (Aff. of R. Molden, ¶ 27); Ex. 41 (Aff. of P. Brandon, ¶ 3). Bo helped his family members and friends and respected the adults in his life. Ex. 30 (Aff. of M. Anderson, ¶ 21); Ex. 26 (Aff. of K. Taylor, ¶ 19); Ex. 31 (Aff. of R. Nathan, ¶ 10); Ex. 41 (Aff. of P. Brandon, ¶ 8); Ex. 69 (Aff. of L. Galloway, Jr., ¶¶ 15-16); Ex. 75 (Aff. of J. Jackson, ¶ 4); Ex. 63 (Aff. of B. Grimes, ¶ 6). If his Aunt Kaffie told him to do something, he would do it. Ex. 26 (Aff. of K. Taylor, ¶ 4). He would help her around the house. *Id.* Bo also

helped Otis Taylor as he got older. Ex. 22 (Aff. of O. Varghese, ¶ 62). Otis would sit in the living room and urinate in a bucket instead of getting up to go to the bathroom. *Id.* Bo would empty the bucket for him. *Id.* Bo would stop by Melvin Anderson's (his half-sister San's father) home to help him out around the house. Ex. 30 (Aff. of M. Anderson, ¶ 21). Bo would cut his grass or clean up the yard. *Id.* Melvin would give him a little cash if he had any to spare, but Bo never expected it. *Id.*

Ishaunda McMillian, one of Bo's first girlfriends, recalled how sweet and sensitive he was with her when they were seeing each other in junior high and high school. When Ishaunda's mother moved her to Gautier, Bo was heartbroken. Ex. 38 (Aff. of I. McMillian, ¶ 7). He decided to move in with his father in Gautier so they could continue their relationship, but he was miserable at his father's house. Ex. 38 (Aff. of I. McMillian, ¶¶ 8-9). Bo's middle school girlfriend, Sophia Loper, recalled that Bo spent a lot of time at her home with her family, and she "was always comfortable having him at [her] home with [her] family" because he got along well with everybody. Ex. 29 (Aff. of S. Loper, ¶¶ 7, 13, 14). Bo was always "a very caring and sensitive boyfriend," and he liked to take care of and protect people. *Id.* ¶¶ 4, 15, 16. Precious Brandon, a girlfriend of Bo's, always felt he treated her with respect. Ex. 41 (Aff. of P. Brandon, ¶ 17). He never hit her or hurt her; he never even raised his voice with her. *Id.* ¶¶ 18-19. They were sexually active, and Bo never asked her to do anything that she felt uncomfortable doing. *Id.* ¶ 17.

Over the years, Bo had many girlfriends, but Shamekia Moore, the mother of his two oldest children, was his one true love. Ex. 46 (Aff. of R. Molden, ¶ 23); Ex. 39 (Aff. of C. McCorvey, ¶ 11). Playing out a script that seemed to have been written generations before, *see supra* pp. 16-17, 48-51, 75, Bo and Shamekia, too, endured a turbulent and trying off-and-on relationship. Ex. 30 (Aff. of M. Anderson, ¶ 22); Ex. 63 (Aff. of T. Norman, ¶ 26). Each breakup devastated Bo because it meant he would not get to see his children. *Id.* Shamekia would use the children to hurt Bo, saying he could not see them. Ex. 30 (Aff. of M. Anderson, ¶ 22). Missing his children, Bo would try to patch things up, but each reunion was short lived. *See Id.* With his father emotionally unavailable to him, Bo would turn to other older men to counsel him about his troubles with Shamekia. Ex. 30 (Aff. of M. Anderson, ¶ 22); Ex. 44 (Aff. of V. Bishop, ¶ 5); Ex. 31 (Aff. of R. Nathan, ¶ 20).

At twenty-four years old, Bo was convicted of a carjacking[20] for an incident that had occurred when he was eighteen. Ex. 61 (L. Galloway III – Carjacking Conviction, at Bates-5853-59). He served in the trustee zone at the Jackson County Adult Detention Center – a zone that rewarded offenders for good behavior and allowed them to work outside of the jail. Ex. 48 (Aff. of Porter Bell, ¶ 16). As part of his sentence, Bo participated in the Regimented Inmate Discipline (RID) Program through the Mississippi Department of Corrections. *Id.* ¶ 12. He adjusted well to the demanding program and structured environment and had no discipline problems.

[20] This conviction and trial counsel's failures to investigate it pretrial and mitigate it to the jury are discussed in detail *infra* pp. 77-83.

Id. ¶ 13; Ex. 64(L. Galloway III – MDOC Pen Pack 2 of 2). In the RID program, Bo's only focus was getting out and returning to his children and to Shamekia. Ex. 48 (Aff. of Porter Bell, ¶ 14); Ex. 39 (Aff. of C. McCorvey, ¶ 23).

Bo wanted to provide a home for Shamekia and his children and finally have the stable family he had craved since childhood. Ex. 48 (Aff. of Porter Bell, ¶ 15). Bo had always accepted Shamekia's daughter by another father as his own. Ex. 23 (Aff. of M. Stanton, ¶ 32); Ex. 24 (Aff. of L. Taylor, ¶ 49); Ex. 22 (Aff. of O. Varghese, ¶ 48). But when Bo got out of prison, things quickly fell apart. Shamekia rejected Bo not long after he got out of the RID program and Bo would have to watch a stream of new men coming to her house. *Id.* ¶ 20. Shamekia would give him a hard time for wanting to have a relationship with his son K.F. – who had a different mother, Carla Foster, whose addiction issues and child neglect created their own stress for Bo. Ex. 24 (Aff. of L. Taylor, ¶¶ 50-51). Shamekia would scream at Bo and get violent with him when they fought. Ex. 31 (Aff. of R. Nathan, ¶ 20); Ex. 41 (Aff. of P. Brandon, ¶ 10); Ex. 67 (Aff. of S.R., ¶ 11).

When their relationship became irreconcilable, Bo, now twenty-five, had to move back home with his mother. Ex. 24 (Aff. of L. Taylor, ¶ 54). He would sleep on the couch or in the bed with Ollie. *Id.* He was depressed that he was having a hard time finding work and that Shamekia kept him from his children. *See id.* ¶ 46. He finally got a job at Burger King where his sister San was a manager. *Id.* ¶ 56. At Ollie's home, Bo was quiet and mostly kept to himself. Ex. 23 (Aff. of M. Stanton, ¶ 32). He set up the master bathroom to use as his own space and kept his clothes in

there. He would retreat to the room to play video games. Ex. 24 (Aff. of L. Taylor, ¶ 54). The stress of his relationship with Shamekia wore on him, especially when she would use his kids against him. Ex. 22 (Aff. of O. Varghese, ¶ 49); Ex. 44 (Aff. of V. Bishop, ¶ 7); Ex. 23 (Aff. of M. Stanton, ¶ 32); Ex. 41 (Aff. of P. Brandon, ¶ 10).

Bo's three children meant the world to him. Ex. 23 (Aff. of M. Stanton, ¶ 28); Ex. 22 (Aff. of O. Varghese, ¶ 43); Ex. 41 (Aff. of P. Brandon, ¶ 11); Ex. 46 (Aff. of R. Molden, ¶ 23); Ex. 70 (Aff. of A. Ash, ¶ 20); Ex. 24 (Aff. of L. Taylor, ¶ 45); Ex. 31 (Aff. of R. Nathan, ¶ 20); Ex. 39 (Aff. of C. McCorvey, ¶ 24). Sophia Loper remembered that even when they were dating in middle school, Bo "used to talk about how much he wanted to be a father someday" and that when he had his first daughter "he was so proud and happy to be a father." Ex. 29 (Aff. of S. Loper, ¶ 20). Bo did not want to repeat the mistakes of his father; he wanted to be a better father for his children. Ex. 41 (Aff. of P. Brandon, ¶ 13). LaTerrance also recalled that "Bo loved his children more than anything. The happiest times for Bo were the birth of his daughter and his graduation from high school . . . Bo was very good with all children, not just his own." Ex. 42 (Aff. of L. Nathan, ¶¶ 16, 17); *see also* Ex. 28 (Aff. of P. McCorvey, ¶ 10); Ex. 66 (Aff. of T. Tucker, ¶¶ 24, 25); Ex. 41 (Aff. of P. Brandon, ¶ 11). Bo's nephew, S.R., the son of his sister, San, was also very close to his "Uncle BoBo." Ex. 67 (Aff. of S.R., ¶¶ 2, 5). Bo was a positive influence on S.R., mentored him, and encouraged him to stay out of trouble and follow his dreams. *Id.* ¶¶ 5-7. Their relationship meant a lot to S.R. *Id.* ¶ 15.

d. Counsel failed to uncover and present Mr. Galloway's parents' own difficult upbringings and the familial patterns imprinted on Mr. Galloway from generations past.

