No. 24-7351

IN THE
Supreme Court of the United States

TERRY PITCHFORD,
Petitioner,

v.

BURL CAIN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT APPENDIX
VOLUME I OF IV

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PETITION FOR WRIT OF CERTIORARI FILED: MAY 28, 2025
CERTIORARI GRANTED: DECEMBER 15, 2025

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Relevant Trial Court Docket Entries

CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI

No. 2005-009-CR

STATE OF MISSISSIPPI v. TERRY PITCHFORD

DATE	
1/11/2005	Indicted for the Offense of Capital Murder
	* * *
6/6/2005	Motion for Special Venire filed w/ cert of Service
6/6/2005	Motion for jury questionare filed w/ cert of Service
6/6/2005	Motion for individual Sequestered voir dire filed w/ cert of Service
6/6/2005	Motion to Serve Jury Summons by Mail & to forbid the extra judicial Exclusion of any juror filed w/ cert of service
	* * *
9/30/2005	Motion for Jury Questionnaire filed w/ cert of Service
	* * *

DATE	
1/12/2006	Letter from Judge Loper to jurors filed
1/12/2006	Juror Questionnaire mailed to jurors filed
	* * *
1/27/2006	Motion That the Judge Use Open-Ended & Non-Suggestive Questions When Querying the Jury On Views of Death, Speak in the Alternative About Verdict & Penalties that might be imposed, & minimize Signals that the Prosecutor is the Secondary Authority Figure in the Courtroom filed w/ cert of Service
1/27/2006	Motion for Broad Leeway to Inquire about Publicity; about actual feelings, opinions, & knowledge; about jurors ability to adequately accord respect to decision-making of others; about Racial bias; & to probe jurors understanding of the concept of mitigation filed w/ cert of Service
1/27/2006	Motion that Judge Not Telegraph or foreshadow responses that might Result in disqualification or dictate to jurors any requirement that they must follow the law before fully developing the feelings, biases, opinions or prejudices that Jurors may hold w/

DATE	
	respect to the death Penalty filed w/ cert of Service
	* * *
2/17/2006	Motion for a new Trial filed w/ cert of Service
	* * *
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3/1/2006	Order denying Motion for new Trial + Amended Motion
	* * *

Relevant Direct Appeal Docket Entries

SUPREME COURT OF MISSISSIPPI

No. 2006-DP-00441-SCT

TERRY PITCHFORD v. STATE OF MISSISSIPPI

DATE	
3/6/2006	Notice of Appeal Filed
	* * *
10/31/2008	Appellant's Brief filed on behalf of Terry Pitchford
	* * *
8/10/2009	Appellee's Brief filed on behalf of State of Mississippi
	* * *
11/9/2009	Reply Brief filed on behalf of Terry Pitchford
	* * *
2/17/2010	Case Argued and Submitted
	* * *
6/24/2010	DECISION: Affirmed
	* * *

IN THE CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

v.

TERRY PITCHFORD

No. 2005-009-CR

Transcript of the pretrial and trial proceedings had and done in the above styled and numbered cause, before his Honor, Judge Joseph H. Loper, Jr., Circuit Court Judge, Fifth Circuit Court District of the State of Mississippi, and a jury of twelve men and women, duly impaneled, on February 6, 7, 8 and 9, 2006.

Excerpts:

Consideration of Jurors' Medical Excuses;

Voir Dire Examination by the Court (February 6, 2006);

Voir Dire Examination by Mr. Evans;

Voir Dire Examination by Mr. Carter;

Individual Voir Dire Examinations;

Challenges for Cause;

Preemptory Challenges;

Jury Impaneled.

A-P-P-E-A-R-A-N-C-E-S

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* * *

[pp. 156:7-332:5]

* * *

And now gentlemen, I handed you few minutes ago some -- if y'all would, just take a couple of minutes. I'll take a brief recess.

As I say, from my view those all look like valid medical excuses, but before I make any determination I want to see if there is any -- either of you have any disagreement on that.

(A RECESS WAS TAKEN.)

MR. EVANS: Your Honor, the State has no objection to any of those.

MR. CARTER: Your Honor, we object to -- I think I've got them confused. We object to this group but not this group.

THE COURT: Okay. These are people that have submitted medical excuses. That would be Sue Walters and Betty Brister and Barbara Lavorne Watkins and Betty Hankins and Mary Elmore, Charles Davis.

Okay. I want you to state the objection why you do not think that, that Larry Futhey, F-u-t-h-e-y, should not be excused. His doctor said he has arthritis, debilitating and chronic hypertension and anxiety. And so --

MR. CARTER: I think I might have confused them, Your Honor. This is the stack we don't object to. Let me go back then and retract what I just said.

THE COURT: I will go through the ones that -- okay. Both sides agree then that Emma White should be excused and Willie B. Nason and Cassandra Liddell and Dan Brown and Amy Stegal and Lucy Futhey, F-u-t-h-e-y.

MR. CARTER: Yes, sir.

THE COURT: And Miss Barnette, you have got those names and you can notify those individuals tomorrow that they don't have to report.

Let me look at these others. As to Juror Barbara Lavorne Watkins, her doctor says that she has got severe depression, nerve problems and that he does not believe that she would be capable of serving on a jury.

MR. CARTER: I think the ones I object to, Your Honor, is the ones we thought there was a possibility the doctors -- in some situation you can clearly tell that somebody from a doctor's office wrote it. There was a few that was written down at the bottom. We can't tell from the handwriting whether it was a doctor - I hate to say it - or the prospective juror themself. That is the only reason we had questions.

THE COURT: I actually can tell you the clerk contacted the doctor on some of these who did not specify exactly what the problem was. And so the clerk actually called the doctor.

MR. CARTER: And did the writing.

THE COURT: Because I had advised the clerk that unless they gave a specific reason why they should not be -- could not appear, that they were going to have to show up. So she -- and if you want to ask Miss

Barnette on the record if that is the case, she can certainly verify what I have just told you.

CIRCUIT CLERK MRS. LINDA BARNETTE: That's correct. Those are the ones that we did call back to ask. And then a couple of them we made them take the statement back, and I think the receptionist or nurse or somebody wrote it in. Because of the HIPAA law some of them had to go back and discuss it with their doctor.

MR. CARTER: So, so your statement in court is that you are sure that it's been verified what's written on there.

CIRCUIT CLERK MRS. LINDA BARNETTE: Yes, sir.

MR. CARTER: Okay. Thank you. No objection then.

THE COURT: I'll also excuse Betty Hankins, Eddie Brister, Sheila Walters, I'm sorry, Sue Walters, Mary Elmore, Charles Davis and Patricia Lavorne Watkins.

I also when I -- you know, this is an individual that I'm likely to excuse if he is presented in court -- I mean comes to court next week. But the clerk gave me his jury questionnaire. It's James Ward Fite, II, who is a full-time law student and has stated that would be a severe hardship. It would have been a severe hardship for me to miss a week of school. I don't know if y'all can agree to --

MR. EVANS: I don't think we would have any choice but to -- I wouldn't want to, but we would agree.

MR. CARTER: What school is he at, Your Honor? THE COURT: Mississippi College. And he circled A on that Question 29.

MR. EVANS: I want him.

MR. CARTER: We have no objection.

THE COURT: I'll allow Mr. Fite to be excused as well, Miss Barnette. If you will, contact him as well.

I guess I want to just state this for the record.

Mr. Pitchford, there was a couple of times you appeared up here and you made an indication you wanted to plead guilty and you did not do so. I don't know if you have thought about that anymore today. I don't know whether the district attorney would allow you to do it if you wanted to. But I can assure you that Monday the Court wouldn't allow you to. I mean if we are here Monday and we've got a jury, we are having a trial. And that will be all there is to it.

Now, I don't know, as I say, if at this late date the district attorney's office would even entertain --

MR. CARTER: One moment, Your Honor. Your Honor, he said he will plead if he can do it tomorrow.

THE COURT: No. I'm not going to be here tomorrow. It's going to be now or never. And you can speak to him a couple of more minutes. I've got a couple of matters Mr. Laster needs me to take up.

MR. EVANS: Your Honor, the family is gone. I could not agree to plead him at this late point, because I don't even have them here to even talk to anymore.

THE COURT: You know, we could allow him to plead today and be sentenced at some later date if that would be something the family would agree to.

MR. EVANS: Your Honor, at this point, as the Court knows, we have inconvenienced this family twice because he said he wanted to plead. I've got them from all over the state here. And then he made a mockery out of the court system by not doing it in front of them.

And I assured them that unless he came in here today and told us this morning that he wanted to plead and was willing to admit his involvement in this case, that we would not let him. So he chose not to do that this morning.

MR. CARTER: Your Honor, if I might say for the record, we have tried for weeks and probably more than a month to set motions on this case, especially the motion that went to whether or not his statement should be suppressed or not. It is not unfair for Mr. Pitchford to expect his lawyers to file motions, to argue motions and to want to see what the motions -- what affect, if any, the motions would have.

I explained to Mr. Evans on more than one occasion what Mr. Pitchford needed to see. And all he wanted to see and all he wanted was a opportunity to have these motions and have them heard. Then he would be in a better position to make a decision whether to plead or not. Mr. Evans would not agree to a date to do these motions.

I called your clerk who told me on one occasion that we could do it at the beginning of the term. I actually came over here, I believe, the day before the term and talked to Terry and told him that we are going to hear the motions. I saw Mr. Evans that day and Mr. Hill. And they told me they would not be prepared to do the motions.

And for whatever reason they have not been willing to do the motions before then. We never had a chance to do the motions before then. This is the only time that we could actually get a date to actually do the motions. Some of these motions have been filed for months.

THE COURT: Now, in all candor you've got to admit you filed these motions. But I never even until you made me a copy of them Friday of last week after you talked to my clerk, I've never even seen any of them.

MR. CARTER: Yes, sir. I didn't send them to you. I admit that, Your Honor.

THE COURT: And you have not requested other than, you know, you were up here on January 9. At that point Mr. Pitchford was playing these games about oh, I'll plead guilty. And you talked to him half the day. Then he came in and said he didn't want to do it.

I didn't hear any more about these motions or the desire to have any of these motions brought up until last Friday when you called my office. I advised my clerk that day to tell you that I had a civil trial, a medical malpractice trial, that was set for Monday and Tuesday of this week and that we would contact you and get these motions heard as quickly as possible. But I knew that I could not hear them until later in the week and just be on standby, and we would get back with you.

MR. CARTER: Yes, sir. That --

THE COURT: So the quickest time that I've had to do it after you called the office last Friday was today.

MR. CARTER: Your Honor, I'm not blaming the Court for sure. I actually called the judge's office before the term started. Your clerk -- I'm sorry. I can't remember his name.

THE COURT: It is Mr. Hopper. And he is here. And I mean he told you --

MR. CARTER: He told me.

THE COURT: -- that January 9 --

MR. CARTER: He told me that we could do it the beginning of the term, but I need to talk to Mr. Evans about it. I talked to Mr. Evans about it. Mr. Evans would not agree to a date so we could do these motions. The times that I was here trying to do a term -- I mean trying to do a plea, I asked the Court about it then because there was a chance I had that maybe I could get it set without Mr. Evans' approval. I mean that is just a fact.

These motions could have been heard not because -- I understand that the Court doesn't really care when we do them if we can agree to do them, but we could never agree. Mr. Evans would never agree.

THE COURT: You never filed a motion asking me to set a date. You just, it was --

MR. CARTER: I didn't file a motion, but I called your office.

MR. EVANS: Your Honor --

THE COURT: You called my office before the term. I said be up there the first day of the term, January 9. And you were up here trying to plea him and that is all that happened that day. You did not at any time after that make a request to this Court that you wanted to set another date for these motions to be heard.

MR. CARTER: Yes, I did, Your Honor. We might disagree, but I did.

THE COURT: I don't know who you made that statement to because it was not made to me.

MR. CARTER: You told me to get with Mr. Evans.

THE COURT: I don't recall it being done at all. But if you got with Mr. Evans -- whether you did or not, you know, with the trial -- in fact, you were up here one other time. Mr. Pitchford went up to the very end and then decided he didn't want to plea. I went through everything with him.

MR. CARTER: All that is true.

THE COURT: So, you know, I don't think that it's any situation where the motions could have been heard much quicker. But I know from past experience most of the time the district attorney's office, if somebody puts them through the, I guess, the work of having to prepare for motions, they most of the time do withdraw any offers that are outstanding.

MR. CARTER: Your Honor, they didn't do it in this instance. And I know and Mr. Evans knows, whether he will admit it or not, that I made lots of efforts to have these motions argued before today and that I couldn't.

As a matter of fact, if I'm not mistaken, I believe the Court or, or the law clerk told -- Your Honor, I believe you told me that we would do it the morning of the trial.

THE COURT: I told you if my medical malpractice case went as long as I was concerned at the end of last week that it might that the first day of the term might be the quickest day that I could hear them because this week was -- I originally had a medical malpractice. And there was a criminal trial that was supposed to go forward yesterday that I did not know how long it would take.

By the lateness of the time you contacted the office last Friday, with a full week of court scheduled in

front of me, I didn't know if I would have any time to do it or not. And I advised the clerk to tell you that we would get them done as quickly as we possibly could. And if we could not get them done prior to the day of the trial, that we would have to do them then.

MR. EVANS: Your Honor, for the record, I would like to state here that I have told the Court and the Court's administrator that any date that the Court set it, I would make myself available.

As far as things that I've said as far as pleas, I told Ray Charles Carter myself that if we had to go through all of this long list of motions, I would not allow him to plead. And I can tell the Court right now after the comments he has made, there will be no offer in this case.

THE COURT: Well, let's --

MR. CARTER: That is fine with me. You do whatever you gotta do.

THE COURT: Suit it up and we will proceed with trial on Monday.

MR. CARTER: Your Honor, can I just clear up the record with your law clerk that I called your office before this term even started and I talked about getting a motion date?

THE COURT: I don't dis -- I just said you called the office, and he had told you to be up here the first day of the term, and you were up here that day. I thought we were going to hear some motions that day.

Then Mr. Pitchford, you know, you spent half the morning trying to get him -- you weren't trying to get him to, you were trying to advise him of the best interest would possibly be to plead, and he chose not

to do that. And that is the last time I heard about the motions getting brought up again until Friday of last week. But certainly yes, I readily acknowledge my office was contacted prior to the term by you.

As I say, we will resume this matter on Monday with jury selection.

(THE PROCEEDING ON THIS DATE WAS CONCLUDED.)

(THE PROSPECTIVE JURORS HAVING BEEN DULY QUALIFIED AND SWORN TO TRY THE ISSUES, PROCEEDINGS ON FEBRUARY 6, 2006, WERE AS FOLLOWS. MR. EVANS, MR. HILL, MR. CARTER, MR. BAUM AND THE DEFENDANT WERE PRESENT.)

THE COURT: Court will come back to order. I'll call up now the case of the State of Mississippi versus Terry Pitchford, cause number 2005-009-CR.

What says the State of Mississippi?

MR. EVANS: State of Mississippi is ready for trial, Your Honor.

THE COURT: What says defense?

MR. CARTER: Ready as well, Your Honor.

THE COURT: Ladies and gentlemen, those of you that are on the jury panel, I'm going to begin calling your name. As your names are called, if you would, come forward and please have a seat up in these rows up front. The bailiffs will give you a number that you will need to affix to your upper collar or lapel area. That will help us keep track of who we are speaking to during this process.

(THE PROSPECTIVE JURORS WERE CALLED UP AND SEATED IN ORDER.)

Ladies and gentlemen, the first process in a trial is a procedure referred to as voir dire, which that's a fancy word or two fancy words meaning to speak the truth. That is, we want to get truthful answers from each of you concerning the views that you might have on the case that we are to be trying today and this week.

These questions are not asked for the purpose of embarrassing anybody, putting you on the spot about any subject or anything else. We just want to make sure that we do get a fair and impartial jury to try this matter. There may be matters peculiar to this case where you couldn't be fair and impartial where you could on any other case. And so that's why we will ask you facts specific to this case.

It's also necessary that you answer these questions under oath. So if you will, please stand at this time and raise that oath -- I mean raise your right hand and take that oath.

Do you and each of you solemnly swear or affirm that you will give true answers to all questions propounded to you by the Court and by the attorneys in the selection of a jury in this case, so help you God?

PROSPECTIVE JURORS: I do.

THE COURT: If you will be seated, please. Ladies and gentlemen, the first -- the first step I always do, I always think it's nice to let the attorneys -- I mean the jury know who the attorneys are in the case. The State of Mississippi is represented by Honorable Doug Evans and Honorable Clyde Hill. These will be the people participating in the trial. And then the defendant is represented by Honorable Ray Charles

Carter and Honorable Ray Baum. And also Honorable Allison Steiner right here is also helping them as well.