Beyond Mr. Galloway's own life, the jury also never heard anything about his parents' background. A parent's upbringing and experiences inherently affect the manner and environment in which a parent rears a child. To know Mr. Galloway and understand the influences that shaped his life, the jury also needed to know about the background of his parents. At a minimum, defense counsel needed to investigate and uncover this background. *See* ABA Guidelines, *Guideline 10.7 - Investigation, Commentary*, 31 Hofstra L. Rev. 913, 1025 (Feb. 2003) ("A multigenerational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment."); *id.* at 1061 ("[A]n understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning."). Had counsel conducted a competent mitigation investigation, it would have revealed the following information about Mr. Galloway's parents and their background:

Leslie Galloway's Mother: Bo's mother was born Ollie Taylor in Moss Point to Marie Dixon. Ex. 22 (Aff. of O. Varghese, ¶¶ 54-56). Ollie Taylor grew up thinking that Otis Taylor was her father, but learned years later that her mother, Marie, had an affair with their neighbor Willie Holbrooks, and that he was likely her father. *Id.* Marie Dixon (Bo's maternal grandmother) was full Choctaw, born to Sarah Dixon (great grandmother), on indigenous land near Philadelphia, Mississippi. Sarah

Dixon and her children grew up in extreme poverty and in cultural isolation. Ex. 80 (Aff. of R. Wilson, ¶ 13). Before Ollie Taylor's birth, Marie at a young age had had several children on the reservation: son Stanley Dixon, daughter Shirley Dixon, son Ken Dixon, and daughter Edna Barbara Dixon. Stanley, Shirley, Ken, and Barbara all had different fathers. Ex. 68 (Aff. of E. Thompson, ¶ 12). Marie left the reservation when her children were young, and left them all behind. Ex. 80 (Aff. of R. Wilson, ¶ 6).

Marie joined the Army during World War II and started to date Otis Taylor when she returned to Mississippi. Ex. 68 (Aff. of E. Thompson, ¶ 18). She temporarily left Otis because he was drinking and seeing other women on the side, and moved – pregnant – to Moss Point on her own. Ex. 22 (Aff. of O. Varghese, ¶¶ 53, 56). However, not long after, Otis followed her to the coast, and they married. Marie had three children in Moss Point while married to Otis – Francis, Kaffie or "Diane," and Ollie – though, again, Otis may not have been the father of them all. Ex. 68 (Aff. of E. Thompson, ¶ 12).

Marie left her Choctaw past behind and never taught her Moss Point children (Ollie, Kaffie or "Diane," and Francis) about the tribe's tradition and customs. Ex. 22 (Aff. of O. Varghese, ¶ 52). Though their mother tried to distance herself and her daughters from Choctaw culture, when Ollie was growing up, the other children at school would call her and her sisters "half-breeds." Ex. 26 (Aff. of K. Taylor, ¶ 15). They would come home in tears. *Id.*

Until Marie's daughter Barbara left the reservation at seventeen years old for Moss Point in an (ultimately unsuccessful) attempt to reunite with Marie, Ollie and her sister Diane did not even know they had other siblings, or that they had a maternal grandmother who was alive and living on the Choctaw reservation. Ex. 68 (Aff. of E. Thompson, ¶ 26); Ex. 22 (Aff. of O. Varghese, ¶ 52). Ollie didn't meet her grandmother Sarah until she was about twenty years old.

Otis related to Marie, Ollie and her sisters through violence. Ex. 68 (Aff. of E. Thompson, ¶ 20); Ex. 22 (Aff. of O. Varghese, ¶ 58). Otis burned with jealousy of his wife and raged with a volatile temper. Ex. 68 (Aff. of E. Thompson, ¶ 20). Just as Red would later do, Otis beat Ollie. Ex. 22 (Aff. of O. Varghese, ¶ 58). Once a neighbor had to call the police because she could hear Ollie screaming. *Id.* When the police arrived, and again previewing her later life with Red, Ollie's face was caked in blood. *Id.*

Otis did not limit his abuse to beatings. At a very young age, Ollie witnessed Otis raping her sister Diane. *Id.* When Marie was in the hospital for a leg amputation, Otis also raped Ollie twice. Since she was just fifteen years old. *Id.* Ollie then ran away from home, and would sleep at friends' houses or in her sister Barbara's car. *Id.* ¶ 59. Ollie was sexually assaulted yet again by her sister's male friend when she was a teenager. *See* Ex. 81 (O. Varghese- SRH Mental Health, at p.2).

In Moss Point, Marie gained a reputation as a troublemaker, and became known for having many men. Ex. 26 (Aff. of K. Taylor, ¶ 14); Ex. 63 (Aff. of T.

Norman, ¶ 4); Ex. 30 (Aff. of M. Anderson, ¶ 11). Everyone in the neighborhood knew that she engaged in sex work, even though she was a married woman. Ex. 75 (Aff. of J. Jackson, ¶ 7).

Marie's children could see that something was not right. Marie seemed mentally ill. Ex. 68 (Aff. of E. Thompson, ¶ 28). She had a difficult time expressing affection towards her children and her moods swung wildly. Her mind "didn't process information in the same way that it did for others." *Id.*

Leslie Galloway's father Red: As his children would later on, Bo's father, Leslie "Red" Galloway Jr., grew up in poverty. Ex. 22 (Aff. of O. Varghese, ¶ 23). He struggled in school and had to repeat several grades, including the first, fourth, and seventh. Ex. 82(L. Galloway, Jr. – Moss Point HS Records, at Bates-9299). He was an extremely quiet child and young man. The school system viewed his shyness as a "defect needing correction" in every grade through ninth grade, when he dropped out. *Id.* Though he was quiet, Red had a reputation around Moss Point for getting into fights. When he was around eighteen years old, he got into a fight with a man named Douglas Francis over a woman. Ex. 69 (Aff. of L. Galloway Jr., ¶ 8); Ex. 68 (Aff. of E. Thompson, ¶ 9); Ex. 22 (Aff. of O. Varghese, ¶ 7); Ex. 30 (Aff. of M. Anderson, Jr., ¶ 8). Red beat Douglas up the first time, but by the second time they fought, Douglas was waiting for him and shot him multiple times in the head and shoulders. Ex. 68 (Aff. of E. Thompson, ¶ 9); Ex. 69 (Aff. of L. Galloway Jr., ¶ 8). One of the bullets remained in Red's body near his spinal cord, leaving him physically disabled and causing periodic seizures. Ex. 22 (Aff. of O. Varghese, ¶ 7);

Ex. 69 (Aff. of L. Galloway, Jr., ¶ 8); Ex. 33 (M. Anderson – Youth Court Records, at Bates-111106).

e. Counsel failed to investigate the carjacking aggravating circumstance used to obtain Mr. Galloway's death sentence.

To obtain Mr. Galloway's 2010 death sentence, the State relied, as an aggravating circumstance, on a May 17, 2007, carjacking conviction from Jackson County. Despite being on notice of this alleged aggravator, counsel made no effort to obtain the full publicly available court file, or the Jackson County Public Defender's Office complete file on Mr. Galloway, though it was offered to them. Ex. 51 (Aff. of R. Rudder, ¶ 8); Ex. 52 (Aff. of A. Galle, ¶ 5). This conduct was all the more baffling because trial counsel Charlie Stewart acknowledged that "it might have been helpful to know how aggravated" the carjacking was – including whether it was a matter of only the car being taken or also involved threats to kill. Ex. 19 (Aff. of R.C. Stewart, ¶ 29). In fact, as explained *infra* p. 80, the facts of the purported "carjacking" were by no means aggravated.

Had trial counsel conducted even the most cursory of paper investigations they would have learned that this prior conviction rested on a dire conflict of interest. By obtaining the records on Mr. Galloway's carjacking conviction, post-conviction counsel learned that Wendy Martin, the lawyer who represented Mr. Galloway in his plea, had previously served as the prosecutor in the very same case. Ex. 61 (L. Galloway III – Carjacking Conviction at Bates-005818, 005872, 005885-90); Ex. 62 (Galloway Plea Transcript – Carjacking). Shortly after discovering this fact, and realizing other failures on Ms. Martin's part, post-conviction counsel filed

a Motion to Vacate Conviction and Sentence on May 1, 2015, raising two claims: 1) that Wendy Martin's conflict of interest, neither disclosed to nor waived by Mr. Galloway, violated his constitutional rights to due process and the effective assistance of counsel; and 2) that Mr. Galloway was denied the effective assistance of counsel due to Ms. Martin's failure to investigate the case. Ex. 83 (Mot. To Vacate Carjacking Conviction). Mr. Galloway amended the motion on June 3, 2015, with additional supporting evidence. Ex 84 (Amend. to Mot. to Vacate Carjacking Conviction). Mr. Galloway then amended the motion again to include a new claim, under *Brady v. Maryland*, 373 U.S. 83 (1963), after learning new, exculpatory information from the complainant that had not been disclosed by the State to trial counsel. Ex. 85 (Second Amend. to Mot. To Vacate Carjacking Conviction).

Upon review of his post-conviction petition filed in Jackson County, the trial court ruled that Galloway's PCR claim was time barred under Mississippi's Uniform Post-Conviction Collateral Relief Act (UPCCRA), having been filed more than seven years after Galloway's conviction for carjacking. Ex 86 (Decision of Circuit Court). On appeal, this Court agreed. *Galloway v. State*, 298 So. 3d 966, 968 (Miss. 2020), *reh'g denied* (Aug. 13, 2020) ("We agree with the trial court that Galloway's PCR claim is time barred under the UPCCRA."). However, despite upholding the time bar, and affirming the lower court's ruling on the merits, "which we are not permitted to second guess" this Court also noted "great consternation with the obvious lack of diligence on Martin's part in this case." *Galloway*, 298 So. 3d at 976.

The UPCCRA required that Mr. Galloway's carjacking conviction be challenged in post-conviction within three years of his guilty plea. His capital trial counsel's appointment in December 2008 fell easily within this timeframe. Ex. 17 (Aff. of G. Rishel at 2). Therefore, had trial counsel investigated this conviction, they would have discovered the glaring conflict of interest and could have challenged the carjacking before the statute of limitations elapsed. *See Galloway v. Cain*, No. 1:20-CV-00271-HSO-RPM, ECF 12, 8 (S.D. Miss.) (July 26, 2021) ("Galloway's carjacking conviction had not yet expired at the time of his 2010 conviction and sentence for murder. Thus, he could have initiated habeas proceedings on the carjacking conviction prior to the expiration of his sentence and avoided the jurisdictional issue now confronting the Court."). This failure to obtain the file, investigate, and raise this challenge undeniably prejudiced Mr. Galloway. *See Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (counsel was ineffective in failing "to make reasonable efforts to obtain and review materials that counsel [knew] the prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial"). *See also Sea v. State*, 49 So. 3d 614 (Miss. 2010) (holding that defendant was prejudiced by counsel's deficient performance in failing to challenge, and instead introducing, evidence of defendant's two prior convictions). As the Commentary to Guideline 1.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases states: "Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make extraordinary efforts on behalf of the accused. As discussed *infra*, these efforts may need to include

litigation or administrative advocacy outside the confines of the capital case itself (*e.g.*, a collateral attack to invalidate a predicate conviction . . .)." 31 Hofstra at 923. (citing inter alia *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (disallowing use of prior conviction used in aggravation); *People v. Johnson*, 506 N.E. 1177, 1178 (N.Y. 1987) (vacating that conviction)). *See also* Commentary to ABA Guideline 10.8 (Duty to Assert Legal Claims), text accompanying nn.230-31.

Along with the investigation revealing the conflict of interest, trial counsel would have learned about the circumstances surrounding the aggravator, which if presented, would have decreased the weight afforded by the jury. Had counsel obtained the plea transcript, they would have learned of its extremely favorable description of the facts:

> Mr. Galloway was – just turned 18 when this carjacking happened. He was in high school. Basically, your Honor, what happened is that they had been drinking a little, they had gotten in the car with the girls. They had been riding around. The girls decided that they wanted them to get out. Mr. Galloway agreed to put $5 worth of gas in the car. They drove around a little more, and they got into an argument. He pulled the girl out of the car and drove home, because he didn't want to walk. This is what the argument started over, about him getting out of the car and walking. He was very young.

Ex. 62 (Galloway Plea Transcript – Carjacking, at 24-26). Capital trial counsel also would have observed many red flags in the discovery that called into question the scenario alleged by the complainant, Monica Simmons. For instance, Ms. Simmons initially identified Marcus Jackson and a boy named Dewayne as the ones who took her car. Ex. 53 (Jackson County Public Defender File, at Bates 10). Next, she identified Paul Martin to law enforcement, *id.* at Bates 6, 19, and to Paul Martin's

sister from a group photograph. Ex. 87 (Aff. of Paul Martin, ¶ 11). Ms. Simmons did not identify Mr. Galloway until Paul Martin's sister Kim Martin forced Mr. Galloway at gunpoint to go over to Ms. Simmons's house, in order to clear her brother's name. Ex. 40 (Aff. of Paul Martin, ¶¶ 35-36); Ex. 87 (Aff. of Paul Martin, ¶¶ 13-14).

Trial counsel never interviewed Mr. Jackson, Mr. McCorvey, and Mr. Martin, even though they all would have all been available to testify on Mr. Galloway's behalf while his capital case was pending. Ex. 40 (Aff. of M. Jackson, ¶¶ 42-43); Ex. 39 (Aff. of C. McCorvey, ¶¶ 25-26); Ex. 87 (Aff. of Paul Martin, ¶ 15). Such inaction on their part amounted to deficient performance. "Failure to call a witness may be excused based on the belief that the testimony will not be helpful; such a belief in turn must be based on a genuine effort to locate or evaluate the witness, and not on a mistaken legal notion or plain inaction." *Davis v. State*, 743 So. 2d 326, 339 (Miss. 1999).

An investigation would have additionally revealed other suspicious facts: that Ms. Simmons and Ms. Fairley knew Mr. Galloway's friend Marcus Jackson and that they had been talking to him for weeks; that the girls were older than Mr. Jackson and Mr. Galloway. Ex. 40 (Aff. of Paul Martin, ¶ 31); that they were among a group of girls who would often come to Moss Point to meet boys and party, and that they would take a lot of pills and do a lot of drugs. *Id.*; Ex. 39 (Aff. of C. McCorvey, ¶ 21). It would have also revealed that sometimes the Moss Point boys would drive the girls back home in the girls' cars because the girls did not know the way home. *Id.*

Basic investigation would further have revealed that Ms. Simmons and Ms. Fairley called Mr. Jackson and asked him to meet them at the L'il Super convenience store in Moss Point so that they could all go to a party together at Paul Martin's house. Ex. 40 (Aff. of Paul Martin, ¶ 32). And it would have revealed that Ms. Simmons was having problems with her boyfriend that night and that her boyfriend was following her car trying to get her to stop when she pulled off and took another route. *Id.* ¶¶ 33-34.

Because trial counsel did not investigate and learn of these favorable facts, they could not determine whether to present them. Any decision about whether or not to present this evidence to mitigate the aggravating circumstance cannot be strategic when trial counsel did not even have the information in the first place. *See, e.g.*, *Wiggins*, 539 U.S. at 521-22; *Rompilla*, 545 U.S. at 390-93; *Wilson*, 81 So. 3d at 1085.

Counsel's failure to investigate this prior conviction was thus deficient and prejudiced Mr. Galloway, in violation of his federal and state constitutional rights to the effective assistance of counsel and not to be subjected to cruel and unusual punishment. U.S. Const. amends. VI, VIII, XIV; Miss. Const. art. 3, §§ 14, 24, 26, 28.

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Mr. Galloway's counsel failed to conduct an adequate mitigation investigation. They failed to interview family members, friends, employers, teachers and other potential mitigation witnesses, and failed to collect the

voluminous number of mitigating documents available. These witnesses and records would have provided a powerful mitigation case in favor of a sentence less than death. Counsel did not make a decision supported by reasonable professional judgment. Rather, they simply fell down on the basic job of investigating. "[C]ounsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision . . . because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.'" *Wiggins*, 539 U.S. at 522 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *see also United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989) ("[C]ounsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."); *Loyd v. Whitley*, 977 F.2d 149,157 (5th Cir. 1992) (finding defense counsel's failure to pursue crucial line of investigation in a capital murder case was not professionally reasonable); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) (explaining that tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum). Trial counsel's failure to investigate was not "part of a calculated trial strategy," but was "likely the result of either indolence or incompetence." *Anderson v. Johnson*, 338 F.3d 383, 393 (5th Cir. 2003) (citation omitted).

Even assuming, arguendo, that Mr. Galloway was unhelpful in providing his own background information, as trial counsel claims, "this does not excuse counsel's obligation to obtain mitigating evidence from other sources." *Douglas v. Woodford*,

316 F.3d 1079, 1088 (9th Cir. 2003); *see also Davis*, 87 So. 3d at 469, 474 (counsel's duty to conduct an "independent" investigation violated where counsel relied only on the witnesses the client suggested). Thus, counsel's performance fell below a reasonable standard.

2. Counsel's repeated unprofessional failures to investigate prejudiced Mr. Galloway's sentencing, and but for these failures there is a reasonable probability of a different outcome.

Counsel's failure to investigate readily available mitigation witnesses and to obtain readily available records prejudiced Mr. Galloway. For Mr. Galloway, counsel's failures spelled, in a word, death.

Beyond a showing of counsel's deficient performance, the law requires a showing of a reasonable[21] probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. A reasonable probability is a probability that is sufficient to undermine confidence in the outcome. *Id.* at 694. Based on the facts reviewed above, and the applicable law, that test is easily met here.

[21] "[T]he adjective is important." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*; *see also Strickland*, 466 U.S. at 693 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."); *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) ("[A] defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice[.]"). A "reasonable probability of a different result" is thus less than a preponderance of the evidence. *Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999) (*Strickland*'s prejudice standard "is not a stringent one. It is less demanding than the preponderance standard.").

a. The law favors a finding of prejudice on these facts.

In *Lockett v. Anderson*, the Fifth Circuit noted that under Mississippi law, a death sentence requires unanimity. 230 F.3d 695, 716 (5th Cir. 2000) (citing Miss. Code Ann. § 99-19-103). "If we can conclude that a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established." *Id.* *See also Wiggins*, 539 U.S. at 537 ("Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."); *Lewis v. Dretke*, 355 F.3d 364, 369 (5th Cir. 2003) (had adequate mitigation been presented, "it is quite likely that it would have affected the sentencing decision of at least one juror"); *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (noting that counsel had to convince only one of twelve jurors to refuse to go along with a death sentence). There can be no question that Mr. Galloway has made such a showing here.

In *Williams v. Taylor*, the Court stressed that while the evidence adduced at trial "may not have overcome" the prosecution's evidence of aggravating circumstances, "the graphic description of [the defendant's] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." 529 U.S. 362, 398 (2000). The Court concluded: "Mitigating evidence unrelated to [aggravating circumstances] may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.*; *see also Brown v. State*, 749 So. 2d 82, 91 (Miss. 1999) ("The very purpose of mitigation is to reveal

evidence that the defendant is not as bad a person as might be believed from the evidence introduced at the guilt phase of the trial."). *See also Williams*, 529 U.S. at 396; *Lewis*, 355 F.3d at 369; *Haliym v. Mitchell*, 492 F.3d 680, 717-18 (6th Cir. 2007) (prejudice found despite fact that the petitioner was involved in the stabbing death of two people); *Mason v. Mitchell*, 543 F.3d 766, 769 (6th Cir. 2008) (prejudice found even though the petitioner raped a woman and beat her to death using "a blood-stained board with protruding nails"). There can be no question that was the case here. *See* Ex. 88 (Aff. of Z. Lukens, ¶ 7) (many jurors were looking for a reason to vote for a life sentence).

b. The facts show the dismal and prejudicial sentencing presentation resulting from counsel's lack of investigation.

Having failed to investigate Mr. Galloway's background, defense counsel gave the jury virtually no reason to spare his life. During its closing argument counsel did not even mention what little evidence it had gathered in mitigation and botched the one detail they offered about their client (his age). R. 862.