These are the attorneys that are involved in this case. And so I'll ask you a few questions first about the attorneys involved in the case. I want to know first if any of you are related by blood or by marriage to anybody that's participating in this case as an attorney. Are any of you related by blood or marriage? Any of you that are, if you will, please stand at this time.

And Mr. Artman, who are you related to?

JUROR KENNETH ARTMAN: Clyde Hill.

THE COURT: And how are you related to Mr. Hill?

JUROR KENNETH ARTMAN: His father was my wife's grandfather's brother.

THE COURT: Okay. So that would be, I guess, by marriage then.

JUROR KENNETH ARTMAN: Yes. By marriage.

THE COURT: And would that influence you in this case? That is, the fact that Mr. Hill is involved in the case, and if nothing else you knew about the case, would you automatically just tend to favor his side because he was involved with it?

JUROR KENNETH ARTMAN: I don't know.

THE COURT: You are saying it would not bother you; is that correct?

JUROR KENNETH ARTMAN: I don't think it would.

THE COURT: Any doubt in your mind about it? Because there can't be any doubts at all.

JUROR KENNETH ARTMAN: There might be.

THE COURT: Why would that influence you? I mean if I advised you right now --

JUROR KENNETH ARTMAN: It --

THE COURT: If I advised you right now that you can't let the fact of who the lawyers involved in the case be a factor but you must base your decision on the evidence presented, can you do that?

JUROR KENNETH ARTMAN: Yes.

THE COURT: Okay. Thank you.

Anyone else that's related by blood or by marriage to anybody that's involved in the case that's one of the attorneys? That is, are any of you related by blood or by marriage to Mr. Evans, Mr. Hill, Mr. Carter, Mr. Baum or Miss Steiner? Are any of you related to any of the rest of them?

The next question then I want to know is if any of you have had a situation where any of these attorneys might have done some work for you in the past. Has any of these attorneys ever represented you in some matter, a legal proceeding or any legal matter whatsoever?

Yes, ma'am. Number 72. Who has done some work for you, Miss Journigan?

JUROR SUSIE JOURNIGAN: Mr. Baum.

THE COURT: Mr. Baum.

JUROR SUSIE JOURNIGAN: Ray Baum. Yes.

THE COURT: How long ago has that been?

JUROR SUSIE JOURNIGAN: A year and two months.

THE COURT: Would the fact that he represented you or did some work for you in the past, would that

be a factor or influence you in being fair and impartial in this case?

JUROR SUSIE JOURNIGAN: No.

THE COURT: Okay. Thank you.

Any one of the rest of you that would have had any work done by any of the attorneys?

Okay. I'll ask kind of the other side of that now. Have any of you ever been on the opposite side of a case from that in which one of these attorneys have been involved? That is, have they opposed you in some legal matter where you were on one side and they were representing somebody that was on the other side? Have any of you had a situation like that where that would have occurred? I take it by your silence that none of you would have that type of case.

Finally, I want to know if any of you have a close friendship, close association, close relationship with any of the attorneys or any one of the attorneys or more than one of the attorneys involved in this case that would affect your ability to be fair and impartial.

Like, I was asking Mr. Artman a few minutes ago. It does not matter if you know one of the attorneys. What I want to know is do any of you have a situation where you would know one of the attorneys and would favor their side knowing nothing about the case but just because you know one of the attorneys you would automatically be on their side. Do any of you have a situation like that?

JUROR DAVID FEDRIC: Actually, I -- Doug is a friend of mine. Our sons grew up together playing ball and hunting. And actually, he did prosecute a son -- a case where my son was the victim. So in all honesty -

- not only that, it's my sister's family's place where it took place.

THE COURT: Okay. We will get into that in a few minutes more about the peculiar facts about the case. Are you telling me that you're related to the person that was the purported victim in this case?

JUROR DAVID FEDRIC: My sister's family owns the store.

THE COURT: Okay. So you would have had some facts already I would take it about this case that you know something about it.

JUROR DAVID FEDRIC: Yes, sir. Plus, plus, Doug is a friend.

THE COURT: Would those factors influence you and affect you in being fair and impartial in this case?

JUROR DAVID FEDRIC: I got a lot of respect for Doug Evans.

THE COURT: Would you just tend to favor his side --

JUROR DAVID FEDRIC: I probably would.

THE COURT: -- and vote for him --

JUROR DAVID FEDRIC: I probably would. I would.

THE COURT: -- just because of who he is? Okay. Thank you. You can be seated.

Yes, ma'am. Number 14.

JUROR DEBRA ALLEN: My family is real good friends with Greg Meyer. We do things social with him. His wife is one of my best friends.

THE COURT: For the record, he is one of the assistant district attorneys in the case.

I don't believe he is -- is he going to be involved in the trial?

MR. EVANS: No, sir.

THE COURT: Would the fact that he works for Mr. Evans automatically cause you to favor the prosecution in this case?

JUROR DEBRA ALLEN: Also, I go to church with Clyde. I have a lot of respect -- I would believe anything Clyde or Greg said.

THE COURT: What it is is they are not going to be testifying. They are just going to be presenting evidence. They are not going to be offering any testimony. They are just going to be representing one side of the case. And then Mr. Carter and Mr. Baum are representing -- Miss Steiner are representing one side of the case.

So you will be basing your decision on the facts as you determine them to be from the evidence and not on who the lawyers are. So can you -- can you assure me that you will follow and listen to the facts and not base it right now on who the lawyers are but base it strictly on the facts as they are presented here in court?

JUROR DEBRA ALLEN: I would listen to the facts. I don't know if I could be totally impartial.

THE COURT: Why would that affect you, not knowing anything about the case and Mr. Meyer not being involved in the case?

JUROR DEBRA ALLEN: I know them. I know that they are -- I don't know. You just tend to trust whoever you know the best.

THE COURT: And so you would tend to favor one side --

JUROR DEBRA ALLEN: I would try.

THE COURT: You tend to favor one side over the other because you know them and you don't know the other side. Is that what you are telling me?

JUROR DEBRA ALLEN: I am just being honest. I would try to do it. But I am saying I might not be able, you know.

THE COURT: Ma'am, I want -- please, I mean there will be all of you will ask questions of. I want honest answers, and I appreciate that, ma'am. If you thought I was trying to give you a hard time, I don't want you to think that at all.

You know, as I said when we first started, we want complete answers to everything. We have got to ask a lot of questions during this process. So I am not trying to embarrass you or put you on the spot. I just want complete answers. I do appreciate your total honesty on that. Let me assure you I want that from everybody, and you are a good example for everybody to follow. I appreciate that.

But you are saying that in your mind that might influence you or it might be a factor --

JUROR DEBRA ALLEN: (Nodded.)

THE COURT: -- and you can't honestly say that it would not be a factor.

JUROR DEBRA ALLEN: I can't honestly say that.

THE COURT: Thank you. I appreciate you being forthright with us on that.

Ladies and gentlemen, any of you -- and as I say, I really do commend Miss Allen, because, you know, you have to do a lot of soul searching when we ask these questions. You have to think about some stuff that maybe you hadn't thought about before. And, you know, the process is going to go on a good portion of the day. But we want everybody to say whatever is on their heart. Whatever we ask we want complete answers to.

If I ask somebody a question in response to what they have answered, that's not -- you know, please don't think that the -- because the attorneys will do that too. Nobody is trying to give anybody a hard time or anything. We just want to make sure that we do get complete answers to everything. Because as can you imagine, this is a very, very serious matter or we would not be here up today. I want to make that clear before we did go any further.

Ladies and gentlemen, I want to ask the next question. That is, if any of you are related by blood or marriage to anybody that serves in law enforcement. I want to know if you are related by blood or marriage to any person that has at some point in the past served in law enforcement. Also, if any of you presently yourselves or have at some point served in law enforcement, I want to know that. Even if you had some cousin that you just see once a year at a reunion that maybe works in Memphis or out of state or something. Anybody that has got any relationship to law enforcement, if you will, please stand at this time. And we will go through those now.

Mr. Marter, who are you related to?

JUROR STEPHEN MARTER: Mark Fielder. Reserve deputy. Montgomery County.

THE COURT: What is his last name again, sir?

JUROR STEPHEN MARTER: Fielder.

THE COURT: Fielder. How are you related to him?

JUROR STEPHEN MARTER: Brother-in-law.

THE COURT: And, of course, as you can imagine, in criminal prosecution law enforcement officers would probably be expected to testify in this case. Would the fact that you've got a brother-in-law that serves in law enforcement or does in Montgomery County, would that be a factor or influence you in this case at all?

JUROR STEPHEN MARTER: No, sir.

THE COURT: Okay. Thank you. You may be seated.

And Mr. Morgan, who is it that you are --

JUROR JAMES MORGAN: I was in law enforcement. I was a constable for two terms and worked as deputy sheriff for four years.

THE COURT: And how long ago has that been?

JUROR JAMES MORGAN: In the 80's.

THE COURT: Would that be a factor or influence you in your ability to be fair and impartial and in this case?

JUROR JAMES MORGAN: No.

THE COURT: Okay. Thank you.

And number 20. Miss Britt.

JUROR LOVEY BRITT: Yes.

THE COURT: What is that situation?

JUROR LOVEY BRITT: My brother-in-law is a reserve deputy sheriff.

THE COURT: And who is that?

JUROR LOVEY BRITT: Albert Britt.

THE COURT: What is the last name?

JUROR LOVEY BRITT: Britt.

THE COURT: Britt.

JUROR LOVEY BRITT: B-r-i-t-t.

THE COURT: And would that influence you or be a factor in your ability to be fair and impartial in this case?

JUROR LOVEY BRITT: Not at all.

THE COURT: Okay. Thank you.

And Mr. James, number 23, what is that situation with law enforcement?

JUROR MANUEL JAMES, JR.: I'm related to Officer Conley, Greg Conley.

THE COURT: You are related to Officer Greg Conley.

JUROR MANUEL JAMES, JR.: Right.

THE COURT: How are you related to him?

JUROR MANUEL JAMES, JR.: We are like second cousins.

THE COURT: Second cousins.

JUROR MANUEL JAMES, JR.: Correct.

THE COURT: Would that cause you to tend to favor the side that he is involved with just because you are related to him? That is, would the fact that he is in law enforcement and you're his cousin influence you

or be a factor in your ability to be fair and impartial in this case?

JUROR MANUEL JAMES, JR.: No, it wouldn't.

THE COURT: I think Mr. Conley is probably going to be a witness in this case. He has been subpoenaed as a witness. Would you tend to favor his side or give his testimony greater weight or credibility just because he is your cousin and you know him? Would that cause you to favor his side or give his testimony greater weight than you would anybody else that testified?

JUROR MANUEL JAMES, JR.: No. I would listen to him.

THE COURT: What I'm saying is that, you know, you have got to listen to each witness independently and you have got to evaluate each witness independently. And you can't automatically if a witness comes up say well, I am going to believe him because I know him and I don't know this next witness. That is the question I am getting at. Do you understand what I'm asking you.

JUROR MANUEL JAMES, JR.: Yes, sir.

THE COURT: So would that cause you to automatically favor his side because you are related or know him and you don't know some of the witnesses?

JUROR MANUEL JAMES, JR.: No, sir. It wouldn't affect me.

THE COURT: Number 28. Miss Parker, what is that situation?

JUROR LISA PARKER: My husband is reserve deputy, Tommy Parker.

THE COURT: Tony.

JUROR LISA PARKER: Tommy Parker.

THE COURT: Tommy Parker. Okay. Would that influence you or affect you in being fair and impartial in this case?

JUROR LISA PARKER: No.

THE COURT: Okay. Thank you.

Okay. Number 32. Mr. Harris, what is that relationship or involvement or kinship with law enforcement?

JUROR CECIL HARRIS: I have a first cousin in Memphis Tennessee. He is a deputy.

THE COURT: Would that influence you or be a factor in your ability to be fair and impartial in this case?

JUROR CECIL HARRIS: No, sir.

THE COURT: Okay. Thank you.

Then number 37. Mr. Durham.

JUROR KENTON DURHAM: I have a brother that is a federal game warden in Yazoo County.

THE COURT: What county is he in?

JUROR KENTON DURHAM: Yazoo.

THE COURT: Would that be a factor in your ability to be fair and impartial in this case?

JUROR KENTON DURHAM: No, sir.

THE COURT: Okay. Thank you.

And then number 46, Mr. Caulder.

JUROR SCOTT CAULDER: I'm presently employed with the City of Grenada Police Department.

THE COURT: And in what capacity?

JUROR SCOTT CAULDER: Patrolman.

THE COURT: And in your capacity as a patrol officer and employee of the city -- I know this was a county case. But did you have any involvement at all in this case as far as -- I don't want to know anything you might have heard or anything like that. But did you have any role in this case as far as investigating?

JUROR SCOTT CAULDER: I didn't have any present involvement. I was aware the day it happened.

THE COURT: Right.

JUROR SCOTT CAULDER: Aware of the situation.

THE COURT: Would the fact that you are in law enforcement affect your ability to be fair and impartial because you are in law enforcement?

JUROR SCOTT CAULDER: I think it would because I know most of the people that are going to be testifying.

THE COURT: So you would tend to favor that side because that is your brethren in law enforcement; is that correct?

JUROR SCOTT CAULDER: Yes, sir. Yes, sir.

THE COURT: Thank you.

Number 64. No, I am sorry. I am skipping number 57. Mr. Merriman.

JUROR RONALD MERRIMAN: Yes, sir.

THE COURT: What is that situation, sir?

JUROR RONALD MERRIMAN: My son is presently an officer on the Grenada Police Department.

THE COURT: And would that be a factor in your ability to be fair and impartial in this case?

JUROR RONALD MERRIMAN: Yes, sir. I will add that I'm also a three-term city councilman with the City of Grenada, not presently serving. But I got real close to the police department through that period of time. That's only been since November.

THE COURT: Right.

JUROR RONALD MERRIMAN: And I do know quite a few of the law around Grenada - from Mr. Evans all the way to William Blackmon, a lot of the others. You know what I mean. There's a lot around.

THE COURT: You know these people and knowing them would cause you to --

JUROR RONALD MERRIMAN: I know them quite well. Yes, sir.

THE COURT: That would affect your ability to be fair and impartial in this case.

JUROR RONALD MERRIMAN: More than likely it would because I got a lot closer to police than I probably should have.

THE COURT: Well, I appreciate that Mr. Merriman.

JUROR RONALD MERRIMAN: I do think a lot of them. I know what they go through, and it probably would affect me. Yes, sir.

THE COURT: Okay. Thank you, sir.

Number 64. Mr. Johnston.

JUROR WILLIAM JOHNSTON: I have a nephew on the Mississippi Bureau of Narcotics.

THE COURT: What is his name?

JUROR WILLIAM JOHNSTON: Lee Tart. He also used to be a police officer with the City of Grenada.

THE COURT: Right. Would that affect your ability to be fair and impartial because your nephew is in law enforcement?

JUROR WILLIAM JOHNSTON: No.

THE COURT: So that wouldn't be a factor in your deliberations on a verdict in this case.

JUROR WILLIAM JOHNSTON: No.

THE COURT: Okay. Thank you, sir.

Number 72. Miss Journigan. Who is it or what is that situation?

JUROR SUSIE JOURNIGAN: My brother was a transport officer in the state of New Jersey for 32 years.

THE COURT: Would that be a factor or influence you in being fair and impartial in this case?

JUROR SUSIE JOURNIGAN: No.

THE COURT: Okay. Thank you.

And Mr. Little, what is that?

JUROR DAVID LITTLE: I have a nephew that is on the Grenada County Sheriff's Department. I have a nephew on the Leake County Sheriff's Department.

THE COURT: First on Grenada. Who is your nephew?

JUROR DAVID LITTLE: James Blakey.

THE COURT: Okay. And then you've got one you said in Leake County as well.

JUROR DAVID LITTLE: Yes, sir.

THE COURT: Would the fact that you've got nephews that are in law enforcement, would that influence you or be a factor in your being fair and impartial in this case?

JUROR DAVID LITTLE: No, sir.

THE COURT: So it won't have any bearing at all; is that correct?

JUROR DAVID LITTLE: No, sir.

THE COURT: Okay. Thank you.

And then Mr. Counts. What is that situation?

JUROR JEFFREY COUNTS: First cousin is Keith Carver, game warden in Grenada County.

THE COURT: Keith Carver, game warden here, is your cousin.

JUROR JEFFREY COUNTS: Yes, sir.

THE COURT: Would that influence you or affect you in any way in your ability to be fair and impartial in this case?

JUROR JEFFREY COUNTS: No, sir.

THE COURT: Okay. Thank you.

I think I will just get everybody on this side before we go to the other side of the courtroom.