All that counsel were left with was to present Mr. Galloway's mother "to beg the jury not to kill her son and to show that Mr. Galloway was loved and could still have a positive impact on his family while he was in prison," *see* Ex. 17 (Aff. of G. Rishel, p. 3), a constitutionally incomplete strategy[22] considering the wealth of other

[22] *Sears*, 561 U.S. at 953 ("[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The 'reasonableness' of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.").

humanizing evidence available in mitigation. *See Woodward*, 635 So. 2d at 810 (finding counsel ineffective where he only argued "redeeming love" at the close of the sentencing phase, rather than presenting available mitigation evidence); *Sears v. Upton*, 561 U.S. at 955-56 ("We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant . . . A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation.").

To be sure, it was not only Mr. Galloway's mother. The defense presented eight other witnesses at sentencing, but their meager offerings spanned a mere twenty-one pages of transcript, following a redundant and limited questioning template. R. 815-21; 826-40. Two sheriff's deputies from the Harrison County Adult Detention Center testified that Mr. Galloway had not caused them problems at the jail while he was awaiting trial, and five family members and one friend testified that Mr. Galloway was a good father to his children, that they cared about him, and that they would visit him in prison if he were sentenced to life. *Id.* Counsel failed to ask any of these witnesses about any aspects of Mr. Galloway's childhood or background. Trial counsel had by the time of trial failed to interview most of these witnesses, and failed to prepare a single family member or friend for their

testimony. Ex. 89 (Aff. of J.G., ¶¶ 12, 13); Ex. 70 (Aff. of A. Ash, ¶¶ 24, 25); Ex. 44 (Aff. of V. Bishop ¶ 13); Ex. 69 (Aff. of L. Galloway Jr., ¶ 18); Ex. 23 (Aff. of M. Stanton ¶ 38); Ex. 22 (Aff. of O. Varghese, ¶ 68).

The first family witness to testify for the defense was J.G., Mr. Galloway's younger half-sister by his father. Like witness Angelo Ash, she spoke to trial counsel for the first time when counsel called her to the stand. Ex. 89 (Aff. of J.G., ¶ 13); Ex. 70 (Aff. of A. Ash, ¶¶ 23-25).[23] Thirteen years old at the time of trial, J.G. came to the courthouse at the request of Ollie Varghese, Mr. Galloway's mother. Mr. Rishel's unpreparedness is flagrantly evident from the record. After J.G. stated her first name J[redaction], Mr. Rishel asked her how to spell it and then how to pronounce it, and then, clearly still having difficulty with her name, he offered instead to "just call you Ms. Galloway." R. 826. Mr. Rishel only asked J.G. five questions of any substance, in what would soon become a rote script: 1) whether she was close to Mr. Galloway; 2) whether he would help her in a jam; 3) whether she loves him; 4) whether she would visit him in prison; and 5) whether that would be good for her. R. 826-27. Had she been asked, J.G. would have also been willing to testify that she and her big brother Bo would joke around, laugh, and have fun together, that Bo is a great father to his three children whom he adores, and that he would often willingly help out their father who had a lot of physical problems.

[23] J.G. and Mr. Ash may well have been called by counsel on the fly simply because they had showed up at the courthouse. The day before their testimony, counsel informed the court that he had only four family members and Dr. Smallwood remaining for the final day of testimony. R. 822. On the last day of trial, he had added two witnesses, to make it five family members and one friend. R. 826-40.

Ex. 89 (Aff. of J.G., ¶ 12).

Trial counsel's next witness was Vencin Bishop, then boyfriend and current husband of Mr. Galloway's sister LaShandra Taylor, who had only known Mr. Galloway for a brief period of time as an adult. Ex. 44 (Aff. of V. Bishop, ¶ 4). Attorney Christensen, who had not been involved in the preparations for the penalty phase prior to trial, examined Mr. Bishop.[24] *See* Ex. 20 (Aff. of D. Christensen, ¶ 5). Ms. Christensen asked Mr. Bishop only how often he would see Mr. Galloway prior to his arrest, whether he had helped Mr. Galloway, whether Mr. Galloway was a good father to his children, whether he had visited him in the jail, and whether he would visit him in prison. R. 828-29. Had he been asked, Mr. Bishop would have told the jury how much stress Bo's relationship with Shamekia Moore caused him, especially in the months leading up to his arrest for this crime. Ex. 44 (Aff. of V. Bishop, ¶ 8). He would have testified that Mr. Galloway was a mama's boy and that his children were the most important thing in his life. *Id.* ¶ 7. He would have told the jury how hard it was on Mr. Galloway when Shamekia would keep the children away from him and how Mr. Bishop would try to counsel Bo about their relationship. *Id.* ¶¶ 5, 7. He would have told the jury how helpful Mr. Galloway was to him around the house working on odd jobs, to supplement the small income he was making at his own jobs. *Id.* ¶ 6. He would have also testified

[24] Of the family witnesses, only Vencin Bishop recalls that Mr. Rishel reviewed with him the questions he would be asking him beforehand – and then, only in the hallway of the courthouse just before his testified. Ex. 44 (Affidavit of V. Bishop, ¶15). Then, Ms. Christensen, whom Mr. Bishop had never met before and who had no responsibility for the penalty phase, was the attorney to examine him on the stand. R. 828; Ex. 44 (Affidavit of V. Bishop, ¶15).

that when he saw Mr. Galloway in the days before his arrest, he was not acting himself. *Id.* ¶ 8. Mr. Bishop could tell that something was wrong with him, as Mr. Galloway had gotten a ride home from him and wouldn't get out of the car. *Id.* He had a blank stare on his face and was in a very serious mood. *Id.* This evidence could have been used to support evidence of Mr. Galloway's mental health impairments, as described more fully above.

Following Mr. Bishop, the defense called Mr. Galloway's childhood friend Angelo Ash. Like J.G., Mr. Ash did not meet trial counsel until he was called to the stand, with no preparation for the questions counsel would ask. Ex. 70 (Aff. of A. Ash, ¶¶ 24-25). Trial counsel asked Mr. Ash nothing that contributed to the fuller portrait the jury so badly needed to see. Instead, the defense refrain continued: was Mr. Galloway a good father to his children, and would you visit him in jail? R. 831-32. Trial counsel never asked Mr. Ash about Bo's childhood and what it was like growing up for them. Had he been asked, Mr. Ash could have told the jury how Bo, their friend Rufus Molden, and he loved to play video games, how they would ride their bikes all over town. Ex. 70 (Aff. of A. Ash, ¶ 7). Mr. Ash would have shared with the jury how Mr. Galloway's mother wasn't around for him because she was working all the time and how his sister San would have to take care of him and his sister Mary. *Id.* ¶ 9. He would have told the jury how Mr. Galloway's father was absent from his life, how Mr. Galloway worried about his mother, and how he (Mr. Ash) had observed signs of Ollie Varghese's depression such as her crying alone in her room. *Id.* ¶ 14. He would have told the jury how Mr. Galloway wanted so badly

to work things out with Shamekia Moore because he loved his children more than life itself and how Mr. Galloway was a hard worker and always employed. *Id.* ¶¶ 20, 21.

Mr. Galloway's father, Leslie Galloway Jr., testified next. Mr. Galloway Jr., too, did not know the questions trial counsel would ask him until he was on the stand. Ex. 69 (Aff. of L. Galloway Jr., ¶ 19). As with the preceding witnesses, trial counsel asked him only whether he loves his son, whether he would visit him in prison, and whether Mr. Galloway is a good father to his children. R. 833-34. Mr. Rishel's lack of preparation tripped him up when Mr. Galloway, Jr. admitted that he had not visited his son while he was incarcerated close by at the Harrison County jail. R. 833. Still, Mr. Rishel did not stray from script: as with every other witness, he asked Mr. Galloway, Jr. if he would visit his son at Parchman, more than a five-hour drive from the Gulf Coast, if he was sentenced to life. *Id.*

Mr. Galloway's sister, Mary Taylor, followed their father. Again, the record exposes how unprepared trial counsel was for her testimony and that he was asking her questions for the first time on the stand. His questioning also revealed how little he knew about his own client and his family. Mr. Rishel asked Ms. Taylor if Mr. Galloway was her older or younger brother. Even after she answered "younger," Mr. Rishel responded, "How much older than you is he?" R. 835. When Ms. Taylor testified that she and Mr. Galloway are "like a year and a half apart," Mr. Rishel asked how old his own client was: "So he's about 29 maybe. He's about 30 years old?" R. 835. Ms. Taylor corrected him, "No, he's 27." R. 835. Though Ms. Taylor

had already testified that Mr. Galloway was younger than she was, Mr. Rishel was surprised by her answer: "Oh, you're older than he is?" R. 835. Even the most minimally-prepared attorney for a capital sentencing phase would have a command of such basic facts about his client and siblings as their ages and order of birth. After stumbling, Mr. Rishel brought back out the same tired script he had used with the witnesses before her: whether she was close to her brother, whether he loves his children, and whether she would visit him in prison. R. 837. Had counsel asked her, Ms. Taylor would have been able to provide overwhelming and powerful evidence in mitigation about Mr. Galloway's background, including the dysfunction and chaos in the home, the neglect by their mother, the abandonment by their father, the domestic violence in their home and in their community, the physical abuse of her brother, their childhood poverty, and so much more. *See* Ex. 23 (Aff. of M. Stanton, ¶¶ 5-33).

Mr. Galloway's mother followed her daughter. Again, counsel asked her nothing more than whether she loves her son, how Mr. Galloway is as a father, and whether she would visit him in prison. R. 839-40. After cross-examination, apparently unsatisfied that her testimony on behalf of her son's life was so incomplete, Ms. Varghese asked for permission to "say something" before she left the stand but this request was denied. R. 840. Counsel did nothing to follow up. *Id.* Had counsel asked, Ms. Varghese, like her daughter, would also have provided overwhelming and compelling evidence in mitigation. *See* Ex. 22 (Aff. of O. Varghese, ¶¶ 5-64).

Without soliciting any information at all about Mr. Galloway's childhood or behaviors from any witness, the defense rested. Mr. Rishel never presented the testimony of his mental health expert Dr. Smallwood, whom he had promised the jury he would call in his opening statement, only the day before. R. 812. *See also infra*, Point I.A.3.

Having laid the foundation with this evidence for an ineffectual closing, Mr. Rishel finished the job in his "ten-minutes or so" plea for his client's life. R. 868. He mentioned only one detail about Mr. Galloway's background at all – his age – and couldn't even get that straight: "He's 27, 28 years old." R. 862. (Mr. Galloway was 27 at the time of the trial, to which his sister had just testified). Rather than summarize what scant evidence the defense presented at the penalty phase, Mr. Rishel began to attack the jury's guilt phase findings, over the prosecution's objections. He reminded the very jury that had just found Mr. Galloway guilty beyond a reasonable doubt that "Leslie denies [doing] this. He denies this," without giving them any reason why they should believe him and spare his life. R. 865. Mr. Rishel then tried to make an incomprehensible analogy of the death penalty to other injustices of Mississippi's past which the death-qualified jurors almost certainly found insulting. R. 865. Finally, he invoked a general plea against the death penalty and asked the jury to spare Mr. Galloway's life to "end all of the killing." R. 866. In light of this scant and pitiful sentencing phase presentation, it is no wonder that several jurors felt like they had no choice but to give Mr. Galloway the death penalty. *See* Ex. 88 (Aff. of Z. Lukens, ¶ 7); Ex 90 (Aff. of S. Henry, ¶ 6).

This performance failed to elicit the compelling mitigating evidence from the witnesses counsel had already identified (through Mr. Galloway and his mother), from the records available but never collected by counsel, and from the community of people who knew and in many cases loved Mr. Galloway, but were never once contacted pretrial. In short, counsel left untold the stories of Mr. Galloway's life that needed to be told to spare his life.

The contrast between what counsel did and what any competent capital lawyer would have done could not be starker. The unexplained "good father" whom counsel trotted out, without more, never stood a chance. But the Bo Galloway who survived and endured the intergenerational poverty, trauma, dysfunction and mental illness set out above is a richer and more textured picture of a life worth saving from execution and sufficiently punished with life imprisonment without parole.

The courts are clear that uncovered and untold mitigation of this value carries the weight of constitutional prejudice. *See Sears v. Upton*, 561 U.S. at 956 ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation."); *Williams*, 529 U.S. at 396 (in finding Williams's ineffectiveness claim meritorious, Court applied *Strickland* and concluded that counsel's failure to

uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams's voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.") (citing 1 ABA Standards for Criminal Justice, Defense Function § 4-4.1, commentary, p. 4-55 (2d ed.1980)), as described in *Wiggins*, 539 U.S. at 523 (same). *See also Williams v. Taylor*, 529 U.S. at 415 (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background).

This Court should vacate Mr. Galloway's death sentence, or grant him leave to proceed in the trial court with a petition for post-conviction relief on this issue.

3. Counsel deficiently and prejudicially failed in the investigation and presentation of Mr. Galloway's mental health mitigation.

Trial counsel's s inexcusable failures to investigate, retain experts, and present available expert testimony about Mr. Galloway's mental health are undeniable. In addition to the affidavits and records discussed above, a reasonable investigation by trial counsel would have further shown the damage Mr. Galloway's traumatic history inflicted on his mental health, well-being, and functioning. Available experts Dr. Frederic Sautter and Dr. Beverly Smallwood would have testified that Mr. Galloway suffers from Post-traumatic Stress Disorder ("PTSD") and complex PTSD, consistent with his documented extensive trauma history. *See* Exs. 2 and 3. They would have explained that Mr. Galloway has other serious mental illnesses, including Depressive Disorder and Psychotic Disorder. Mr. Galloway further demonstrates abnormalities indicating brain damage. Ex. 6 (Aff.

of Dr. Gur, ¶ 12); Ex. 5 (Aff. of Dr. Watson, ¶ 7); Ex. 7 (Aff. of Dr. Agharkar, ¶ 5). Competent trial counsel would have retained and prepared appropriate mental health experts who could have, and would have testified about Mr. Galloway's mental functioning and mental health.

Counsel has a duty to select appropriate experts and "present those experts with information relevant to the conclusion of the experts." *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir. 1996); *see also Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999) (counsel have an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health). *See also Rompilla*, 545 U.S. at 390-91, 398 (counsel were deficient even though they "arranged for Rompilla to be examined by three experienced mental health professionals, experts described by [trial counsel] as 'the best forensic psychiatrist around here, [another] tremendous psychiatrist and a fabulous forensic psychologist.'" [I]f trial counsel had investigated further, they would have found evidence "pointing to schizophrenia and other disorders." [T]his evidence "would have destroyed the benign conception of Rompilla's . . . mental capacity defense counsel had formed … from the reports of the mental health experts."); *Carter v. Bell*, 218 F.3d 581, 596-600 (6th Cir. 2000) (finding prejudice where counsel "presented no meaningful evidence by way of mitigation as a result of their failure to investigate and prepare, not as a result of trial strategy after thorough research"); *Hooks v. Workman*, 689 F.3d 1148, 1203-1207 (10th Cir. 2012) (counsel presented testimony of mental health expert, but was ineffective because the

"mental-health evidence [presented] . . . was inadequate, unsympathetic, and even counterproductive at times" and because counsel failed to see "clear markers for organic brain damage"); *Ferrell v. Hall*, 640 F.3d 1199, 1227 (11th Cir. 2011) (although trial counsel hired mental health expert, they were ineffective because they did not ask expert to look for evidence of brain damage); *Kenley v. Armontrout*, 937 F.2d 1298, 1300, 1303, 1305, 1308 (8th Cir. 1991) (even though "counsel requested a psychiatric examination" counsel was ineffective for failing to further investigate "all available leads" and present mitigating evidence of client's "medical, psychological and psychiatric history.").

The starting point for this claim is Dr. Beverly Smallwood, the expert retained by trial counsel to evaluate Mr. Galloway pretrial, whose testimony counsel promised, but never actually offered the jury. Counsel was correct to retain a mental health expert, but fell down on the job from the start by providing her with none of the information she needed to assess the mitigation and mental health concerns that should be integral to a robust defense at capital sentencing. Counsel provided Dr. Smallwood with only a single life-history record, itself a single page, Mr. Galloway's Greene County school record. Ex. 3 (Aff. of Dr. Smallwood, ¶ 30).

Counsel's limited referral questions to Dr. Smallwood were insufficient for purposes of developing mitigating evidence, as she acknowledged herself. *See* Ex. 4 (Dr. Smallwood's Evaluation, at Bates-8114); *see also Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003) ("Regarding mental health mitigating evidence, our court has distinguished between its use during the guilt phase to establish

competency to stand trial and presenting mental health mitigating evidence at the penalty phase"); *Combs v. Coyle*, 205 F.3d 269, 311 (6th Cir. 2000) (competency report cannot substitute for a full mitigation work-up of defendant's mental health); *Smith v. Stewart*, 189 F.3d 1004, 1009 (9th Cir. 1999) (same).

Dr. Smallwood wrote in her report that "conducting a full mitigation study is outside the scope of [her] forensic practice," and requested that counsel enlist the mitigation services of the "Office of Capital Defense in Jackson" or that another qualified expert in mitigation be appointed. *Id.* at 8114. Competent counsel would have followed these recommendations, seeking a qualified mitigation investigator, conducting the required social history investigation, and presenting Dr. Smallwood with those results. However, defense counsel "did not heed her advice*." Ronk,* 267 So. 3d at 1272.

In the absence of the social history, Dr. Smallwood could do little more with a single interview and review of relevant police reports than scratch the surface of Mr. Galloway's life history. Dr. Smallwood learned some of the basic outlines of Mr. Galloway's life, including that his father was often absent, his parents were separated, his father had been shot, and that he had young children. Ex. 4 (Dr. Smallwood's Evaluation, at Bates 8106). Even without the critical social history available through investigation, Dr. Smallwood still documented a number of mental health symptoms, including reporting that Mr. Galloway had "trouble going to sleep," experienced trouble concentrating, had memory problems, was sometimes

depressed, experienced auditory hallucinations, and had suicidal thoughts in the past. *Id.* at 8107-08.

After reviewing the affidavits and social history records collected by post-conviction counsel, Dr. Smallwood found that these records "painted a very different picture of Leslie's social history and . . . family dynamics" than she was aware of at the time of her evaluation of Mr. Galloway prior to trial. Ex. 3 (Aff. of Dr. Smallwood, ¶ 11). She found that the records provided "an invaluable amount of mitigating material," namely, a childhood marked by severe domestic and community violence, paternal abandonment, maternal neglect, early exposure to alcohol and substance abuse, and severe poverty; a multi-generational history of mental illness that predisposed Mr. Galloway to mental illness; a multi-generational history of sexual abuse, including sexual abuse within his childhood home; and the loss of Mr. Galloway's older brother to incarceration. *Id.* ¶¶ 11, 13-15, 18-20, 22-25. Had Dr. Smallwood been given the records she was provided in post-conviction, including the evidence above, she would have then been able to tell the jury about Mr. Galloway's PTSD, Major Depressive Disorder, and how his history of traumatic life experiences severely harmed his psychological and neurological development. Ex. 3 (Aff. of Dr. Smallwood, ¶¶ 13-16, 21, 26-28).