Number 87. Miss Downs, what is that situation? JUROR BETTY DOWNS: My sister's presently a deputy warden at Parchman. I myself work at Delta Correctional in Greenwood.

THE COURT: And you're in the prison system. What do you do for them up in Greenwood?

JUROR BETTY DOWNS: I'm a bookkeeper.

THE COURT: Bookkeeper.

JUROR BETTY DOWNS: (Nodded.)

THE COURT: And would those factors influence you or affect you in being fair and impartial in this case?

JUROR BETTY DOWNS: No, sir.

THE COURT: Okay. Thank you.

And Miss Clark. Number 88.

JUROR MARIANNE CLARK: My brother-in-law is a sheriff's auxiliary officer.

THE COURT: Auxiliary officer. Is that what you said?

JUROR MARIANNE CLARK: (Nodded.)

THE COURT: What is his name?

JUROR MARIANNE CLARK: Steve Howell.

THE COURT: What is the last name again?

JUROR MARIANNE CLARK: Howell.

THE COURT: Howell. Okay. Would that influence you or affect you in any way in being fair and impartial in this case?

JUROR MARIANNE CLARK: No, sir.

THE COURT: Okay. Thank you.

Mr. Bennett.

JUROR GARY BENNETT: My brother-in-law is Grenada police officer.

THE COURT: What is his name?

JUROR GARY BENNETT: I'm embarrassed. John Wayne -- I can't call his last name.

MR. EVANS: Haddox.

JUROR GARY BENNETT: Yeah.

THE COURT: What is the last name again?

MR. EVANS: Haddox.

JUROR GARY BENNETT: We don't see one another often. John Wayne Haddox.

THE COURT: We all have situations where we can't remember names too. I'm the world's worst. I can't remember my own name half the time. So no problem at all. I understand.

Would that factor influence you in being fair and impartial?

JUROR GARY BENNETT: None whatsoever.

THE COURT: It would not; is that correct?

JUROR GARY BENNETT: It would not.

THE COURT: Thank you. I appreciate that.

Mr. Chairs, what is that situation?

JUROR GILBERT CHAIRS: I'm cousins with Greg Conley.

THE COURT: You are a cousin of Mr. Greg Conley. To what degree? Do you know?

JUROR GILBERT CHAIRS: Like second or third. Something like that.

THE COURT: Would the fact that you are related to him influence you or cause you to favor one side or the other in this case?

JUROR GILBERT CHAIRS: No, sir.

THE COURT: If he testifies in this case would you listen automatically and tend to believe his testimony over somebody else's strictly because you are related to him or anything? Would that be a factor at all?

JUROR GILBERT CHAIRS: No.

THE COURT: Okay. I appreciate that, Mr. Chairs.

Now, here on the other side of the courtroom.

Number 78. Miss Tramel, what is that relationship or involvement with law enforcement?

JUROR NATHALIE TRAMEL: My husband's second cousin is a motorcycle officer in Wiggins County. I can't remember his name.

THE COURT: Where does he work?

JUROR NATHALIE TRAMEL: Wiggins.

THE COURT: Down south.

JUROR NATHALIE TRAMEL: Yes, sir.

THE COURT: Would that affect you in any way in being fair and impartial in this case?

JUROR NATHALIE TRAMEL: No, sir.

THE COURT: Okay. I appreciate that. Thank you.

Okay. Miss Johnston.

JUROR BETTY JOHNSTON: My husband is number 64. Lee Tart is also my nephew.

THE COURT: Okay. Would that influence you or affect your ability to be fair and impartial in this case?

JUROR BETTY JOHNSTON: No, sir.

THE COURT: Okay. Thank you.

Number 83. Miss Lancaster, what is that situation?

JUROR CANDICE LANCASTER: My brother-in-law is reserve police officer for Grenada County.

THE COURT: What is his name?

JUROR CANDICE LANCASTER: Robert Bowen.

THE COURT: Would that influence you in any way in being fair and impartial in this case?

JUROR CANDICE LANCASTER: No, sir.

THE COURT: Okay. Thank you.

And then number 84, Miss Beck.

JUROR LEIGH BECK: My husband is first cousins with someone on Grenada Police Department. His name is Mark Beck.

THE COURT: Mark.

JUROR LEIGH BECK: Beck.

THE COURT: Okay. Would that influence you or affect you in any way in your ability to be fair and impartial in this case?

JUROR LEIGH BECK: No, sir.

THE COURT: Okay. Thank you, ma'am.

Y'all pardon me a second. I have a scratchy throat. I need to take a drink of water.

Ladies and gentlemen, I am going to kind of give you a brief scenario of what the charge is before you today. It's charged that Terry Pitchford on or about the 7th day of November, 2004, in this county and within the jurisdiction of this court, while acting in concert with another or while aiding, abetting, assisting or encouraging another, did willfully, feloniously, intentionally and without authority of law and with or without the deliberate design to effect death kill and murder Rubin Britt, a human being, while engaged in the felony crime of armed robbery.

So Mr. Pitchford is charged with the crime of capital murder. And that is the type case that we are here on today. And he is here today because he was indicted by a grand jury of this county.

Now, an indictment is not an indication of the guilt or innocence of the person that is on trial. An

indictment is strictly the means by which a case is brought to you petit jurors for trial. So, I want to know if there is any one of you that would just because there is an indictment handed down in this case tend to favor one side or the other without having heard any proof at all. Are there any of you that would automatically favor one side or the other in this case?

So each of you are assuring me then that you will disregard the fact that there was an indictment and base your decision on the evidence; is that correct? I assume by your silence that is, in fact, the case.

Now, the burden of proof in a criminal trial is on the State of Mississippi. They've got to prove Mr. Pitchford guilty beyond a reasonable doubt. He does not have to prove his innocence. In fact, he does not have to prove anything whatsoever. So is there any one of you that think the burden of proof should be higher than that of beyond a reasonable doubt? Or is there any of you that you think it should be lesser than that of beyond a reasonable doubt? So each of you, I take it by your silence, are assuring me that you understand the burden of proof and understand what it is.

And also situation where you have to -- all 12 members on a jury panel have to agree on a verdict before it can be returned into court as the verdict of the jury. So is there any one of you that think it ought to be just, you know, seven to five or less than unanimous verdict? So each of you are assuring me that you understand that it's got to be unanimous and agree with that and have no problem with that.

I want to ask you now -- maybe get more fact specific to the case that we've got today. I want to know first

of all if any of you are related by blood or by marriage to Terry Pitchford. Any of you related at all by blood or by marriage to Mr. Pitchford. And I take it by your silence none of you are related by blood or by marriage to Mr. Pitchford.

I want to know if any of you just know Mr. Pitchford. As far as when he walked in the courtroom, you might have known him on sight as being Terry Pitchford. Did any of you know him in any way whatsoever?

Okay. Number 16. Mr. Tillman, how did -- how do you know Mr. Pitchford?

JUROR CINTRON TILLMAN: From dating sisters.

THE COURT: From who?

JUROR CINTRON TILLMAN: From dating sisters.

THE COURT: So you used to date Mr. Pitchford's sister; is that correct?

JUROR CINTRON TILLMAN: No. We dated sisters.

THE COURT: Oh, you dated a sister and he dated the other sister.

JUROR CINTRON TILLMAN: Yes, sir.

THE COURT: So y'all would have had some kind of social situation where y'all might have met each other.

JUROR CINTRON TILLMAN: Yes, sir.

THE COURT: Would that influence your ability to be fair and impartial in this case?

JUROR CINTRON TILLMAN: No, sir.

THE COURT: Can you lay aside the fact that you might have known Mr. Pitchford in that regard and

just base your decision strictly on the evidence only? Is that correct?

JUROR CINTRON TILLMAN: Yes, sir.

THE COURT: Okay. Thank you.

And number 72. Miss Journigan, you know Mr. Pitchford as well.

JUROR SUSIE JOURNIGAN: I know him because he is one of my customers. He is one of my customers.

THE COURT: Okay. Where do you work?

JUROR SUSIE JOURNIGAN: Hankins Auto World.

THE COURT: Okay. He has been in there buying or at least looking at automobiles or something before.

JUROR SUSIE JOURNIGAN: Yes, sir.

THE COURT: And would that influence you in being fair and impartial in this case?

JUROR SUSIE JOURNIGAN: Since I've handed paperwork to law enforcement for him I couldn't be fair.

THE COURT: You just feel like you -- because of those involvements, you couldn't be a fair juror in this case.

JUROR SUSIE JOURNIGAN: No, sir.

THE COURT: Okay. Thank you, Miss Journigan.

Any one of the rest of you that would know Mr. Pitchford?

Okay. I want to know now if any of you were related by blood or by marriage to Rubin Britt. Were any of you related by blood or marriage to Mr. Britt?

How many of you, if any, knew Mr. Britt during his lifetime? If you knew Rubin Britt during his lifetime, if you will, please stand.

Okay. Mr. Morgan, number 13, how did you know Mr. Britt?

JUROR JAMES MORGAN: Just through the store he ran, Your Honor. I traded in there some.

THE COURT: And, of course, this incident, I think, occurred probably at his place of employment or allegedly occurred at his place of employment. Would the fact that you knew Mr. Britt from the store where he worked, would that be a factor or influence you in being fair and impartial in this case?

JUROR JAMES MORGAN: I don't think so.

THE COURT: And have you heard anything about the case?

JUROR JAMES MORGAN: The usual.

THE COURT: Well, has that caused you to form any opinion as to the guilt or innocence of Mr. Pitchford?

JUROR JAMES MORGAN: No.

THE COURT: Can you lay aside anything you heard and base your decision strictly on the evidence here?

JUROR JAMES MORGAN: Yes, sir.

THE COURT: Okay. Thank you.

And then number 71. Miss Campbell, how did -- how did you know Mr. Britt?

JUROR LARISA CAMPBELL: I didn't know him really personally but I did shop in the store occasionally when I went through that way.

THE COURT: When you went through that way you would shop there.

JUROR LARISA CAMPBELL: (Nodded.)

THE COURT: Would that be a factor or affect you in being fair and impartial in this case?

JUROR LARISA CAMPBELL: I'm not so sure about that.

THE COURT: You have doubts about it in your own mind about whether you could be fair because you knew him where the place he worked; is that correct?

JUROR LARISA CAMPBELL: Yes, sir.

THE COURT: Thank you.

Then number 85. Mr. Welch, how did you know Mr. Britt?

JUROR TERRY WELCH: I just knew him through the store, stopping in and going to see some of my friends in Coffeeville. I work with a bunch of guys from Coffeeville, Water Valley that stopped there a lot when they come to work.

THE COURT: Would that influence you in being fair and impartial, the fact that you would have seen him in that type of environment or knew Mr. Britt from there?

JUROR TERRY WELCH: I don't think that would affect me as so many people I know talking about him.

THE COURT: Okay. I'll ask you that question then. So you heard some facts about the case during the time it occurred since November of '04; is that correct?

JUROR TERRY WELCH: Yes, sir.

THE COURT: Has that caused you to form opinions as to the guilt or innocence of Mr. Pitchford?

JUROR TERRY WELCH: I'm under oath; right?

THE COURT: Right. And I don't want to know what any opinion you might have about the case. Have you already in your idea got a fixed opinion of the case?

JUROR TERRY WELCH: I think I do.

THE COURT: Could you lay that aside and base the decision on the evidence in court or is your opinion already fixed to the extent that you just feel like you could not lay that opinion aside?

JUROR TERRY WELCH: I probably could.

THE COURT: You could lay that opinion --

JUROR TERRY WELCH: I think I could.

THE COURT: Well, I want -- it can't be any doubt because -- and I understand. And please, you know, I don't -- I don't want you to think that I'm putting you on the spot or anything. But we have got to have, you know, a jury up here that can't have any ideas about anything other than coming in and basing the decision only on the evidence and not on any information that has been gathered elsewhere.

JUROR TERRY WELCH: I realize that. Like I say, I have heard a lot of talk from work on stuff like that from a lot of people.

THE COURT: Okay. So you are concerned that that would affect you; is that correct?

JUROR TERRY WELCH: Yes, sir.

THE COURT: Okay. Thank you.

Yes, sir. Mr. Marter.

JUROR STEPHEN MARTER: I just realized who we were talking about. I have been in the store as well and met him and talked with him.

THE COURT: Would that influence you or affect you in being fair and impartial in this case?

JUROR STEPHEN MARTER: No, sir.

THE COURT: And so you are saying that wouldn't be a factor at all if you were on the jury; is that correct?

JUROR STEPHEN MARTER: Yes, sir.

THE COURT: Okay. Thank you.

Ladies and gentlemen, I want to know now if any of you have heard anything about this case. And I know obviously a few of you have already responded that you have heard a little bit about the case. But any of the rest of you that have not spoken up or any of you that have spoken up but need to do so again, feel need to do so again, any of you have any knowledge about the case. Have any of you heard anything about the case?

Again, it was alleged that Mr. Britt was murdered during the course of an armed robbery.

UNIDENTIFIED JUROR: What was the store?

THE COURT: Crossroads Grocery Store was the name of the store. That may give you more knowledge about the case.

But if any of you have heard anything about it, if you have, I want you to stand. Again, I don't want to know what you heard, but I might want to know a little bit about it.

Okay. Mr. Artman, you heard about the case.

JUROR KENNETH ARTMAN: Yes, sir.

THE COURT: And how did you come to hear about it?

JUROR KENNETH ARTMAN: Most of my wife's relatives live out in Hardy, and that's in the general area of where that happened.

THE COURT: And has that caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR KENNETH ARTMAN: At the time I heard it.

THE COURT: Can you lay aside now anything you heard outside the courtroom and then just base your decision only on the evidence presented here?

JUROR KENNETH ARTMAN: Yes, sir.

THE COURT: Okay. Thank you.

And number 8. Miss Tillman, you heard about the case.

JUROR MISTY TILLMAN: Yes, sir.

THE COURT: And has that caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR MISTY TILLMAN: Yes, sir.

THE COURT: Can you lay that aside and just base your decision on the evidence or is your opinion so fixed --

JUROR MISTY TILLMAN: Probably not.

THE COURT: So you could not lay what you heard aside; is that correct?

JUROR MISTY TILLMAN: (Nodded.)

THE COURT: You can be seated.

Mr. Marter, I believe you already mentioned you had heard about the case but that has not caused you to form an opinion as to Mr. Pitchford's guilt or innocence; is that correct?

JUROR STEPHEN MARTER: No, sir.

THE COURT: You can base your decision strictly on the evidence here; is that correct?

JUROR STEPHEN MARTER: Yes, sir. Yes, sir.

THE COURT: Okay. Thank you.

Number 36, Miss Harrison, you heard about the case.

JUROR CRISTIN HARRISON: Yes, sir.

THE COURT: And how did you come to hear about it?

JUROR CRISTIN HARRISON: Relatives that own a country store also.

THE COURT: A relative -- say that again.

JUROR CRISTIN HARRISON: Relatives that own a country store.

THE COURT: Has that caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR CRISTIN HARRISON: At this point I don't believe so.

THE COURT: So you have not got an opinion on that then.

JUROR CRISTIN HARRISON: No, sir.

THE COURT: Can you lay aside anything you heard and base your decision only on the evidence presented here in court?

JUROR CRISTIN HARRISON: Yes, sir.

THE COURT: Okay. Thank you.

Number 41, Mr. Fedric, you heard something about the case; is that correct?

JUROR DAVID FEDRIC: My sister's family owns a grocery. Yes, sir. I heard about it that way.

THE COURT: Yes, sir. I'm sorry. You had already made a statement that, I believe, because of your knowledge of the case and because of you knowing Mr. Evans that you couldn't be fair and impartial in this particular case; is that --

JUROR DAVID FEDRIC: I could not.

THE COURT: I appreciate that, and I appreciate your honesty. Okay. Thank you.

Okay. Number 42. Mrs. Goff.

JUROR CHRISTY GOFF: I have friends and relatives that knew Mr. Britt real well.

THE COURT: You have friends and relatives that knew Britt. Is that what you said?

JUROR CHRISTY GOFF: They knew the hour --

THE COURT: Has what you heard caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR CHRISTY GOFF: Yes, sir.

THE COURT: And could you lay that aside and base your decision on the evidence here in court or is it so fixed in your mind that you could not lay that aside and base it on the decisions here -- I mean on the evidence here?

JUROR CHRISTY GOFF: It would be difficult for me.

THE COURT: So you feel like you could not lay those facts aside then; is that correct?

JUROR CHRISTY GOFF: Yes, sir.

THE COURT: Okay. Thank you.

Okay. Number 57. Mr. Merriman, I believe you've already said because of your knowledge of law enforcement and friendships --

JUROR RONALD MERRIMAN: I just did want to explain that there is a relative of Mr. Britt's, Tim McDaniels, who is a customer in the store that I work -- good customer of mine. He was, I think, a nephew and also a neighbor to Mr. Britt, lived in -- right next door to him. And he told us quite a bit about it. It would probably affect me quite a bit.