Dr. Smallwood learned from records provided to her by post-conviction counsel that Mr. Galloway's father, maternal grandfather, and older brother perpetrated a tremendous amount of violence in his childhood home, and Bo would often "cry and scream" and "retreat to a corner" when his father would beat his

mother. *Id.* ¶ 13. Bo's older brother, Melvin, also physically attacked Bo and forced Bo to fight his siblings, which "trained [Bo] at an early age to fight for his survival." *Id.* ¶ 14. Dr. Smallwood found that "[t]he violence Leslie was exposed to as a child deprived him of the sense of safety and security that all children need to achieve good mental health as an adult." *Id.*

Based on records provided by post-conviction counsel, Dr. Smallwood also found that Bo was severely neglected by his mother, which had a "psychologically-crippling" effect on him. *Id.* ¶ 19. Bo's mother suffers from bipolar disorder and was "emotionally absent from her children." *Id.* ¶ 22. The family also moved a lot, lived in poverty, and Bo had to share a bed with his siblings and "often go hungry for lack of food." *Id.* ¶ 25. Dr. Smallwood has found that this neglect "is significant in terms of mitigation because it adds to the cumulative evidence that Leslie was raised without a sense of being nurtured or cared for by a parental figure," and Dr. Smallwood "would have testified at length about how Leslie was impacted by his mother's neglect had [she] known this valuable information. The literature on childhood abuse and neglect suggests that the adverse outcomes of neglect and the lack of psychological availability on the part of key caregivers can be equally or more damaging to children than actual abuse." *Id.* ¶ 19. *See also id.* ¶ 25 ("The family's poverty paired with the instability in the home would have a devastating psychological impact on Leslie. Poverty and food insecurity are risk factors that are associated with internalizing and externalizing symptoms in children, and can have negative effects on brain development.").

In addition to identifying numerous sources of trauma and triggers for mental illness in the information provided by post-conviction counsel, Dr. Smallwood also found that Bo began to display classic symptoms of PTSD from a very young age. Dr. Smallwood learned from Bo's social history and medical records that he began having panic attacks when he was five or six years old, and found it "striking that Leslie began to suffer from panic attacks at such an early age . . . The presence of this level of anxiety from such an early age is consistent with the high intensity of Leslie's exposure to violence and atmosphere of terror from early life." *Id.* ¶ 15. Bo would also fight to defend himself or his family and would have trouble calming down after getting upset, which shows that Bo was "hypervigilant and hyperaroused – symptoms of PTSD." *Id.* ¶ 16. To cope with and numb his traumatic memories, Bo "began to abuse marijuana at an early age and may have been abusing alcohol around the time of his arrest," and this substance abuse may have caused Bo "to become even more isolated, irritable, depressed, hypervigilant, and hyperaroused . . ." *Id.* ¶ 24.

Dr. Smallwood also learned that Bo's social history documents provided evidence that he dissociates, a symptom "often seen in people with PTSD." *Id.* ¶17. This led Dr. Smallwood "to question whether on the night of the offense in this case, some event triggered past abuse suffered by Leslie and led him to dissociate." *Id.* Dr. Smallwood would have told the jury about Bo's history of dissociation and the significance of this PTSD symptom had trial counsel provided her with the information in Bo's social history. *Id.* Ultimately, Dr. Smallwood would have been

able to diagnose Bo with PTSD at the time of his trial if she had been provided with the available social history. *Id.* ¶ 16.

The records in Bo's social history, provided by post-conviction counsel, also showed Dr. Smallwood that Bo had "more severe symptoms of depression before and leading up to his arrest." *Id.* ¶ 26. These symptoms included Bo isolating himself for days at a time, passing up food, and locking himself in a room with knives and threatening to take his own life. *Id.* Bo's records from the Harrison County Adult Detention Center showed that Bo had insomnia and suicidal ideation at the time of Dr. Smallwood's initial evaluation. *Id.* ¶¶ 26-27; *see also* Ex. 128 (L. Galloway III – HCSD Med Records). If Dr. Smallwood had been aware of these symptoms, she would have testified that he "met the criteria for Major Depressive Disorder, a serious psychological disorder that involves disturbance in mood, can result in significant social withdrawal, be expressed as severe irritability, and can affect cognitive functioning." Ex. 3 (Aff. of Dr. Smallwood ¶ 26).

However, Dr. Smallwood was unable to discuss any of this mitigating evidence at the time of the trial because trial counsel failed to conduct an adequate mitigation study and never provided Dr. Smallwood with any social history, or any medical, mental health, or court records on Mr. Galloway or his family, save a single page of school records and information from discovery related to the crime. *Id.* ¶¶ 4, 7, 30. Although Dr. Smallwood made it clear to trial counsel that she could not conduct a mitigation study and could only identify limited mitigating information from the scant information provided to her, trial counsel never initiated

an adequate mitigation investigation and never provided Dr. Smallwood with any other information from Mr. Galloway's social history and records. *Id.* ¶¶ 3, 4, 7, 30. Consequently, Dr. Smallwood could only conduct a "limited assessment" because she lacked sufficient information to conduct "a complete psychological evaluation." *Id.* ¶ 30. Had she been provided with the information from Mr. Galloway's social history, Dr. Smallwood's "evaluation and conclusions would have been very different, and [she] would have had mitigating information to share to the jury at the penalty phase . . . [Her] testimony could have been woven into his penalty phase mitigation case in an effective manner." *Id.* ¶ 32. However, lacking this, the jury heard nothing of Mr. Galloway's devastating traumatic history and severe mental illness.

This Court recently reviewed two other death sentences from Mr. Rishel's office in which it also hired Dr. Smallwood to evaluate the defendants. *Keller v. State*, 306 So. 2d 706, 713 (Miss. 2020); *Ronk*, 267 So. 3d 1239. While this Court ultimately affirmed those death sentences, its reasoning strongly supports Mr. Galloway's claim.

In *Keller*, this Court concluded that the defendant had made a substantial showing of the denial of his right of effective assistance of counsel for failing to investigate and discover significant evidence of mitigation. *Keller v. State*, 229 So. 3d 715, 715-16 (Miss. 2017). The Court ordered an evidentiary hearing on the claim, including the allegation that counsel were deficient for failing to follow Dr. Smallwood's recommendation to hire a mitigation specialist. *Id.* On remand, the

trial court rejected the claim, and found that counsel's performance was not deficient in light of the fact that central components of the mental health mitigation, like the defendant's placement in special education and low IQ, were presented to the jury through the introduction of records and the trial testimony of Dr. Smallwood. *Keller,* 229 So. 3d at 712-13. This Court affirmed, reciting that a defendant "cannot show prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker." *Id.* at 711 (quoting *Chamberlin v. State*, 55 So. 3d 1045, 1054 (Miss. 2010). Here, where no social history records were introduced and no mental health expert testified, it cannot be tenably denied that the new mitigation evidence would have altered the sentencing profile presented to the jury.

Similarly, in *Ronk v. State*, this Court rejected a claim on ineffective assistance of counsel based on trial counsel's deficient handling of mitigating evidence and failure to follow up on the recommendation by Dr. Smallwood that counsel conduct a mitigation investigation. *Ronk*, 267 So. 3d at 1262. Dr. Smallwood testified at trial in that case that Mr. Ronk had Bipolar Disorder and ADHD, and her twenty-five-page social history and psychological report was introduced. *Id.* at 1261-63 (with the benefit of Mr. Ronk's psychological and medical history as well as speaking to his parents, Dr. Smallwood report included, among other things, information on family, education, prior convictions, employment, history of hospitalizations, mental health symptoms, and trauma). This Court found that "[a]rguably, counsel's mitigation investigation was deficient," and that "Dr.

Smallwood's report and the records that were obtained arguably would have led a reasonable attorney to investigate further." *Ronk*, 267 So. 3d at 1271, 1272. The Court nonetheless rejected the claim, on the ground that the new evidence Mr. Ronk provided was "mostly cumulative." *Id.* at 1273. In Mr. Galloway's, case, however, the new evidence is far from cumulative.

In short, like in *Ronk*, the available evidence in Mr. Galloway's initial evaluation "would have led a reasonable attorney to investigate further." But, unlike in *Ronk* and *Keller*, Dr. Smallwood did not testify at trial and none of the critical mental health evidence available about Mr. Galloway was ever presented to the jury. Indeed, the prejudice to Mr. Galloway is overwhelming from trial counsel's failure to prepare Dr. Smallwood, and to prepare and present expert testimony at trial about Mr. Galloway's mental health.

Other experts retained in post-conviction agree with the conclusions Dr. Smallwood reached once provided with an adequate social history. These experts could have testified at Mr. Galloway's trial and supplemented and corroborated Dr. Smallwood's testimony. Dr. Frederic J. Sautter, Professor of Clinical Psychiatry in the Department of Psychiatry and Health Sciences at the Tulane University School of Medicine, conducted a comprehensive assessment of Mr. Galloway. He reviewed the extensive social history records and witness affidavits obtained by post-conviction counsel, performed two in-person assessments, administered several psychological assessment instruments,[25] and reviewed testing results from a

[25] Dr. Sautter also administered the "SIRS" to Mr. Galloway, which is considered the "Gold Standard" test of malingering in forensic populations. Ex. 2 (Affidavit of Dr. Sautter,

separate neuropsychological evaluation conducted by Dr. Dale Watson. Ex. 2 (Aff. of Dr. Sautter, ¶¶ 4-9, 27). Dr. Sautter determined that at the time of his capital murder trial Mr. Galloway met all of the DSM-IV-TR criteria for PTSD, and that "at the time of the offense Mr. Leslie Galloway's thinking and behavior were strongly influenced by his PTSD, complex post-traumatic stress, depression, and psychosis." *Id.* ¶¶ 22, 32. Significantly, Dr. Sautter found that virtually all of Mr. Galloway's traumatic life history is established by the affidavits of family and friends and medical and court records that post-conviction counsel obtained in their investigation, and that would have been readily available to trial counsel at the time of Mr. Galloway's trial. *Id.* ¶ 12. Dr. Sautter also found that Mr. Galloway met the past criteria for Major Depressive Disorder, the current criteria for Depressive Disorder, the criteria for Psychotic Disorder NOS, and the past criteria for substance abuse disorder relating to his past abuse of alcohol and marijuana. *Id.* ¶ 29; *see also* Ex. 5 (Aff. of Dr. Watson, ¶ 7) ("Mr. Galloway is experiencing a severe degree of depression that appears to be sustained and long-standing.").

Dr. Sautter determined that Mr. Galloway has been exposed to a "large number" of traumatic events, including "(1) being exposed to regular physical assaults by his older brother Melvin . . . (2) witnessing Melvin's regular physical and emotional assaults of his mother, including watching an apparent attempt to

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¶ 8). Mr. Galloway's scores "on all seven scales fell within the 'Honest' range, indicating that he was honest in his responses to questions about psychiatric problems. The validity subscales of the Trauma Symptom Inventory also showed that Mr. Galloway was honest in his responses to questions about post-traumatic stress. These data all support the validity of the assessment findings." *Id.*

take her life, in addition to other violence perpetrated by Melvin including his starting a potentially dangerous house fire and torture of cats; (3) Melvin forcing Leslie to fight other young males in the neighborhood thus involving Leslie in terrifying physical combat from approximately the age of eight years old through 13 years old, each posing a threat of serious physical injury; (4) being exposed to a drive by shooting when he was 10 years old and someone shot bullets into the Galloway home when Mr. Galloway was home; (5) being physically attacked by 'twelve guys in the neighborhood' when he was in his early teens; (6) being threatened by a man stealing Leslie's bicycle who pulled a knife on 14 year-old Leslie and threatened to hurt him, and (7) years of continuous emotional abuse as he was verbally assaulted and denigrated by his brother and father." *Id.* ¶ 11.

Dr. Sautter also determined that Mr. Galloway was "exposed to high levels of early life adversity" that made him vulnerable to psychological problems in general, and PTSD in particular. *Id.* ¶ 13. Dr. Sautter's assessment found that Mr. Galloway's early life adversity included "high levels of family stress and conflict; loss of a father figure who could provide support and nurturance when his father left the family; maternal neglect as his mother would work long hours, leaving her older daughter, Lashandra, who was a young child herself, to watch the younger children, often for days on end; living in an impoverished family environment where all four children would share a bed, would often go hungry for lack of food, and where he was exposed to frequent violence and criminal behavior by his brother and other family members and family acquaintances, including apparent attempts by

Melvin to take his sister Mary's life; living in a family environment in early childhood that accepted alcohol abuse, lack of family support in school and to develop intellectual skills and social behaviors that would provide the foundation to achieve competence and success later in life; a chaotic and unstable home environment, with frequent residential moves and school changes; growing up in a violent environment that deprived him of developing the sense of safety and security that all children need to achieve good mental health as an adult; the endless cycle of abandonment by his brother, as he was in and out of juvenile detention and mental institutions; [and] living in a family environment where his sister Lashandra was sexually abused by his father." *Id.* ¶ 13.

From an early age, Mr. Galloway's prolonged exposure to traumatic events and life adversities triggered the signs and symptoms of PTSD and other psychiatric disorders. From the age of five or six, Mr. Galloway "would respond to [his mother's] threats of punishment against him by hyperventilating," and Mr. Galloway developed severe anxiety and panic attacks where he would have trouble breathing and complain that his chest was hurting and his heart was beating heavy and fast. *Id.* ¶ 20. Mr. Galloway also showed signs of "avoidance" and "numbing" – symptoms characteristic of PTSD – from an early age and continuing through the time of the offense. *Id.* ¶¶ 16, 17. These included "withdrawing or shutting down," avoiding thoughts and feelings about past trauma, retreating to a corner, and isolating himself in a room for days at a time where he would pass up food and spend significant time playing video games alone. *Id.* ¶¶ 16, 17. Mr. Galloway also

displayed the PTSD symptoms of "increased hyperarousal" including "problems sleeping" and "trauma-related hypervigilance and an exaggerated startle response," as evidenced by his "fight[ing] to protect himself and his family," showing a quick temper, and having a difficult time calming down after becoming upset about something. *Id.* ¶¶ 18, 19.

Dr. Sautter also found that Mr. Galloway demonstrates "complex PTSD symptoms" that occur when children and adults are exposed to "chronic interpersonal trauma" early in life. *Id.* ¶ 23. In Mr. Galloway's case, Dr. Sautter found that he has experienced symptoms of dissociation, which "is a defensive process in which an individual develops the capacity to separate himself or herself from the psychic or physical pain caused by the trauma." *Id.* ¶ 24. Dr. Sautter noted that affidavits from friends and family showed that Mr. Galloway sometimes blacked out during fights and would have no memory of getting into an altercation – all dissociative symptoms that began to emerge in Mr. Galloway's teens. *Id.* ¶ 26. Mr. Galloway's severe PTSD with complex PTSD symptoms "would impair his social judgment, problem- solving and self-control, and would bias his perceptions of the world in the direction of overestimating threat . . . [H]e would likely experience a detached dissociative state that would interfere with his ability to process threat or other social information, impair his social judgment and likely cause him to overestimate threat and to potentially behave in an impulsive manner." *Id.* ¶ 31.

Dr. Sautter concluded that at the time of the offense, "Mr. Leslie Galloway's thinking and behavior were strongly influenced by his PTSD, complex post-

traumatic stress, depression, and psychosis." *Id.* ¶ 32. Moreover, "the influence of complex trauma processes would decrease his ability to exercise conscious control over his own behavior and increase his perceptions of threat while rendering him less capable of controlling his trauma-related emotions and anger." *Id.*

Like Dr. Smallwood's testimony, Dr. Sautter's testimony would have constituted powerful and probative mitigation evidence that almost certainly would have led to one or more jurors voting for life imprisonment without parole.

Post-conviction counsel also retained Dr. Shawn Agharkar, a psychiatrist in private practice with Comprehensive Psychiatric Services of Atlanta, who, like Dr. Sautter, "found substantial evidence of trauma." Ex. 7 (Aff. of Dr. Agharkar, ¶ 5). Dr. Agharkar found that Mr. Galloway reported "severe sleep disturbances," and that he "exhibited slow processing speed whenever he had to recall something from memory, indicating impaired verbal recall and fluency." Ex. 7 (Aff. of Dr. Agharkar, ¶ 5).[26] He further found that "these symptoms could indicate that Mr. Galloway suffers from serious mental health problems, including brain damage" and recommended a neuropsychological assessment. *Id.* ¶¶ 5-6. This assessment was completed by Dr. Dale Watson who found "signs of a significant attentional disorder," possible "lateralized brain dysfunction," impairments in auditory processing, and short-term verbal recall in the "severely impaired range." Ex. 5 (Aff. of Dr. Watson, ¶ 7). Dr. Watson also concluded that Mr. Galloway's "pattern of

[26] *See also* Ex. 8 (Second Aff. of Dr. Agharkar, ¶10)("The results of my 2021 evaluation were consistent with the results of my first evaluation including evidence of trauma, problems with recall, and slow processing speed.")

performance on the battery was most similar to that of individuals with mild traumatic brain injury." *Id.* Post-conviction expert, Dr. Ruben Gur, analyzed the results of the neuropsychological testing by Dr. Watson and completed a behavioral imagining analysis.[27] Ex. 6 (Aff. of Dr. Gur, ¶¶ 3, 5-6). Dr. Gur found that the results of the neuropsychologic tests suggested "left hemisphere dysfunction" and recommended an MRI and PET scan to "assess the structural and functional bases for brain abnormalities." *Id.* ¶¶6-7. Dr. Gur found abnormalities which "implicate brain systems that are important for regulating behavior," and noted that "individuals with such abnormalities are not capable of using normative means for regulating behavior." *Id.* ¶ 12. Dr. Gur determined that "the abnormalities observed are consistent with several causes, including traumatic brain injury." *Id.*

As explained above, counsel's failure to provide Dr. Smallwood with sufficient information to conduct a comprehensive analysis stemmed from their failure to conduct an adequate mitigation investigation or, if they were unable to do so because of a lack of time or expertise, retain a qualified mitigation investigator to do so. Again, Dr. Smallwood wrote in her report that "conducting a full mitigation study is outside the scope of [her] forensic practice," and requested that counsel enlist the mitigation services of the "Office of Capital Defense in Jackson" or that another qualified expert in mitigation be appointed. *Id.* at 8114. Competent counsel would have followed these recommendations, seeking a qualified mitigation

[27] A method developed by Dr. Gur in collaboration with colleagues across several universities that utilizes a computerized algorithm with established reliability and validity to conduct an objective interpretation of standardized neuropsychological test results. See generally, Ex. 6 (Aff. of Dr. Gur, ¶ 5, n.1).

investigator, conducting the required social history investigation, and presenting Dr. Smallwood with those results.

However, defense counsel "did not heed her advice." *Ronk v. State*, 267 So. 3d 1293, 1272 (Miss. 2019). Trial counsel's inexplicable decision to forgo the necessary resources directly contributed to their failure to adequate investigate and present the mitigating evidence in this case.