THE COURT: Okay. Thank you.

JUROR RONALD MERRIMAN: All right.

THE COURT: And number 39. Mr. Chamberlain, how did you hear about the case?

JUROR JOHN CHAMBERLAIN: Just being in Grenada.

THE COURT: Just like straight talk or out about town where you just sit around and visit, drink coffee and kind of gossip or talk like we all do everywhere.

JUROR JOHN CHAMBERLAIN: (Nodded.)

THE COURT: Has that caused you --

JUROR JOHN CHAMBERLAIN: I ain't formed no opinion.

THE COURT: So you can lay anything aside and base it only on the evidence; is that correct?

JUROR JOHN CHAMBERLAIN: (Nodded.)

THE COURT: Okay. I appreciate that. Thank you, sir.

Number 56. Mr. Redditt, how did you hear about the case?

JUROR MICHAEL REDDITT: I know the other guy that was charged with him too.

THE COURT: And would that -- is that -- do you have any facts that would have caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR MICHAEL REDDITT: I don't think I could be fair.

THE COURT: You feel like you could not be fair and impartial in this case because of the knowledge of the case.

JUROR MICHAEL REDDITT: Yes, sir.

THE COURT: Okay. Thank you.

Number 71. And I believe you have already said you shop there and knew the situation.

And then number 72. I believe, Miss Journigan, you already said because of knowing Mr. Pitchford and selling cars and stuff that you felt like you couldn't be fair and impartial; is that correct?

JUROR SUSIE JOURNIGAN: That's correct.

THE COURT: You two ladies may be seated.

And then number 76. Miss Dunn, what is that situation?

JUROR BETTY DUNN: I manage a convenience store, and I know people who know everybody in the case.

THE COURT: And has anything that you heard about the case caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR BETTY DUNN: Yes, sir.

THE COURT: Could you lay that aside and base your decision on the evidence, or is your opinion so fixed that it could not be changed?

JUROR BETTY DUNN: I think so.

THE COURT: You think you could lay it aside or you think you could not?

JUROR BETTY DUNN: I don't think I could.

THE COURT: Okay. Thank you.

And Mr. Curry.

JUROR MICHAEL CURRY: I just answered the question I had heard about it. I heard about it when it happened, but I haven't heard about it since or. . .

THE COURT: Has that caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR MICHAEL CURRY: No, sir.

THE COURT: Can you lay aside anything you have heard and base your decision only on the evidence here in court?

JUROR MICHAEL CURRY: I just heard -- I think it, it was on the radio.

THE COURT: I don't want to know what you heard or anything but you did hear about it at the time. But you have not had that fixed in your mind where you could not base your decision on the evidence; is that correct?

JUROR MICHAEL CURRY: That's right.

THE COURT: So you are saying you will lay anything aside and base it only on the evidence in court.

JUROR MICHAEL CURRY: (Nodded.)

THE COURT: Okay. Thank you.

And then -- your number is partially blocked, ma'am. Okay. Number 92. Miss Whitfield, you heard about the case.

JUROR ROBIN WHITFIELD: If this is the case I'm thinking of, yes. One of my former students I think is involved. And I heard his peers talk about it at school.

THE COURT: You heard people talking about the case. Has that caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR ROBIN WHITFIELD: No, sir.

THE COURT: Can you lay anything you might have heard aside and base your decision only on the evidence presented here in court?

JUROR ROBIN WHITFIELD: Yes, sir.

THE COURT: Okay. Thank you.

Number 84. Miss Beck, how did you hear about the case?

JUROR LEIGH BECK: I just heard.

THE COURT: Just talk out in town.

JUROR LEIGH BECK: (Nodded.)

THE COURT: Community grapevine kind of.

JUROR LEIGH BECK: Yeah.

THE COURT: And has that caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR LEIGH BECK: Yes, it has.

THE COURT: Can you lay that aside and base your decision on the evidence here in court?

JUROR LEIGH BECK: No, sir.

THE COURT: You are saying you have already got a fixed opinion that cannot be changed; is that correct?

JUROR LEIGH BECK: Yes, sir.

THE COURT: Okay. Thank you.

Number 68. Miss Hammond, how did you hear about the case?

JUROR GERTHY HAMMOND: I read it in the paper and from --

THE COURT: Read in the paper. And how else?

JUROR GERTHY HAMMOND: Like someone else that was involved in it.

THE COURT: Okay. I don't want to hear about anything you might have heard, anything other than has what you might have heard or read caused you to form an opinion as to the guilt or innocence of Mr. Pitchford?

JUROR GERTHY HAMMOND: No, sir.

THE COURT: And you can lay aside -- can you lay aside whatever you heard and base your decision only on the evidence presented here in court?

JUROR GERTHY HAMMOND: No, sir.

THE COURT: You cannot lay those facts aside.

JUROR GERTHY HAMMOND: (Shook head.)

THE COURT: Are you saying then that that would affect you in being fair and impartial?

JUROR GERTHY HAMMOND: It would affect me. Yes, sir.

THE COURT: Okay. Thank you.

Yes. Number 6.

JUROR ANDREA RICHARDSON: I just found out today that Tim McDaniel was a nephew of someone involved. And Tim McDaniel has done some plumbing work at my home. And I know -- I know Tim McDaniel's daughter as well.

THE COURT: And --

JUROR ANDREA RICHARDSON: I don't know anything about the case.

THE COURT: You just know that he might be related to somebody.

JUROR ANDREA RICHARDSON: Right. Yes, sir.

THE COURT: Would that influence you or cause you to form an opinion as to guilt or innocence of Mr. Pitchford or influence you or be a factor in any way in this case?

JUROR ANDREA RICHARDSON: No, sir.

THE COURT: Okay. Thank you.

And number 85. And I believe you said you had been in the store and you had shopped in the store and that caused you to form an opinion already about the case; is that correct?

JUROR TERRY WELCH: Yes, sir. All the guys I work with knew the man quite well. I mean they were pretty friendly with him.

THE COURT: Thank you.

Ladies and gentlemen, I want to know now if any of you have a situation where you have had a family member that was murdered or have had a violent crime committed against them or if any of you had a crime of violence or a robbery or anything like that committed against yourself. Any of you have a

situation where you have been the victim of some type of violent crime or had a family member that was the victim of some type of violent offense.

Okay. Number 14. Miss Allen, and what is that type -- what is that situation?

JUROR DEBRA ALLEN: My nephew was -- he was at a bar, and he was hit on his head with a crowbar and broke his jaw. And the guy was never prosecuted.

THE COURT: And would that factor influence you in this case? I believe you have already said that being -- knowing some of the attorneys involved might be a factor in being fair and impartial. Would this enter into as well or would that also be a factor?

JUROR DEBRA ALLEN: This particular thing probably would not factor.

THE COURT: I thank you.

Number 36. Miss Harrison, what is the situation here?

JUROR CRISTIN HARRISON: I had a first cousin that was murdered.

THE COURT: And where did that happen?

JUROR CRISTIN HARRISON: In Canton, Mississippi.

THE COURT: Canton. And how long ago has that been?

JUROR CRISTIN HARRISON: Fifteen years.

THE COURT: And would that influence you in being fair and impartial in this case?

JUROR CRISTIN HARRISON: I don't believe it would.

THE COURT: Any doubt in your mind?

JUROR CRISTIN HARRISON: It's so hard to say. But I mean --

THE COURT: You know, of course, and this applies to everybody. All we want is for people to listen to the evidence from the witness stand and look at exhibits that are offered into evidence and not have something, life experience, that has happened in their past that comes into play.

We just want people to look at the evidence and not have anything that has happened in their background or past influence them in their deliberations or in sitting on the case. So do you have any question in your mind about that influencing you or coming into play if you were a juror in this case?

JUROR CRISTIN HARRISON: No, sir, I don't believe so.

THE COURT: Okay. Thank you.

And number 42. Miss Tidwell. I'm sorry. Forty-three. Miss Goff. I'm sorry. I got my numbers off by one. Three is a two when you get my age and vision looks close to the same. Sorry. What is that situation?

JUROR CHRISTY GOFF: My cousin's nephew was murdered in jail here last year.

THE COURT: Cousin's nephew.

JUROR CHRISTY GOFF: Um-hum.

THE COURT: And I believe you have already said you had some knowledge about this case as well that would influence you in being fair and impartial; is that correct?

JUROR CHRISTY GOFF: Yes.

THE COURT: Okay. Thank you.

Mr. Wilson, what is that situation?

JUROR JAMES WILSON, JR.: My father was murdered in Marx, Mississippi.

THE COURT: Over where?

JUROR JAMES WILSON, JR.: Marks.

THE COURT: Marks. And how long ago was that?

JUROR JAMES WILSON, JR.: Fifteen years.

THE COURT: Would that influence you or affect you in being fair and impartial in this case?

JUROR JAMES WILSON, JR.: Yes, it would.

THE COURT: So you are concerned that you couldn't be fair because of the situation with your father; is that correct?

JUROR JAMES WILSON, JR.: Yes, sir.

THE COURT: Okay. Thank you.

Number 54. Miss Smith, what is that situation?

JUROR BRANDI SMITH: My cousin was murdered about two years ago.

THE COURT: And where did that happen?

JUROR BRANDI SMITH: Fort Smith, Arkansas.

THE COURT: And would that influence you or affect you in being fair and impartial in this case?

JUROR BRANDI SMITH: No, sir.

THE COURT: So that wouldn't bear on your decision at all; is that correct?

JUROR BRANDI SMITH: (Nodded.)

THE COURT: Okay. Thank you.

And number 53. Miss Hubbard.

JUROR TABATHA HUBBARD: My uncle.

THE COURT: And he was murdered.

JUROR TABATHA HUBBARD: Um-hum.

THE COURT: How long ago was that?

JUROR TABATHA HUBBARD: About ten years ago.

THE COURT: How long?

JUROR TABATHA HUBBARD: Ten.

THE COURT: Ten years ago. And would that be a factor or influence you or affect you in being fair and impartial in this case?

JUROR TABATHA HUBBARD: No, sir.

THE COURT: Okay. Thank you.

And then Miss Holman.

JUROR WILLOLA HOLMAN: My sister-in-law.

THE COURT: Was she murdered?

JUROR WILLOLA HOLMAN: Yes, sir. She was murdered.

THE COURT: How long has that been?

JUROR WILLOLA HOLMAN: It's been about five years.

THE COURT: Five years ago. Would that affect you or influence you in being fair and impartial in this case?

JUROR WILLOLA HOLMAN: It would because it was hard for my husband.

THE COURT: So you just think because of that that you would be thinking about that and it would influence you if you were on a jury.

JUROR WILLOLA HOLMAN: It takes you back.

THE COURT: Okay. Thank you.

Number 51. Mr. Griffith.

JUROR CHARLES GRIFFITH, SR.: Four years ago my wife was beat up and robbed in Greenville, Mississippi.

THE COURT: Would that influence you or affect you in being fair and impartial in this case?

JUROR CHARLES GRIFFITH, SR.: No, Your Honor.

THE COURT: Okay. Thank you.

And number 66. Mr. Pryor.

JUROR HENRY PRYOR: Yeah. My uncle owned a furniture store in Illinois. And he was robbed, robbed and murdered.

THE COURT: And would that influence you or affect you in being fair and impartial as a juror in this case?

JUROR HENRY PRYOR: It probably would. Can I say, I see Tim on a daily basis because I work at the waste water treatment plant and he dumps every day there?

THE COURT: Who is Tim?

JUROR HENRY PRYOR: Mr. Britt's nephew.

THE COURT: You know Mr. Britt's nephew.

JUROR HENRY PRYOR: Yes.

THE COURT: You also because of the fact where you had an uncle that was murdered, you think those would bear on your decision making and you couldn't be fair because of that; is that correct?

JUROR HENRY PRYOR: Yes, sir.

THE COURT: Okay. Thank you.

Number 80. Miss Taylor, what is that situation? Ma'am.

JUROR BEVERLY TAYLOR: I had a cousin that was killed in Grenada County jail last summer.

THE COURT: Okay. Would that influence you or affect you in being fair and impartial in this case?

JUROR BEVERLY TAYLOR: Yes, it would.

THE COURT: You would be thinking about that and not be able to judge this case independently of that; is that correct?

JUROR BEVERLY TAYLOR: That's correct.

THE COURT: Okay. Thank you.

Miss Holland.

JUROR DONNA HOLLAND: Yes, sir. I had a cousin killed very similar to this in Casilla, Bobby Whitten, several years ago.

THE COURT: Where did it happen, ma'am?

JUROR DONNA HOLLAND: Casilla.

THE COURT: Okay. I could not understand what you had. And that was how many years ago?

JUROR DONNA HOLLAND: Four or five years ago.

THE COURT: Four or five. And would that influence you or affect you in being fair and impartial in this case?

JUROR DONNA HOLLAND: Yes. Because I saw what happened to the family, the things it caused the family.

THE COURT: You would be thinking about that and you couldn't be fair because of that fact; is that correct?

JUROR DONNA HOLLAND: Yes. Um-hum.

THE COURT: Okay. Thank you.

Yes. Number 18. Miss Williams.

JUROR DIANNA WILLIAMS: Yes, sir.

THE COURT: Ma'am.

JUROR DIANNA WILLIAMS: I had an uncle who was hit and killed in Gore Spring. I think the year was '97.

THE COURT: I did not hear the first part of what you said, ma'am.

JUROR DIANNA WILLIAMS: I had a uncle that was killed.

THE COURT: Uncle that was killed at Gore Springs.

JUROR DIANNA WILLIAMS: Yes, sir.

THE COURT: And would that influence you or affect you in being fair and impartial in this case?

JUROR DIANNA WILLIAMS: No, sir.

THE COURT: And can you -- so that wouldn't affect you in any way in sitting in judgement on this case then; is that correct?

JUROR DIANNA WILLIAMS: No, sir. No, sir.

THE COURT: Okay. Thank you.

Number 76. Miss Dunn, what is that situation?

JUROR BETTY DUNN: I was robbed in a convenience store.

THE COURT: You were robbed when?

JUROR BETTY DUNN: About four years ago.

THE COURT: And I believe you already said that you heard facts on this case as well where you just feel like because of this knowledge of the case you couldn't be fair and impartial; is that correct?

JUROR BETTY DUNN: Yes, sir.

THE COURT: Okay. Thank you.

And number 86. Miss Hubbard.

JUROR GLADYS HUBBARD: Yes, sir.

THE COURT: What is your situation there?

JUROR GLADYS HUBBARD: I had a brother murdered.

THE COURT: And how long ago was that?

JUROR GLADYS HUBBARD: About ten years ago.

THE COURT: Ten years. Would that influence you or affect you in being fair and impartial in this case?

JUROR GLADYS HUBBARD: Yes, sir.

THE COURT: So you just feel like you would be thinking about that and not be able to concentrate and be fair in this case; is that correct?

JUROR GLADYS HUBBARD: Yes, sir.

THE COURT: Number 87. Miss Downs.

JUROR BETTY DOWNS: Yes, sir. My father was murdered seven years ago in his store.

THE COURT: And where was his store located?

JUROR BETTY DOWNS: Lambert, Mississippi.

THE COURT: Lambert. Would that influence you or affect you knowing that this is a similar type

situation? Would that influence you or affect you in being fair and impartial in this case?

JUROR BETTY DOWNS: No, sir. I don't think so.

THE COURT: So you could lay that aside and base your decision strictly on the evidence here in court; is that correct?

JUROR BETTY DOWNS: Yes, sir.

THE COURT: Okay. Thank you.

Now, ladies and gentlemen, I am going to ask the next question, and I don't want in any way anybody to be offended by the question. But Mr. Pitchford is a black male, and he is charged -- and Mr. Britt was a white male.

And, you know, I want everyone to search their hearts now. And I want to ask you if, you know, the fact that this alleged offense crossed racial lines would that influence any of you. Would any of you just tend to look at the case any differently than if it was people of the same race or where you didn't even know the race of the individuals involved?

What I'm wanting to know basically is will race play a part in your decision making of any of you in this case? I take it by your silence that none of you would look at the race of the individuals involved and have that factor into or influence you in any way. And I take it by your silence that that is the situation. And if that is not the case, I want you to let me know that. I take it that is the situation.

I want to know -- and I know because I've already had a couple of you indicate this. If you are related to somebody else on the jury panel or a spouse of somebody else on the jury panel, I want you to stand,

any of you. If you look around and see who else is here and see if any of you are related to somebody else that is here.

Okay. Well, we'll start with you. Miss Tillman, who are you related to?

JUROR MISTY TILLMAN: Terry Welch.

THE COURT: Okay. How are you and Mr. Welch related?