Due process, equal protection, and the right to counsel guarantees require indigent defendants be provided with the tools reasonably necessary to mounting a defense. *Ake v. Oklahoma*, 470 U.S. 68, 76-77 (1985) (due process demands "access to the raw materials integral to the building of an effective defense"); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (the Eighth Amendment requires that capital defendants be afforded "individualized consideration" at their penalty phase proceedings"). Trial counsel here neglected to even seek these basic tools.

For over thirty years, the capital defense community has recognized the importance of conducting a "mitigation investigation" in preparation for the penalty phase of a capital trial. Gary Goodpaster, *The Trial For Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L. Rev. 299, 323-24 (1984) ("There must be inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychological and present feelings. The affirmative case for sparing a defendant's life will be composed in part of this investigation, and the care with which it is conducted cannot be overemphasized."); *see also* Welsh S. White, *Effective Assistance of Counsel in*

Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 377 (1993); Dennis N. Balske, *The Penalty-Phase Trial: A Practical Guide*, Champion, Mar. 1984, at 42; Kevin McNally, *Death is Different: Your Approach to a Capital Case Must Be Different, Too*, Champion, Mar. 1984, at 8.

The role of the mitigation specialist on the capital defense team is also a well-established norm in the capital defense community. *See, e.g.*, Cessie Alfonso & Katharine Baur, *Enhancing Capital Defense: The Role of the Forensic Social Worker*, Champion, June 1986, at 26; James Hudson, Jane Core & Susan Schorr, *Using the Mitigation Specialist and the Team Approach*, Champion, June 1987, at 33; Kevin McNally, *supra*, at 12-13; Russell Stetler & Kathy Wayland, *Dimensions of Mitigation*, Champion, June 2004, at 31; Paul J. Bruno, *The Mitigation Specialist*, Champion, June 2010, at 26 ("The capital mitigation specialist is arguably the most important member of the capital defense team, especially when the client is facing a sentencing hearing in a death penalty case. This person, in effect, enables the capital defense team to develop and 'tell the story' of the client—the key to saving the client's life.").

The core interdisciplinary team includes a mitigation specialist. ABA Guideline 4.1(A)(1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist."). Mitigation specialists are critical to the capital defense team because they possess the "time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have

never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf." ABA Guidelines, Comment to Guideline 4.1—The Defense Team and Supporting Services, 31 Hofstra L. Rev. 913, 959 (2003).

The ABA standards are recognized by the U.S. Supreme Court as the "prevailing norms of practice," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), including the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, *Wiggins*, 539 U.S. at 522; *Williams*, 529 U.S. at 396; *Rompilla*, 545 U.S. at 387.

In this case, trial counsel neither sought and obtained the assistance of a mitigation specialist, nor relied on any other team member or expert with similar experience and skills. Mr. Rishel defended his failure to hire this core team member with an unfounded and erroneous assertion that judges are reluctant to grant funding for mitigation specialists and that mitigation specialists are often hard to find. Ex. 17 (Aff. of G. Rishel, at 2). However, this was neither true before or after Mr. Galloway's trial. Mr. Rishel had two distinct avenues for requesting mitigation investigation resources: he could have requested funds to appoint a mitigation investigator in this case, or he could have requested the assistance of the Office of the State Public Defender, Capital Defense Division. *See* http://www.ospd.ms.gov/CapDef.htm ("Our office was established with two main

purposes: (1) to provide high quality representation to indigent persons charged with death penalty eligible offenses in the state courts of Mississippi at the trial level and on direct appeal where the death penalty has been imposed; and (2) to relieve the financial burden death penalty cases pose to local governments.").

At the time of Mr. Galloway's trial in September 2010, judges in Mississippi – and specifically judges along the Gulf Coast – had been authorizing funds for mitigation specialists for years, if not decades. *See, e.g.*, Ex. 91 (*State v. Carr*, Pleadings, at Bates-006) (December 21, 2004 Order authorizing funding for social worker Kelly Bell to provide mitigation services); *see also* Ex. 11 (Aff. of R. Simons, ¶¶ 9-10); Ex. 51 (Aff. of R. Rudder, ¶ 10). Gulfport attorney James Davis, for instance, has "regularly sought funds to hire a mitigation specialist to conduct a mitigation investigation in any capital case that I expected to go to trial" and had been getting authorization for mitigation funding since the late 1990s. Ex. 12 (Aff. of J. Davis, ¶¶ 6-7). And just a few months after Mr. Galloway's trial, the Harrison County Public Defender's Office succeeded in obtaining funding for a mitigation specialist in *State v. Smith*.[28] Then, just under two years after Mr. Galloway's trial, the Public Defender's Office sought and received initial funding of $5,000 for out-of-state mitigation specialist Janette Gagnon, from Judge Roger Clark, the same judge who presided over Mr. Galloway's trial. *See* Ex. 92 (*State v. Radau*, Pleadings, at Bates-002, 004). Several months later, the defense requested more time to conduct

[28] In *State v. Barbara Smith*, the court approved the public defender's office's request for $5,000 to hire mitigation specialist Stacey Ferraro. Ex. 93 (*State v. Smith*, Pleadings, at 001). The case eventually settled. *Id.*

the mitigation investigation, and the court approved additional funds for the mitigation specialist, up to $10,000. Ex. 92 (*State v. Radau*, Pleadings, at Bates-027). The Office now hires mitigation specialists for all its capital cases. Ex. 20 (Aff. of D. Christensen, ¶ 6). Mr. Rishel's decision to forgo the resources was an indefensible error and a grave misunderstanding of his constitutional obligation and the available resources.

Counsel's failure to fund and conduct a thorough mitigation investigation was all the more inexcusable given that counsel's own expert informed them that the Office of Capital Defense in Jackson would be able to provide them with mitigation assistance. Ex. 4 (Dr. Smallwood Evaluation, at 008114); Ex. 10 (Aff. of A. de Gruy, ¶ 9); Ex. 12 (Aff. of J. Davis, ¶10). And that expert, whom counsel never called to testify, made clear that her work evaluating Mr. Galloway's mental health could not be done without the foundation of an adequate social history investigation. *Cf. Ronk* 267 So. 3d at 1262 (having the benefit of Mr. Ronk's psychological and medical history, Dr. Smallwood's report referenced a history of hospitalizations, mental health symptoms, and trauma).

Counsel's performance thus fell below the standard of reasonable representation and, based on the reasons and cases detailed above, there is far more than a reasonable probability that the missing mitigating evidence would have affected the outcome of the penalty phase of the trial. *See Strickland*, 466 U.S. at 694; *Doss*, 19 So. 3d at 708.

Mr. Galloway was further denied his right to the effective assistance of counsel due to trial counsel's failure to call Dr. Smallwood as a witness at the penalty phase after telling the jury that he planned to do so. Trial counsel claimed that he did not call Dr. Smallwood to testify because she had nothing helpful to say. Ex. 17 (Aff. of G. Rishel at p. 2). However, counsel knew the content of her testimony at the time of his opening statement when he brought her to the jury's attention, and indeed had known for months. Therefore, it was nonsensical and extremely damaging to Mr. Galloway's cause to mention her to the jury one day and then the next to decline to call her when no discernible circumstances had changed. *See* Ex. 130 (Smallwood Invoices, Bates-008135) (showing that Dr. Smallwood prepared and was available to testify). Even based almost entirely on the single interview with Mr. Galloway, Dr. Smallwood's report contained significant evidence the jury should have heard, including about Mr. Galloway's suicidal thoughts, depression, sleeplessness, and auditory hallucinations. But even more glaringly, Dr. Smallwood's affidavit makes it clear that she could have provided critical mitigating testimony had trial counsel conducted the mitigation investigation that Dr. Smallwood requested. Ex. 3 (Aff. of Dr. Smallwood, ¶¶ 3, 11, 30, 32).[29]

Trial counsel's failure to call Dr. Smallwood as a witness after announcing their intention to do so was clearly deficient and prejudiced Mr. Galloway. *See*

[29] Furthermore, counsel's decision not to call Dr. Smallwood demonstrates how poorly-prepared he was for the sentencing phase of this capital trial. Dr. Smallwood had cleared her calendar for the trial and, in fact, billed for two days in court. Ex. 3 (Affidavit of Dr. Smallwood, ¶ 8). Dr. Smallwood's affidavit shows that trial counsel made the decision not to call her as a witness during the trial itself, though her report had been available to the defense for over ten months prior to the trial.

Strickland, 466 U.S. at 694; *Anderson v. Butler*, 858 F.2d 16, 18 (1st Cir. 1988) (Even "if it was . . . wise [not to call the witness] . . . it was inexcusable to have given the matter so little thought at the outset as to have made the opening promise.").

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Trial counsel utterly failed in their duty to investigate and present the powerful and abundant mitigation evidence readily available about the lives of Mr. Galloway and his family. Their deficiency resulted in the jury never hearing a compelling narrative of serious mental illnesses, profound family dysfunction, parental neglect and abandonment, physical and emotional abuse, and severe poverty. Had counsel uncovered this wealth of mitigation evidence, there is a reasonable probability that Mr. Galloway would not have been sentenced to death.

B. Trial Counsel Provided Unconstitutional Ineffective Assistance During Jury Selection.

Trial counsel's performance at jury selection, like their performance at the penalty phase, fell woefully below the standard of competent counsel required by the United States and Mississippi Constitutions. Mr. Galloway was prejudiced as a result. Counsel inexplicably failed to raise a *Baston* objection even though the prosecution used 75% (three of four) of its strikes against qualified Black jurors who were similarly situated to the white jurors it accepted, resulting in an all-white jury. Trial counsel's performance fared no better during jury selection. They failed to ask any meaningful questions about such crucial topics as the jurors' ability to consider mitigation; their ability to consider a life sentence in a case with sexual