JUROR MISTY TILLMAN: He is my uncle.

THE COURT: And I believe you both already indicated that you had heard about the case and because of that could not sit in judgement; is that correct?

JUROR MISTY TILLMAN: Yes, sir.

JUROR TERRY WELCH: Yes, sir.

THE COURT: Okay. You two, you can both be seated.

And then, Mr. Smith, who are you related to?

JUROR MAMIE SWIMS: Swims.

JUROR ARCHIE SMITH: Swims.

THE COURT: To --

JUROR ARCHIE SMITH: First cousins.

(A JUROR GOT UP AND WAS WALKING TOWARDS THE DOOR.)

THE COURT: Ma'am, where are you going?

A JUROR: I have to go to the bathroom.

THE COURT: Okay. We'll take a 10-minute recess.

Ladies and gentlemen, during this recess you can't talk with anyone or among yourselves about the case.

You can't discuss this case at all. And we will be in recess for a few minutes, for ten minutes.

(A RECESS WAS TAKEN.)

Okay. Ladies and gentlemen, we will come back to order now. And before we have the recess I was asking any of you if you had a relative that was on the panel. If you would, please stand.

So those of you that we did not get your responses to before the break, if you will, stand back again. And we will continue from where we left off earlier. Okay.

Number 21. Mr. Smith, who was it you were telling us you were related to? You are related to number 49. And number 49 is Miss Swims.

JUROR MAMIE SWIMS: (Nodded.)

THE COURT: How are y'all related to each other?

JUROR ARCHIE SMITH: First cousins.

THE COURT: First cousins. If you and Miss Swims were both on the jury panel, would you feel like you had to listen to her and follow her views on the case just because y'all are related? Or would you judge the case independently from her?

JUROR ARCHIE SMITH: Independent.

THE COURT: And Miss Swims, if --

You can be seated, Mr. Smith.

And Miss Swims, if you and Mr. Smith were together on the case, would you feel like you needed to follow what he said because y'all were related, or would you judge the case independently from him?

JUROR MAMIE SWIMS: Independently.

THE COURT: Okay. Thank you.

And number 18. Miss Williams.

JUROR DIANNA WILLIAMS: Yes, sir. Gladys Hubbard. I consider her as my aunt, 'cause her and my uncle been dating for years. By common law they are married but not legally.

THE COURT: Okay. Now, what is her number?

JUROR DIANNA WILLIAMS: Eighty-six.

THE COURT: And, and how -- she is -- say that again, if you would.

JUROR DIANNA WILLIAMS: She is dating my uncle.

THE COURT: Her and your uncle have a relationship together, maybe not married but they are real close.

JUROR DIANNA WILLIAMS: Yes, sir.

THE COURT: Would you -- if you were on the panel with her and on the jury with her, would you feel like you had to follow what she said because y'all had that kinship or relationship?

JUROR DIANNA WILLIAMS: No, sir.

THE COURT: And you can be seated.

And Miss Hubbard, if you were on the panel with Miss Williams would you feel you had to follow what she thought on the case just because y'all had that bond with each other?

JUROR GLADYS HUBBARD: No, sir.

THE COURT: Okay. Thank you.

What is your number? I cannot see.

JUROR TABATHA HUBBARD: Number 53.

THE COURT: Miss Hubbard, who are you related to on the jury panel?

JUROR TABATHA HUBBARD: Eighty-six.

THE COURT: Okay. How, how are you related to her?

JUROR TABATHA HUBBARD: I'm her daughter.

THE COURT: Okay. Mother and daughter. And if you were both sitting on the panel together, would you feel like you had to listen to mom and go along with what she thought just because she was -- y'all are in that mother-daughter relationship?

JUROR TABATHA HUBBARD: No, sir.

THE COURT: And I believe that your mother already said maybe there was some situations about the case where her brother was murdered a few years back. I guess that would be your uncle.

JUROR TABATHA HUBBARD: Yes, sir.

THE COURT: Your mother said that that would influence her where she didn't feel like she could sit on the case. Would that influence you in that fashion?

JUROR TABATHA HUBBARD: No, sir.

THE COURT: So that wouldn't be a factor in you sitting in the case; is that correct?

JUROR TABATHA HUBBARD: Yes.

THE COURT: It would not be; right?

JUROR TABATHA HUBBARD: Yes.

THE COURT: Okay. Thank you.

Number -- is that 44?

JUROR JEFFREY COUNTS: Seventy-four.

THE COURT: So how are you kin to number 74? Who did you say you are kin to?

JUROR JEFFREY COUNTS: Nobody yet. Number 84.

THE COURT: Let me get this straight. Okay. How are y'all -- what is your situation?

JUROR JEFFREY COUNTS: Second cousins.

THE COURT: And would you feel like you had to follow along with Miss Beck if you were sitting on the jury with her or, or feel like you had to, you know, go along, just keep family harmony?

JUROR JEFFREY COUNTS: (Shook head.)

THE COURT: I believe Miss Beck has already said that she had heard about the case and had some factors where she didn't feel like she could be fair and impartial. Would those factors bother you at all or would you know?

JUROR JEFFREY COUNTS: No, sir.

THE COURT: Okay. Thank you.

And then Miss Dunn, number 76.

JUROR BETTY DUNN: I'm related to number 80 first cousins.

THE COURT: Y'all, I think, have both had the same type incident where y'all have had a relative that was killed and felt like you couldn't be fair and impartial; is that correct?

JUROR BETTY DUNN: (Nodded.)

JUROR BEVERLY TAYLOR: (Nodded.)

THE COURT: And then number 77.

JUROR MICHAEL CURRY: I think she is claiming me today.

THE COURT: It's a good day then.

JUROR MICHAEL CURRY: This is my wife over here.

THE COURT: Well, we assured y'all when we were going through jury qualifications we would make sure you didn't both end up the panel because you have a young child at home. So thank you for standing as well.

Then number 64, Mr. Johnston and 79, I believe correct me if I'm wrong. I believe y'all are married.

JUROR WILLIAM JOHNSTON: Yes.

THE COURT: To both of you -- Mr. Johnson, if you were both selected and, you know, you might be, might not be. But if you were both on the panel together would you feel like you had to follow what your wife thought on the case just because y'all are married or to keep peace in the family or anything?

JUROR WILLIAM JOHNSTON: I think I could make my own mind up.

THE COURT: And Miss Johnston, I'll ask you the same thing. Could you judge this case independently of your husband?

JUROR BETTY JOHNSTON: Definitely.

THE COURT: Thank you. I appreciate both of your responses there.

Ladies and gentlemen, I've got before me a list of people that have been subpoenaed as witnesses in this case. Just because somebody is subpoenaed does not mean they are going to be a witness in the case. But

that means that there is a potential for them being a witness in this case. So I'm going to read through this list of potential witnesses first.

And then after I read through the list as a whole, I'm going to ask you a few questions concerning the group as a whole. And then if there are individuals on the list, I might have to ask you some specifics about individuals.

But these are the potential witnesses. When I am reading these questions -- these names, what I want to know is if any one of you -- I know some of these names are going to be familiar to you because some of them are people that are involved in law enforcement or other professions in this county and in this area.

But when I ask you the questions I'm going to be asking these questions. I'm going to be asking if the fact you might know one of these witnesses would cause you to listen to their testimony and give it greater weight and credibility than a witness you did not know. So because each witness I want you to look at independently of each other and independent of any knowledge you may have on a particular witness and base your decision strictly on the proof as given in the courtroom.

So with that in mind, I'm going to read through these potential witnesses and then maybe have you think along those questions I've just mentioned to you. Richard Crenshaw. Marvin Fullwood. Tom Byers. Rena Byers. Kim Lindley. Johnny Grantham. Alton Strider. Jessie Gonzales. Clovis Harvey. Jerry Harvey. Eddie Merriman. Donald Lea. DeMarquis Westmoreland. Wesley Kincaid. Gary Harbison. Michael Flager. F-1-a-g-e-r. Billy Kite. James

Hathcock, Jr. Greg Conley. Adam Eubanks. Walter Davis. And Walter Davis, Jr. Mark McGavock. M-c-G-a-v-o-c-k. Robert Jennings. Stephanie Gray. Gerald Gatlin. Steve Gatlin. Paul Hubbard. Louis Brooks. Henry Brooks, Jr. Carver Conley. Johnny Morrison. Steve Howell. Tim McDaniel. Lynn Shelby Ratliff. Sandy Trusty. Dantron Mitchell. Eddie Johnson. Ricky Williamson. Shirley Jackson. Dominique Hogan. John Seales. Sammie Seales. Lettie Britt. Sylvia Lee. Malcom Grant. Starks Hathcock. Grant Grantham. Claire N-e-t-h-e-r-y. Claire Nethery. Mike Allen. David Zeliff. Steven Hayne. Henry Ross, Jr. Quincy Sullins. Dr. Chris Lott. Dr. Gilbert McVaugh. Dr. Reb McMichael. Moses Wright.

Now, you know, and I know I went over them quickly with you or not that quick. But I want to know these facts. Is there any one of you that have a relationship, a kinship, a friendship or an association with any one of these witnesses where you would automatically tend to favor the testimony that witness was giving because you know them and have some relationship with some of those witnesses and you don't have with somebody else? Again, if any of you have a situation where you, like, know one of these individuals and you just automatically would say okay, I am going to listen to what they have to say and I am going to listen more carefully and believe it over somebody else just strictly because I know that individual. Do any of you have a situation like that as to any of these individuals that I've just gone over with you? Okay. Any of you have, if you will, please, stand.

Okay. Mr. Caulder, I believe you've already said you are in law enforcement and you have got several brethren in law enforcement and because of that you

would tend to favor them and could not be fair and impartial; is that correct?

JUROR SCOTT CAULDER: Yes, sir.

THE COURT: Mr. Merriman, does that pretty much characterize your situation as well?

JUROR RONALD MERRIMAN: Along with one of the witnesses being my older brother.

THE COURT: Okay. Thank you.

Number 39. Mr. Chamberlain, who is it you would know, or what is that situation?

JUROR JOHN CHAMBERLAN: I know Mr. Conley. Know both of the Conleys.

THE COURT: And it's got to be more than knowing. Would you just automatically listen to them and accept their testimony because you know them and you don't know somebody else that might be testifying?

JUROR JOHN CHAMBERLAN: Probably so.

THE COURT: You just know them to such an extent that you would judge their testimony different than somebody else's.

JUROR JOHN CHAMBERLAN: Gotta be honest.

THE COURT: Yes, sir, please. I appreciate that. And I -- again, I appreciate everybody being forthcoming, because that is what we want, is everybody to give us complete answers. I appreciate your response, Mr. Chamberlain.

Number 56. Mr. Redditt, and what is that situation? Who, who was it you --

JUROR MICHAEL REDDITT: Dantron Mitchell is my nephew by marriage.

THE COURT: And he is your nephew by marriage.

JUROR MICHAEL REDDITT: Yes, sir.

THE COURT: And would that cause you to favor his testimony over somebody you don't know?

JUROR MICHAEL REDDITT: No.

THE COURT: Haven't you said you felt like you had heard something about the case and just can't lay it aside and be fair and impartial?

JUROR MICHAEL REDDITT: I don't think I can be fair with it.

THE COURT: Okay. Thank you.

Number 68. Miss Hammond, and which one of these witnesses would you know to the extent that you would tend to favor their testimony over somebody else?

JUROR GERTHY HAMMOND: DeMarquis Westmoreland.

THE COURT: Who?

JUROR GERTHY HAMMOND: DeMarquis.

THE COURT: And I believe you have already said you read in the paper and also formed an opinion at any rate and couldn't be fair and impartial; is that correct?

JUROR GERTHY HAMMOND: Yes, sir.

THE COURT: Okay. Thank you.

Then 81. Miss Bounds, who is it that you know and would just believe their testimony over somebody you didn't?

JUROR JOYCE BOUNDS: Dominique Hogan.

THE COURT: Who?

JUROR JOYCE BOUNDS: Dominique Hogan.

THE COURT: How is it you know him?

JUROR JOYCE BOUNDS: That's a she.

THE COURT: I could not --

JUROR JOYCE BOUNDS: That's a she. I know her through my --

THE COURT: What's the name then again?

JUROR JOYCE BOUNDS: Dominique Hogan.

THE COURT: How is it that you know her?

JUROR JOYCE BOUNDS: She is a friend of my niece.

THE COURT: And would that cause you to just favor the side that she was testifying for or believe her testimony over the testimony of a stranger's or people you did not know?

JUROR JOYCE BOUNDS: It probably would.

THE COURT: So you are concerned that that would be a factor in, in your sitting in judgment in this case.

JUROR JOYCE BOUNDS: Yes.

THE COURT: Okay. Thank you.

Ladies and gentlemen, this is a capital murder trial. And I know because you were sent questionnaires that there were some issues regarding the death penalty that you were asked about during the -- in the questionnaire. The way the process works is this.

If -- and the State is seeking the death penalty in this case. If Mr. Pitchford is found guilty of capital murder, then the State will move or is seeking to have the jury impose the death penalty. The way it works is this.

First, you have a trial to determine Mr. Pitchford's guilt or innocence. If the jury finds Mr. Pitchford guilty, then you go into the second phase and the jury determines the penalty. The jury determines whether he should be sentenced to death or not.

Now, if the jury finds Mr. Pitchford innocent, there is no second part of the trial. The trial is concluded at that point, and we do not ever go into the second phase of the trial.

But this is a case under the laws of the State of Mississippi where the State of Mississippi can seek the death penalty if Mr. Pitchford is convicted of the crime of capital murder. And so I'm going to ask you a couple of questions about the death penalty at this point.

And these are very important, and I want you to, you know, search your heart and your soul and answer these just as fully as you have all these other questions. I want to know if there are any of you that just feel like in your heart you know right now that even if the facts justified it and the law allowed it you just could not consider imposing the death penalty. Are there any of you that if you just thought the facts justified it and the law allowed it, you felt like you still could not the consider a death penalty in this case? If any of you have that situation, I want you to please stand at this time.

Number 5 first. This is Miss Coleman.

Miss Coleman, are you telling me even if the law provided for the death penalty and allowed it and even if the facts possibly justified it, you just could not consider that at all?

JUROR NADINE COLEMAN: No.

THE COURT: Okay. Thank you.

And then number 7. Miss Foxx, could you even consider the death penalty at all if the case got to the second phase?

JUROR SYRETTA FOXX: No.

THE COURT: So there is no way you could ever even consider it.

JUROR SYRETTA FOXX: No.

THE COURT: Okay. Number 12. Miss DeBlois, are you saying you could not under any circumstances consider imposing the death penalty?

JUROR DONNA DEBLOIS: No, sir.

THE COURT: Okay. Thank you.

And number 15, Miss Willis. Could you if the law provided for it and the facts justified it, could you consider imposing the death penalty in this case?

JUROR LOVIE WILLIS: (Shook head.)

THE COURT: So there is no way you could consider it at all.

JUROR LOVIE WILLIS: (Shook head.)

THE COURT: And Mr. Tillman, you have heard the question that I've asked the others. I'll ask you as well. If the facts justified it and the law provided for it, could you consider the death penalty in this case?

JUROR CINTRON TILLMAN: No.

THE COURT: There is no way you could even consider it; is that correct?

JUROR CINTRON TILLMAN: Yes.

THE COURT: Okay. Thank you.

After I talk to you - I'm sorry - you can be seated. Miss Williams, if the law provided for the death penalty and the facts justified it, could you consider the death penalty?

JUROR DIANNA WILLIAMS: No, sir.

THE COURT: So there is no way you could even think about doing it; is that correct?

JUROR DIANNA WILLIAMS: That's right.

THE COURT: Okay. Thank you.

And then number 21, Mr. Smith. Could you consider the death penalty if the law allowed it and the facts justified it?

JUROR ARCHIE SMITH: No.

THE COURT: Okay. Thank you.

Mr. Mack, if the law allowed it and the facts justified it, could you consider imposing the death penalty?

JUROR P.M. MACK: No, sir.

THE COURT: And Mr. Manuel, if the facts allowed it -- if the facts justified it and the law allowed it, could you consider the death penalty?

JUROR MANUEL JAMES, JR.: No, I couldn't.

THE COURT: And could you, Mr. Allen?

JUROR JESSIE ALLEN: No.

THE COURT: You could not even consider it at all.

JUROR JESSIE ALLEN: No.

THE COURT: How about you, Miss Kelly?

JUROR TONYA KELLY: No.

THE COURT: So you could not consider it at all.

JUROR TONYA KELLY: No.

THE COURT: Okay. Number 32. Mr. Harris, if the law allowed it and the facts justified it, could you consider the death penalty?

JUROR CECIL HARRIS: No, sir.

THE COURT: And Mr. Andrews, could you consider imposing the death penalty if the law allowed it and the facts justified it?

JUROR ELVIE ANDREWS: No.

THE COURT: And, Miss McGee, if the law allowed it and the facts justified it, could you consider the death penalty?

JUROR BILLIE MCGEE: No, sir.

THE COURT: And number 36. Miss Harrison, could you consider the death penalty if the law allowed it and the facts justified it?

JUROR CRISTIN HARRISON: No, sir.

THE COURT: And number 39, if the law allowed it and the facts justified it, you could not consider the death penalty.

JUROR JOHN CHAMBERLAIN: No, sir.

THE COURT: Okay. Number 45. Miss Wesley, if the facts justified it and the law allowed it, could you consider imposing the death penalty?

JUROR DORA WESLEY: No, sir.

THE COURT: Okay. And number 49, Miss Swims, if the facts justified it and the law allowed it, could you consider imposing the death penalty?

JUROR MAMIE SWIMS: Not at all.

THE COURT: Okay. What is your number, ma'am, here on the -- yes. I can't see. Okay. Miss Alicea, are

you saying even if the law allowed it and the facts justified it, you could not consider imposing the death penalty?

JUROR MARIA ALICEA: (Shook head.)

THE COURT: And then number 52. Miss Holman, are you advising the Court that even if the facts justified it and the law allowed it you could not consider the death penalty?

JUROR WILLOLA HOLMAN: No, sir. Not even after losing a sister-in-law.

THE COURT: Okay. Thank you.

And Miss Hubbard, if the facts justified it and the law allowed it, could you consider the death penalty?

JUROR TABATHA HUBBARD: No, sir.

THE COURT: Okay. Thank you.

MR. HILL: What number was that, Your Honor?

MR. CARTER: Fifty-three.

THE COURT: And number 40, I believe I overlooked you. Mr. Wilson, if the facts justified it and the law allowed it, could you consider imposing the death penalty?

JUROR JAMES WILSON: No.

THE COURT: Okay. Number 58. Miss Brexton, if the law allowed it and the facts justified it, could you consider imposing the death penalty?

JUROR OPHELIA BREXTON: No, sir.

THE COURT: Okay. And number 62. Mr. Kincaid, if the facts allowed it -- justified it and the law allowed it, could you consider imposing the death penalty?

JUROR JIMMY KINCAIDE: No, sir.

THE COURT: And I'll just go ahead with all of them on that side of the courtroom then we will get back to the other side of the courtroom.

Number 72, Miss Journigan, if the facts justified it and the law allowed it, could you consider the death penalty?

JUROR SUSIE JOURNIGAN: No.

THE COURT: And number 75. Miss Hubbard, if the facts justified it and the law allowed it, could you consider even imposing it?

JUROR THELMA HUBBARD: I don't want no part in it.

THE COURT: No part of it. You couldn't even look at it and even think about it; is that correct?

JUROR THELMA HUBBARD: (Shook head.)

THE COURT: Okay. Number 86. Miss Gladys Hubbard, you are telling the Court that if the facts justified it and the law allowed it, you still could not consider the death penalty; is that correct?

JUROR GLADYS HUBBARD: No, sir.

THE COURT: Okay. Number 91. Mr. Chairs, could you consider imposing the death penalty?

JUROR GILBERT CHAIRS: No.

THE COURT: Even if the facts justified it, you could not consider it; is that correct?

JUROR GILBERT CHAIRS: Right.

THE COURT: Thank you.

Number 56. Mr. Redditt, and I believe you've already said for other reasons you couldn't be fair and

impartial. But you also could not consider the death penalty at all; is that correct?

JUROR MICHAEL REDDITT: Right.

THE COURT: And number 55. Miss House, if the facts justified it and the law allowed it could you even consider the death penalty?

JUROR STACEY HOUSE: No, sir.

THE COURT: And ma'am, I cannot see. Okay.

Number 68. Miss Hammond, if the facts justified it and the law allowed it, could you even consider the death penalty?

JUROR GERTHY HAMMOND: No, sir.

THE COURT: Okay. Thank you.

And then number 81. Miss Bounds, and if the facts justified it and the law allowed it, could you impose the death penalty?

JUROR JOYCE BOUNDS: No.

THE COURT: Okay. Thank you.

And then number 95. Mr. Parker, if the facts justified it and the law allowed it, could you consider the death penalty?

JUROR ROBERT PARKER: No, sir.

THE COURT: Okay. Thank you.

Now I want to ask kind of the other question on that. Are there any of you -- is there any one on the panel that if Mr. Hubbard was convicted of capital murder just would automatically impose the death penalty? Just if any of you -- are there any of you that just think that if he is convicted of the crime for which he is

charged that automatically he should be sentenced to death?

Any of you have a opinion on that where you just feel like that automatically without hearing anything else, you would feel like that he should be sentenced to death in this case? Any of you have a situation like that?

Ladies and gentlemen, I also -- of course, you were instructed when you were sent out your jury questionnaire card that once the jury is selected, the jury will be sequestered during the course of the trial. You know, we are anticipating it taking probably the better part of this week. It's hard to anticipate just how quickly a case will proceed.

But I want to know if any of you have a situation where because you are going to be sequestered if you are selected that that is going to create an undue hardship on you to such an extent you just feel like you could not serve because of the fact that you would be sequestered during the duration of the trial. Do any of you have a situation where being sequestered is going to have where you do not feel like you could serve?

Miss Ward.

JUROR LAURA WARD: If you will, just keep in mind that I have three children at home.

THE COURT: Do you have --

JUROR LAURA WARD: We have after-school activities.

THE COURT: I --

JUROR LAURA WARD: I'm not saying my husband is incompetent, but I'm -- momma does a lot.

THE COURT: I am sure that anybody that has children, you know, they are automatically going to miss their kids.

JUROR LAURA WARD: I have a 6-year-old, a 10-year-old and a --

THE COURT: But would that be a situation where you could not even serve because of that or is that just going to be a hardship?

JUROR LAURA WARD: It's going to be a hardship. I wouldn't mind one night. But, you know, if it's going to be an all week thing . . .

THE COURT: As I say, I can never anticipate how long something is going to take.

JUROR LAURA WARD: Right. Right. If you will, just consider it.

THE COURT: And then, Mr. Caulder, I believe you already said for a lot of other reasons you feel like you could not serve; is that correct? Number 46.

JUROR SCOTT CAULDER: I ain't said anything yet.

THE COURT: I am saying on the other issues you have already said because of being in law enforcement.

And then, Miss Starks, what is the situation on that?

JUROR EMMA STARKS: My mom is in the hospital. So I don't know, you know, her situation.

THE COURT: Where does she reside?

JUROR EMMA STARKS: In Tallahatchie County.

THE COURT: And would that -- would that be a factor in you being sequestered?

JUROR EMMA STARKS: Yeah. My dad is old too. So I have to go back and forth to see about her.

THE COURT: So are you having to check up on your elderly parents constantly?

JUROR EMMA STARKS: Yes.

THE COURT: Okay. Thank you.

And number four. Mr. --

JUROR KENNETH ARTMAN: I have just got a question. I take medicine that I have to inject in my stomach, and it has to be refrigerated. Would my wife be able to bring it to me?

THE COURT: Your wife would be able to bring it to the bailiffs to give it to you.

JUROR KENNETH ARTMAN: Do you have a place where it could be refrigerated or would she have to do that whenever I need it?

THE COURT: We can -- we will make arrangements however you need to on that.

Let me say again, once you are sequestered you won't be able to talk basically with anybody outside.

JUROR KENNETH ARTMAN: Will I be able to make those arrangements before?

THE COURT: Yes, sir. The bailiffs will -- you can give them the phone number. And, of course, we are going to be recessing in a little bit for lunch even. But the bailiffs could call your wife, and she could bring the medicine. And they could give it to you. And then she could take it back home.

I mean we will accommodate a situation like that. But if you are sequestered, you won't be able to actually have contact or talk to anybody, you know,

your spouse or anybody else. But they can pass messages to you through the bailiffs. And the bailiffs can pass messages from you to them.

Does that answer it enough for you, sir?

JUROR KENNETH ARTMAN: Yes, sir.

THE COURT: Okay. And then, Miss Harrison, what is your situation?

JUROR CRISTIN HARRISON: Mine is the same as Miss Ward. I have small children at home.

THE COURT: And do you have somebody else that can take care of them?

JUROR CRISTIN HARRISON: Yes, sir. My husband is there. Just like she said, I wanted you to be aware.

THE COURT: I know any parent is going to miss their children.

I don't know. My parents might not have missed me for a few days at times, but I think most of the time they would.

And Miss Taylor, you've got some situation where being sequestered might adversely affect you. What is that situation?

JUROR BEVERLY TAYLOR: I have a 13-year-old son that takes daily medication for medical problems. And the two people that stay with him at nighttime are staying with sick people already.

THE COURT: And they are what?

JUROR BEVERLY TAYLOR: They are already staying with sick people.

THE COURT: So you have a son at home at night that basically nobody is there to see about him; is that correct?

JUROR BEVERLY TAYLOR: Right.

THE COURT: Okay. Thank you.

Ladies and gentlemen, I mean I know that we have had a number of people that have responded to different issues about knowledge of people involved in law enforcement or there are some that have had family members that have been murdered and there are some that know some of the attorneys involved that for various reasons you know already that you cannot be fair and impartial in this case. And again, I appreciate truthful and complete answers to every question that's been asked, because that is what we want. We want to make sure if there is any situation like that, we know it.

But there is also sometimes questions that somebody in the jury panel knows in their heart they can't be fair and impartial but for some reason the right question is just not asked. So if you have not spoken up about a particular question earlier but you already know in your heart that for some reason or another you just cannot be fair and impartial to both sides in this case then I want you to let me know that.

So is there any one other than those that have already spoken about various issues that already know ahead of time that you can't be fair and impartial to both sides?

Yes, sir. Number 34.

JUROR WALTER BARRETT, III: I believe I can be fair and impartial. But you asked the question about knowing Mr. Britt.

THE COURT: Right.

JUROR WALTER BARRETT, III: I did not know him but I know the McDaniel and the Grant family.

THE COURT: And are they some kind of kin to Mr. Britt?

JUROR WALTER BARRETT, III: Yes.

THE COURT: And would the fact that you know some of Mr. Britt's extended family influence you or affect you in being fair and impartial?

JUROR WALTER BARRETT, III: No, sir. Not at all.

THE COURT: Okay. Thank you.

And since Mr. Barrett raised that issue, I'll ask all of you. If any of you have a situation where you have got friends that are kin to Mr. Britt and it would affect your ability to be fair and impartial, if any of you have a situation like that where you might know some of Mr. Britt's family and that would affect you then I want you to stand. I take it nobody else has that situation.

Yes, sir. Mr. Tillman.

JUROR CINTRON TILLMAN: At first I didn't understand your question about me knowing Terry. I don't think I could be fair.

THE COURT: Excuse me.

JUROR CINTRON TILLMAN: I don't think I could be fair.

THE COURT: You think because you know him and been friends with him you could not be fair and impartial; is that correct?

JUROR CINTRON TILLMAN: Yes, sir.

THE COURT: Okay. Thank you.

Ladies and gentlemen, at this time we are going to recess for lunch. And let me caution you during this recess you cannot discuss this case with anyone. You cannot discuss it among yourselves.

When you are coming back after lunch, if you should run into one of the attorneys out in the hall that is participating in the case, if you should run into one of these witnesses whose names I called earlier, you cannot talk to them. You cannot have any contact with them. If you should see one of them just walk right on by. They are not supposed to speak to you, and you can't speak to them either.

When the attorneys or some of these witnesses see you out in the hall and they walk by you and ignore you, they are not doing that to offend you. I want you to be assured of that. They are just following the law and the rules of court as been imposed. So do not take any offense if they walk by you without speaking. They just cannot do that.

So at this time ladies and gentlemen, we will be in recess until 1:20. If you will all be back at 1:20 and kind of look at who you are sitting next to. I want you all to wear your numbers back as well. But please be seated in the same place this afternoon as you were this morning.

(COURT RECESSED FOR THE NOON HOUR. PROCEEDINGS RESUMED IN OPEN COURT. MR.

EVANS, MR. HILL, MR. CARTER, MR. BAUM AND THE DEFENDANT WERE PRESENT IN OPEN COURT.)

THE COURT: I am going to ask you now any of you had someone sitting next to you before lunch and they are not here to raise your hand. I am trying to find out how many people we are missing.

Okay. We will proceed shortly.

(SOME JURORS ENTERED THE COURTROOM AND WERE SEATED.)

Okay. Do I have anybody that has a vacant seat next to them? Okay. We are still lacking one person then. Okay.

THE BAILIFF: Number 30.

(THE COURT WAITED A FEW MINUTES FOR THE JUROR TO RETURN TO THE COURTROOM.)

THE COURT: Gentlemen, I am ready to proceed. Miss Lee will be dealt with accordingly. I think if everybody else could be back on time she could have as well.

So I am going to tender the panel now to the State of Mississippi.

You may proceed, Mr. Evans.

MR. EVANS: Thank you, Your Honor.

Good evening, ladies and gentlemen.

JURY PANEL: Good evening.

MR. EVANS: As the judge told y'all, for any of you that don't know me, I am Doug Evans, your district attorney. Clyde Hill, one of the assistant district attorneys, will be assisting me in trying this case. We represent the State of Mississippi. And the way the

state is divided up, I have seven counties that I prosecute in. Grenada is one of those counties.

Now, what that means is every felony case, whether it be a grand larceny, all the way up to capital murder, has to be handled by our office. So this is why we are involved in this case. It is a capital murder charge, as the judge told you.

Now, there are several things that I want to go into a little bit more detail than the judge went into and there's a couple of things I want to cover that the judge didn't. To start with, as the judge told you, this is capital murder. There are several different types of murder in this state. They are classified as capital murder. And there are others that are just classified as regular murder or manslaughter.

What makes this is a capital murder is because it is charged that this defendant committed the murder while engaged in the crime of armed robbery. And our legislature passed a law that makes that a capital offense that can carry the death penalty. That's the reason that it falls into that category.

I know a lot of y'all have already stated your opinions on the death penalty, and we are going to go into that in a few more minutes. Now, this defendant, Terry Pitchford, that is sitting at opposite table over here is on trial in this case for capital murder.

(JUROR LINDA LEE ENTERED THE COURTROOM.)

THE COURT: Miss Lee, can you explain why you are like about 15 minutes later than everybody?

JUROR LINDA LEE: I have to walk up here.

THE COURT: Mr. Evans, you can go back and ask that question again because Miss Lee has finally joined us.

MR. EVANS: That's all right, Your Honor. I will just continue where I am. Thank you though.

This defendant, Terry Pitchford, that is sitting at the table is charged with capital murder. The jury that is picked in this case will be picked to only try him as far as guilt or innocence and possibly the penalty.

But there is another defendant that is charged in this same crime. I want to make sure y'all understand that also. Eric Bullin is also charged with capital murder in the same offense. Y'all, whoever is picked as the jury, will hear testimony about both of these two, but you are only here to decide this defendant's fate at this point. Do each of y'all understand that that will be a complete, separate jury that will have to hear the evidence for themselves?

As the judge told you, this is an armed robbery that occurred at Crossroads Grocery. For any of y'all that aren't familiar with Crossroads Grocery, it is on Highway 7 like you are going toward Coffeeville. It's right at the intersection of Scenic Loop 333. It comes out on the north end of the lake, a little small store that has been there for many years.

The judge covered this earlier. And I know a lot of y'all are sitting here thinking about questions that the judge has asked. And for the ones of you that never served on a jury before, this is probably the first time you have ever thought about some of those questions. So if any of these things that I go back over, if any of them you failed to answer, please, let us know.

One of the things I want to go back over now is any of you that may now remember that you know this defendant, him or any of his family. His mother is Shirley Jackson, and his step-father is Louis Jackson. Do any of you know them?

Yes, ma'am.

JUROR JOYCE BOUNDS: I know Shirley.

MR. EVANS: And your number, please.

JUROR JOYCE BOUNDS: Eighty-one.

THE COURT: When you are responding to questions asked by the attorneys, you are going to need to stand just like you did when you responded to the Court's questions.

MR. EVANS: All right. Miss Bounds, I believe you've already, in answering some of the Court's questions, said you didn't feel you could be fair and impartial in this case; is that correct?

JUROR JOYCE BOUNDS: Yes, sir.

THE COURT: Would this be another reason that you feel you couldn't be fair and impartial?

JUROR JOYCE BOUNDS: Yes.

MR. EVANS: Okay. Thank you, ma'am.

Anyone else?

Yes, ma'am. Number 72. And who do you know?

JUROR SUSIE JOURNIGAN: Miss Jackson. Mother.

MR. EVANS: Would this be from business also, like you knew him?

JUROR SUSIE JOURNIGAN: Yes.

MR. EVANS: Thank you, ma'am.

Anyone else?

Before I even get to the death penalty issue, there is a question -- I can't remember if the judge asked this or not. He usually does. And we know that everybody has their own beliefs, whether it be personal beliefs or religious beliefs. Nobody is questioning anybody else's beliefs. But there are certain beliefs that make it difficult for someone to sit as a juror.

One of those beliefs is the belief that you should not sit in judgement of someone else. It's fine for a person to have that belief. But if that person were picked on the jury -- and basically, once we have put on all the proof and the jury went back in this room right over here to deliberate, they would have to throw up their hands and say I'm sorry, I just don't think I have the right to judge anyone else or I can't judge anyone else. And we would have wasted the entire trial. So if there is anyone here that feels that they should not judge another person, please, let us know at this point.

Okay. And just start on the front first.

You are number 7. Miss Foxx, you feel you just could not judge anyone else.

JUROR SYREETA FOXX: Right.

MR. EVANS: Okay. Thank you, ma'am.

Number 36. Miss Harrison, you just feel that you could not judge anyone else.

JUROR CRISTIN HARRISON: No, sir.

MR. EVANS: And let me back up just a minute.

Miss Foxx, let me just ask you one further question. Would that fact that you could not judge anyone else keep you from being able to make any decision in any single case?

JUROR SYREETA FOXX: Correct.

MR. EVANS: Thank, you, ma'am.

Miss Harrison, the same to you. Would that keep you from being able to sit in judgement on any other case?

JUROR CRISTIN HARRISON: Yes, sir.

MR. EVANS: Thank you, ma'am.

Number 3. Mr. Crawford, do you feel that you could not sit in judgement of anyone else?

JUROR RODELL CRAWFORD: No, sir.

MR. EVANS: On any type of case.

JUROR RODELL CRAWFORD: No, sir.

MR. EVANS: That would keep you from being a fair and impartial juror because you can't judge anyone.

JUROR RODELL CRAWFORD: Yeah.

MR. EVANS: Thank you, sir.

Number 21. Mr. Smith, you also feel that you could not sit in judgement of anyone.

JUROR ARCHIE SMITH: Yes, sir.

MR. EVANS: And would that be on any type of case?

JUROR ARCHIE SMITH: Any type of case.

MR. EVANS: Thank you, sir.

Okay. Number 35, I believe you are next. Miss McGee, you are telling us you could not sit in judgement on anyone.

JUROR BILLIE MCGEE: Yes, sir.

MR. EVANS: Thank you, ma'am.

Number 40. Mr. Wilson, you also are telling us you could not sit in judgement of anyone.

JUROR JAMES WILSON: Right.

MR. EVANS: That is regardless of what the case was.

JUROR JAMES WILSON: (Nodded.)

MR. EVANS: Thank you, sir.

Number 49. Miss Swims, are you telling us also that you could not sit in judgment of anyone regardless of the penalty or what the crime was?

JUROR MAMIE SWIMS: If it related to the death penalty, no I would not.

MR. EVANS: Okay. Yours is just as related to the death penalty.

JUROR MAMIE SWIMS: Correct.

MR. EVANS: Okay. I'll get back on that issue in just a minute. But as far as just a regular case, you could sit in judgment.

JUROR MAMIE SWIMS: Yes.

MR. EVANS: Okay. Thank you.

JUROR MARIA ALICEA: Same as hers with the death penalty.

MR. EVANS: This is just in general, on any type of case right now. I will get back to the death penalty part in just a minute.

JUROR WILLOLA HOLMAN: The same when it comes to deciding whether someone lives or dies.

MR. EVANS: As far as just a general case, you could sit in judgment as long as the death penalty was not an issue. Thank you, ma'am.

Yes, ma'am.

JUROR TABATHA HUBBARD: Same.

MR. EVANS: Of the ones of you standing, are y'all's responses only on the death penalty or on any type of case?

JUROR ROBERT PARKER, JR.: Any type of case.

MR. EVANS: Any type of case. All right. Your number is number 95. Mr. Parker, you could not sit in judgment of anyone regardless of the type of case or the sentence.

Yes, sir. Your number?

JUROR MICHAEL REDDITT: Fifty-six.

MR. CARTER: What did he say - 56?

MR. EVANS: Fifty-six.

Okay. Mr. Redditt, are you telling us you could not sit in judgement of anyone regardless of the crime or penalty?

JUROR MICHAEL REDDITT: That's right.

MR. EVANS: Thank you, sir.

And number 91. Mr. Chairs, are you telling us you could not sit in judgement of anyone regardless of the crime or the penalty?

JUROR GILBERT CHAIRS: Right.

MR. EVANS: Thank you, sir.

MR. CARTER: For clarity, Your Honor, I think we need to make sure that the other ones who said they could not sit in judgment before they knew they were talking about the death penalty. We need to make sure that they meant just to the death penalty or sit in judgement period.

MR. EVANS: I specifically asked them the question. If he wants to go back over it, that is his option.

Before I go on to any other issues, I want to go into the death penalty issue at this point. And this is something else that everybody is entitled to their own belief. But by law, in this state this is the type of crime the death penalty can be given in. And this is the type of case that we are going to be asking you to give the death penalty when we get through.

I know a lot of y'all have already answered the judge's question. I am going to go back and maybe just ask one or two more questions. But at this point before I get into that, is there anyone that did not answer the judge's question that just does not believe in the death penalty and could not consider the death penalty? Does anyone other than the ones that answered the judge's questions?

Number 3. Mr. Crawford, and you do not believe in the death penalty.

JUROR RODELL CRAWFORD: (Shook head.)

MR. EVANS: Are you telling us that even, even if the law authorized it and even if after hearing the facts, the facts of the case justified the death penalty, that you could not personally consider it as a possibility?

JUROR RODELL CRAWFORD: No, sir.

MR. EVANS: Thank you, sir.

THE COURT: You've got another hand too. If you will, stand, please.

MR. EVANS: Number 22. Mr. Mack, I believe you answered that to the judge's questions, didn't you?

JUROR P.M. MACK: Yes.

MR. EVANS: Okay. Thank you, sir.

And number 58. I believe you did too, Miss Brexton.

JUROR OPHELIA BREXTON: Right.

MR. EVANS: I will get back with y'all in just a minute. Right now I was trying to see if there was anyone that had not already responded to that question.

Thank you, Mr. Crawford.

I want to try -- if I miss anybody, y'all let me know. I am trying to keep up with everybody that answered that question. I may not have gotten everyone.

Number five.

JUROR NADINE COLEMAN: Yes, sir.

MR. EVANS: Now, if I understand right - I want to make sure I do - you are against the death penalty.

JUROR NADINE COLEMAN: Yes, sir.

MR. EVANS: Are you telling us that you could not personally vote for the death penalty even if the law -- if the judge told you the law authorized it and even if after hearing the testimony in this case the facts justified it, you, yourself, could not consider the death penalty?

JUROR NADINE COLEMAN: Right.

MR. EVANS: Okay. Thank you, ma'am.

Miss Foxx, number 7, basically the same questions. I know this is a lot of repetition but it is necessary that we go back through this. Are you also telling us that on no case because of your beliefs that you could consider the death penalty regardless of what the law is or what the facts are in this case?

JUROR SYRETTA FOXX: No, I could not.

MR. EVANS: Thank you, ma'am.

Number 12. I'm sorry. It's hard to keep up with y'all the way the numbers are. Are you also telling us that your beliefs against the death penalty are such that you personally could not consider it in any case, regardless of what the law was or regardless of what the facts were?

JUROR DONNA DEBLOIS: (Shook head.)

MR. EVANS: If you would, answer because the court reporter has to take it down.

JUROR DONNA DEBLOIS: Yes.

MR. EVANS: Thank you, ma'am.

If y'all would, when we go through them, please stand, because the court reporter has got to take down not only what I say but what y'all say too.

The next one that I'm showing is number 15. Willis, are you also telling us that your beliefs are such against the death penalty that you could not impose the death penalty or even consider it regardless of the facts of the case?

JUROR LOVIE WILLIS: (Nodded.)

MR. EVANS: Thank you, ma'am.

Number 16. Mr. Tillman, are you also telling us that your beliefs against the death penalty are so strong that you could not consider it even as a possible option regardless of the law or the facts of the case?

JUROR CINTRON TILLMAN: Right.

MR. EVANS: Thank you, sir.

Number 18. Miss Williams, again, I'm assuming you are against the death penalty, because of what you said.

JUROR DIANNA WILLIAMS: Yes, sir.

MR. EVANS: Are your beliefs such that you could not personally consider it as a option regardless of what the law was or what the facts of the case are?

JUROR DIANNA WILLIAMS: Yes, sir.

MR. EVANS: Thank you, ma'am.

Number 21. Mr. Smith. Mr. Smith, are your beliefs against the death penalty such that you could not consider it as an option regardless of what the judge told you the law was and what the facts of the case were?

JUROR ARCHIE SMITH: (Nodded.)

MR. EVANS: Thank you, sir.

Mr. Mack, I will get back to you now. Also, are you telling us that your beliefs against the death penalty are such that regardless of the case, no matter what the law was or the facts of the case that you could not consider the death penalty as an option?

JUROR P.M. MACK: Yes, sir.

MR. EVANS: Thank you, sir.

Number 23. Mr. James, your beliefs against the death penalty, are they such that you could not consider the death penalty as an option regardless of what the facts were?

JUROR MANUEL JAMES, JR.: No, I couldn't.

MR. EVANS: Okay. Twenty-five. Mr. Allen, yours -- are your beliefs such that you could not consider the death penalty as a possible option regardless of the law or the facts of the case?

JUROR JESSIE ALLEN: No, I couldn't.

MR. EVANS: Thank you, sir.

Number 32. Mr. Harris, are your beliefs against the death penalty such that you could not consider it as a possible option regardless of what the judge told you the law was and regardless of what the facts of the case were?

JUROR CECIL HARRIS: Yes, sir.

MR. EVANS: Thank you, sir.

Number 33. Mr. Andrews, are your beliefs such against the death penalty that you could not consider it as a possible option regardless of what the judge told you the law was and regardless of what the facts were?

JUROR ELVIE ANDREWS: I couldn't. No, sir.

MR. EVANS: Thank you, sir.

Number 35. Miss McGee, are your beliefs against the death penalty such that you could not consider it as a possible option regardless of what the judge told you the law was and regardless of what the facts were?

JUROR BILLIE MCGEE: Yes, sir.

MR. EVANS: Okay. Number 39. Mr. Chamberlain. Mr. Chamberlain, are your beliefs against the death penalty such that you could not consider it in any case regardless of what the law was or regardless of what the facts were?

JUROR JOHN CHAMBERLAIN: That's correct.

MR. EVANS: Thank you, sir.

Number 40. Mr. Wilson, are your beliefs such against the death penalty that you could not consider

it as an option in any case regardless of what the law was or regardless of what the facts were?

JUROR JAMES WILSON: Yes, sir.

MR. EVANS: Thank you, sir.

Number 45. Miss Wesley, are your beliefs such against the death penalty that you could not consider it in any case regardless of what the law was or the facts were?

JUROR DORA WESLEY: Correct.

MR. EVANS: Thank you.

Number 49. Miss Swims, are your beliefs against the death penalty such that you also could not consider it in any case regardless of what the law was or what the facts of the case were?

JUROR MAMIE SWIMS: That's right.

MR. EVANS: Thank you, ma'am.

Number 50. Are your beliefs against the death penalty such that you could not consider it in any case regardless of what the law was or what the facts of that particular case were?

JUROR MARIA ALICEA: Yes, sir.

MR. EVANS: Thank you.

Number 52. Miss Holman.

JUROR WILLOLA HOLMAN: Yes, sir.

MR. EVANS: Your beliefs are such that you could not consider it in any case regardless of what the law was or what the facts of the case were.

JUROR WILLOLA HOLMAN: Yes, sir.

MR. EVANS: Thank you, ma'am.

Fifty-three. Ms. Hubbard, are your beliefs against the death penalty such that you also could not consider it in any case, regardless what the law was or what the facts of the case were?

JUROR TABATHA HUBBARD: Yes, sir.

MR. EVANS: Thank you.

Fifty-five. Miss House, are your beliefs such against the death penalty that you could not consider it in any case regardless of what the law was or what the facts of the case were?

JUROR STACEY HOUSE: Yes, sir.

MR. EVANS: Thank you.

Mr. Redditt, number 56, are your beliefs against the death penalty such that you could not consider it in any case, regardless of what the law was or what the facts of the case were?

JUROR MICHAEL REDDITT: Yes, sir.

MR. EVANS: Thank you.

Number 58, Miss Brexton, are your beliefs against the death penalty such that you could not consider it in any case regardless of what the law was or what the facts were?

JUROR OPHELIA BREXTON: That's right.

MR. EVANS: Thank you, ma'am.

Number 62. Mr. Kincaide, are your beliefs against the death penalty such that you also could not consider it in any case regardless of what the law was or what the facts of the case were?

JUROR JIMMY KINCAIDE: Correct.

MR. EVANS: Thank you, sir.

Number 66. Mr. Pryor, are your beliefs against the death penalty such that you could not consider it in any case regardless of what the law was or what the facts of the case were?

JUROR HENRY PRYOR, JR.: Yes, sir.

MR. EVANS: Thank you, sir.

Number 68. Miss Hammond, are your beliefs against the death penalty such that you could not consider it in any case regardless of what the law was or what the facts of the case were?

JUROR GERTHY HAMMOND: Yes, sir.

MR. EVANS: Number 72. Miss Journigan, are your beliefs against the death penalty such that you also could not impose it in any case regardless of what the law was or what the facts of the case were?

JUROR SUSIE JOURNIGAN: That's right.

MR. EVANS: Thank you, ma'am.

Number 75. Miss Hubbard, are your beliefs against the death penalty such that you could not consider it in any case regardless of what the law was or what the facts were?

JUROR THELMA HUBBARD: That's correct.

MR. EVANS: Number 76. Miss Dunn, are your beliefs against the death penalty such that you could not consider it in any case, regardless of what the law was or what the facts were?

JUROR BETTY DUNN: That's correct.

MR. EVANS: Thank you.

Number 78. Where is number 78? I'm sorry.

JUROR NATHALIE TRAMEL: I'm 78.

MR. EVANS: Miss Tramel, are your beliefs such against the death penalty --

JUROR NATHALIE TRAMEL: I did not indicate that. No, sir.

MR. EVANS: You didn't. I must have written yours down wrong. That is one reason I'm going back through this.

JUROR NATHALIE TRAMEL: Okay. Thank you.

MR. EVANS: It's easy to write the wrong one down.

Miss Bounds, number 81, are your beliefs against the death penalty such that you could not consider it as an option regardless of what the law was or what the facts of the case were?

JUROR JOYCE BOUNDS: That's correct.

MR. EVANS: Thank you, ma'am.

Miss Hubbard, number 86, are your beliefs against the death penalty such that you could not consider it as an option regardless of what the law was or the facts of the case were?

JUROR GLADYS HUBBARD: Yes, sir.

MR. EVANS: Thank you, ma'am.

Number 91. Mr. Chairs, is your belief against the death penalty such that you couldn't consider it in any case regardless of what the law was or the facts of the case were?

JUROR GILBERT CHAIRS: Yes, sir.

MR. EVANS: Thank you, sir.

Miss Whitfield, number 92, did you answer that question?

JUROR ROBIN WHITFIELD: No, sir. I did not.

MR. EVANS: And Mr. Parker, number 95, are your beliefs such against the death penalty that you could not consider it in any case regardless of what the law was or the facts were?

JUROR ROBERT PARKER, JR.: Yes, sir.

MR. EVANS: Thank you, sir.

All right. Is there anyone that I missed?

All right. If y'all would, stand, please. All right.

Number 24. Miss Kelly, are your beliefs such that you could not consider it as an option regardless of what the law was or the facts of the case were?

JUROR TONYA KELLY: That's correct.

MR. EVANS: And number 36.

JUROR CRISTIN HARRISON: Well, it's kind of contradicting. It's not that I don't believe in the death penalty, but I don't want to be responsible for that when it comes to someone else's life.

MR. EVANS: You personally could not consider it as an option. Is that what you are saying?

JUROR CRISTIN HARRISON: Correct.

MR. EVANS: Anyone else that I missed?

Now, the judge briefly went into the burden of proof. I will go into that. But also, before I even get into that I want to cover something called a presumption of innocence. The State of Mississippi, which is us, has the obligation to prove this defendant or any defendant guilty to a jury.

We have to do that by what is called beyond a reasonable doubt. We can't sit up here and explain to you what is reasonable and what is not. That is up to the jury to determine what's reasonable. But it's the

same burden of proof in any case, whether it be a larceny case, robbery case, a murder case, death penalty.

Because this is a case that the penalty can carry the penalty of death, is there anyone here that would hold us to a higher burden of proof than what the law requires just because of the possible penalty? Anyone at all?

Now, before we even get to that, on the presumption of innocence, because we have to prove any defendant guilty. If you were asked to vote right now on guilt or innocence of this defendant, under your oath you would have to vote not guilty. The reason for that is we haven't put on any proof. So you have nothing to base your decision on. Could each of you tell us at this point that at this point in the trial you could follow the law and give them the presumption of innocence? Anyone that could not, please let us know.

All right. And just the opposite of that, once we have proven to you beyond a reasonable doubt that he is guilty, that presumption of innocence disappears and it's not there to protect him anymore. Will each of you tell us that once we have proven this case beyond a reasonable doubt, that that will be all that you require? Anyone that could not do that please let us know.

In any case where there is more than one person charged, the judge will instruct the jury on what action and conduct is. I'm not going to go into the entire instructions but basically what we would expect the Court to tell is where you have two or more people working together and both of them are present

during the crime, each are fully responsible for the acts of the other. So it doesn't matter whether this --

MR. CARTER: Your Honor, I object to that. He is arguing the facts of the case.

MR. EVANS: Not yet.

THE COURT: Overrule the objection.

MR. EVANS: Thank you, Your Honor.

Each defendant is held to be responsible for what the other does. Will each of you tell us that you will follow the Court's instructions and that you will do what the judge tells you on acting in concert? Anyone here that would not?

Capital murder trial - and the judge briefly mentioned this, but I want to go a little bit deeper in it - is divided into two parts. Just as at this point in a trial this defendant is presumed to be innocent, you also are not to make any determination at this point as to what penalty is appropriate. I think the Court will instruct you, you can't do that.

So at this point, if you are picked as a juror, all that you will be looking for in the first phase is did they meet their burden of proof. Is this defendant guilty? You will not -- when you go out to vote on the first part, you are not to even discuss what the penalty is or what the penalty could be. Do each of you understand that? So the 12 of you that are picked as a jury, when you go out to deliberate it will be only on one issue. Did he commit the crime?

If you come back in with a verdict of guilty, then the Court will tell you that we will go into a second part. And in that part the State may put on certain evidence. The defense may put on certain evidence.

And after hearing that evidence, then the jury will determine what penalty is appropriate.

Can each of you tell us that you will listen to what the judge tells and not make any determination of what penalty is appropriate until you have heard the second phase? Is there anyone here that cannot do that?

In any criminal case the judge is the one that determines what law is appropriate. At the end of the trial, as he has already done, he has already told you a lot of things that the law is in this case and what is required. At the end of case, he will read you instructions on what the law is. You are obligated to follow his instructions. But that is only on the law.

The jury determines what weight and credibility to give witnesses. The jury determines who they can believe, who they don't believe. And makes the decisions of fact. So basically, it will be your obligation to listen to all the evidence, look at the evidence that comes before you and make a decision of guilt or innocence.

And I guess where that comes into play is in a couple of ways. But one, in this case you may hear conflicting evidence. Is there anyone here that says well, if this doesn't come out -- if there's a little contradictory in here, something like that, I can't weigh it? I can't think about it. Can each of you tell us that you can listen to the evidence and make a determination of who you can believe based on the evidence and the facts? Can each of you do that?

Also, and I've kind of gone through this with people you know. There may be people that testify that some of you know. And basically, what the Court is telling

you is that you have to weigh their testimony the same as anybody's. That doesn't mean that you disregard it or things like that. It just means that you listen to all the testimony. And after you have heard all the testimony you, as the jurors, decide how much weight and credibility each witness's testimony is due. Can each of you do that?

And in follow-up to that question, we expect some witnesses in this case -- and I just want to make sure that you don't disregard their testimony. We expect there to be some people involved that may have been involved in the planning. We expect that they will testify for the State. Will each of you tell us that you will listen to their testimony and give it what weight and credibility it deserves after listening to all the testimony and all the witnesses?

We also expect there may be some individuals that were in jail that are going to come in and testify about things that this defendant told them. Is there anybody here that would say well, they are in jail. They are not going to believe anything they say. Or would you also listen to their evidence and give it what weight it deserves after you hear all the testimony?

One area that I normally don't even cover but since the judge mentioned it I am going to make this comment. Race has absolutely no place in the courtroom. I want each of you to assure me that it will not have any place in here. Is there anybody in this courtroom that would let race interfere with their decision one way or the other in a criminal case? If there is, please let us know.

If y'all will, give me just a second.

Okay. Number 43. Miss Tidwell. Miss Tidwell, are you related to David Tidwell?

JUROR PATRICIA TIDWELL: That's my cousin.

MR. EVANS: Your cousin. Okay. Thank you, ma'am.

Kind of a follow-up question. Like the judge asked, a lot of you have given a lot of different reasons for possibly not being able to sit on this case. But other than the reasons that y'all have given, is there anyone here that knows of any reason that they could not be fair and impartial to both sides, listen to the evidence and base the decision on the evidence in the case?

Your Honor, I tender the panel.

THE COURT: Mr. Carter or Mr. Baum, whichever.

MR. CARTER: My name is Ray Carter. Along with Ray Baum, we represent Terry Pitchford. I'm a defense lawyer. I'm just the opposite of Mr. Evans, who is prosecutor.

Mr. Evans and I make our system work. The system couldn't work without Mr. Evans, and it couldn't work without me. So you might see us going at it and fighting hard and taking a different position. That is what we are supposed to do. It doesn't mean that we are enemies, that we hate each other. I can assure you that we don't. Even if it looks like it, we don't. We are doing our jobs.

Now, people like certain things and don't like certain things. For instance, I don't like snakes. And you can tell me it's a pet snake or good snake. You can tell me the snake is at the zoo giving away money today, and I still wouldn't like a snake. And because I don't like them, it wouldn't be fair for me to sit in judgement of

snakes, because I'm not sure if I could be fair to snakes.

If I saw one coming in this courtroom right now, the first thing I would do is go in the opposite direction. I just don't like them. Might even have to kill it if I can get something to hit it with. That is how I feel about snakes. I am not saying anybody else should feel that way. That is just how a person feels. So can you assure me that you have no bias in favor of Mr. Doug Evans or his side or any bias against my side since I'm a defense lawyer. I take that to mean that you can treat both of us fairly. Is that fair to say?

Now, I want y'all to understand that all the evidence comes from the witness stand. And can you promise me that you will make a decision based on the evidence you hear from the witness stand and not what you heard in the community or what you hear me say necessarily or what you hear Mr. Evans say? I'm asking you will you base your decision on the evidence that comes from the witness stand, which is what you are supposed to do. Would anybody have a problem with that?

There is always a lot of confusion about cases and, and what lawyers do. We get a chance to go to law school. And I don't want you to think for a minute that because we go to law school we are not confused too because we are confused about some things too. I know that you have to confused about some things because you even haven't had the training that we have had.

Now, you heard us talking about this possibly could be a death penalty case. Now, I want you to understand that we are not conceding that Mr.

Pitchford is guilty. I want you to understand that. I don't want you to think that we are sitting here saying that Mr. Pitchford is guilty and that the only issue is whether you can kill this man or not.

MR. EVANS: Your Honor, I object to that. That is not a proper comment.

MR. CARTER: A follow-up will clarify it.

MR. EVANS: I object to it.

THE COURT: I sustain. The jury is not being asked to kill him. They will just be asked to possibly impose the death penalty. So I will sustain the objection as to the way the question was phrased.

MR. CARTER: Yes, sir.

So you heard this question being asked of whether you could consider the death penalty. Now, what does consider mean? Now, consider doesn't mean that you vote for the death penalty. There are two options. Do you understand there are two options - the death penalty and there is life without possibility of parole? And the State of Mississippi can't tell you -- they are not trying to tell you how to vote.

So the question is not whether you can just consider the death penalty, but can you consider the death penalty and can you consider life without possibility of parole equally? Can you consider both options? You are not being asked just to consider whether you vote for death or not. You are supposed to consider both options. And based on the evidence that you hear from the witness stand, then you decide how you vote. Do you understand that?

And with that being the case, knowing that you don't have to vote for death, that nobody can make you vote

for death, that it's your decision and your decision alone after hearing the testimony. Now, no one has told you yet how you decide, whether to vote for life or death.

There is something, ladies and gentlemen, called aggravation and mitigation. The prosecutor will put on what is called aggravation. And this will have to be done before you make any decision about how to vote.

Now, I know you couldn't possible understand but I am trying to make you understand. And when Mr. Evans put on what is called aggravation, which is the reason he believes that the death penalty should be considered or voted for, we attempt to put on what is called mitigation. I get a chance to tell you why you should vote for life versus death.

In the first phase, as the judge told you, you decide guilt or innocence. If you decide that, we go to the second phase where you decide, again, life or death based on how you feel about aggravation that they put on, based on how you feel about mitigation we put on.

Now, a lot of you said you could never consider the death penalty.

Now, number 3, Mr. Crawford, you said you couldn't sit in judgment of others. And I'm trying to be clear. Were you thinking about -- were you telling us that you could not -- were you saying you could not vote for the death penalty? Is that what you were saying? Or were you saying you could not sit in judgement of anybody for any reason?

JUROR RODELL CRAWFORD: Yeah, I can judge somebody. Not for the death penalty.

MR. CARTER: Let me ask you this. Now, you could sit on this trial and you could decide whether a person was guilty or innocent; is that correct?

JUROR RODELL CRAWFORD: I can do that.

MR. CARTER: You sit on the jury, and you decided that. Then we went to the second phase, and you heard, again, what is called mitigation, the reasons I would put forth why the person should live. Aggravation, reasons Mr. Evans would put forth as to why he think the person should be killed.

Could you listen to both sides then decide whether you wanted to vote for life or death? With it being your decision, you are not being told to vote for death or life. You have both options. It would be left up to you. Could you, in fact, sit and make that decision?

JUROR RODELL CRAWFORD: I believe I could.

MR. CARTER: Could you consider both, not could you vote for one? Could you consider, think about both and make a decision as to which one you wanted to vote for?

JUROR RODELL CRAWFORD: I could make that decision.

MR. EVANS: Your Honor, he is not asking the legal question. I would ask that it be asked in a way that the Supreme Court has said it needs to be asked.

MR. CARTER: I asked him, Your Honor, if he could consider both options. I don't know what else Mr. Evans want me to ask him.

MR. EVANS: I think you know what the Court says.

MR. CARTER: Could you consider both options equally, life or death, and then decide which one you

wanted to vote for, with it being your decision and nobody else's decision but your decision?

JUROR RODELL CRAWFORD: Yeah. Yeah.

MR. CARTER: Okay. Number 5. Miss Coleman, understanding now that you didn't have to vote for death, no one can make you vote for death.

MR. EVANS: Your Honor, I object. He is not asking the question as the Supreme Court has said it should be asked. And I would ask that it be asked in the proper form.

MR. CARTER: I am asking it in the proper form, Your Honor. I am not asking it to Mr. Evan's liking but --

MR. EVANS: No, it's --

THE COURT: I don't want you arguing with each other.

MR. EVANS: We would just ask it be asked in the form the Supreme Court has approved it in.

MR. CARTER: I don't know what he is talking about, Your Honor.

THE COURT: You can proceed. Overruled.

MR. CARTER: Miss Coleman, I am trying to be clear. I am trying to make sure you understand. I hope I'm not confusing you. If I am, let me know. My question -- a few minutes ago it was asked could you consider the death penalty. I want to make sure you are not confused by that. Can you consider the death penalty doesn't mean you have to vote for the death penalty. What I want to know -- and all consider means is that you could consider that, the death penalty as well as a life without possibility of parole

sentence and decide between those two, which one you thought was appropriate after hearing the evidence.

JUROR NADINE COLEMAN: Yes.

MR. CARTER: Could you do that?

JUROR NADINE COLEMAN: Yes.

MR. CARTER: Number 7. Miss Foxx, could you -- understanding that no one can tell you what to vote for or which way to vote, that it's your decision, could you after hearing the evidence from Mr. Evans and from me, consider both options, life without possibility of parole or death? Not that you have to vote for either, could you consider both options and then vote according to your conscience?

JUROR SYRETTA FOXX: No.

MR. CARTER: You couldn't do that.

JUROR SYRETTA FOXX: I couldn't consider death and I wouldn't decide -- I wouldn't go for life. I wouldn't judge on that.

MR. CARTER: Okay. You can't judge. Okay. There is no right and wrong answer. I just want an honest answer. Okay. Thank you.

Mr. -- I'm sorry. Miss Deblois, now, I'm trying to make sure that you understand this question and hopefully I made myself clear. Could you -- knowing that you never have to vote any particular way, you never have to vote for death, it's up to you, could you, after hearing the evidence from both sides, aggravation and mitigation, decide according to your own conscience and consider both the life without possibility of parole and death option?

JUROR DONNA DEBLOIS: The only way I know how to answer that is I could consider life without

parole. I believe in punishment. I don't want to be responsible for causing someone's life.

MR. CARTER: I can understand you don't want to be responsible. Are you saying you couldn't do it or you could do it or it would make you uncomfortable?

JUROR DONNA DEBLOIS: I can't consider death, but I believe they need to be punished.

MR. CARTER: Okay. Thank you.

Number 15. Miss Willis, after having given some kind of explanation, hopefully some clarification, are you saying that even though you are not being forced to vote for either option and nobody can force you to vote for either option, that you never have to vote for death if you don't want to, could you sit on this case and listen to the evidence from both sides and consider either life or death --

JUROR LOVIE WILLIS: I could.

MR. CARTER: -- as a punishment?

JUROR LOVIE WILLIS: I could. Yes.

MR. CARTER: Mr. Tillman, now that there has been some explanation, and understand that nobody can tell you how to vote. Nobody can force you to vote either way. It's your decision. Could you sit on this jury or any jury and consider both options, life or death, based on the evidence presented to both sides?

JUROR CINTRON TILLMAN: No, I couldn't.

MR. CARTER: You couldn't consider death.

JUROR CINTRON TILLMAN: (Shook head.)

MR. CARTER: Okay. Thank you.

Miss Williams, I hope I've clarified this a little But same question. Understanding that it's your decision

how you vote, nobody can make you vote either way, that you can vote for life without possibility of parole or death, understanding that, could you sit on the jury or any jury and hear the evidence from both sides and vote and consider either life or death?

JUROR DIANNA WILLIAMS: No, I couldn't.

MR. CARTER: Okay. Thank you.

Mr. Smith, understand this is your decision and your's alone. Nobody can tell you how to vote. Could you under those circumstances sit on this jury or any jury with both options, life or death, and vote according to your own conscience and consider both options?

JUROR ARCHIE SMITH: Could not.

MR. CARTER: I'm not sure if it's Mr. Mack or Mrs. Mack. Mr. Mack, I want to make sure. It is real important that you understand this. Knowing that you don't have to vote either way. You can vote either way you want to. Nobody can tell you how to vote. With that being the case and understand that you never have to vote for death if you don't want to, would you consider both options, life without possibility of parole or death?

JUROR P.M. MACK: I can't consider death.

MR. CARTER: Okay. Thank you.

Mr. James, understanding now that you -- it's up to you to vote your conscience. That is all you are being asked to do. And understand nobody can make you vote for death, or even life, if you don't want to. It is totally up to you. Understanding that, could you sit on this jury or any jury and consider both options?

JUROR MANUEL JAMES, JR.: I could consider it but not death. I couldn't consider that.

THE COURT: I didn't hear that.

JUROR MANUEL JAMES, JR.: I couldn't consider death.

THE COURT: Okay. Thank you.

MR. CARTER: Miss Kelly, now understanding that you are voting your own conscience, that you have two options, and nobody can tell you how to vote. It is totally up to you. Is it still your position that you couldn't consider both options from the evidence according to both sides?

JUROR TONYA KELLY: I can't consider death.

MR. CARTER: Jessie Allen. Mr. Allen, understanding that you have two options, it's totally your decision about the case. You are supposed to vote your conscience based on hearing the evidence from both sides. Could you consider both options and vote your conscience and your conscience alone?

JUROR JESSIE ALLEN: Still couldn't.

MR. CARTER: Couldn't. Thank you.

Cecil Harris. Now understanding that no one can tell you how to vote, that you could never be forced to vote for death or life. That it is totally your decision based on your own conscience after hearing the evidence from both sides, can you tell us whether you could actually consider both options and choose the option that suits your conscience?

JUROR CECIL HARRIS: I couldn't consider death.

MR. CARTER: Couldn't consider death.

Is it Mr. Andrews? Mr. Andrews, now realizing that no one can tell you how to vote, it's totally up to you how to vote, that you have two options. Understanding that, can you give both options equal consideration?

JUROR ELVIE ANDREWS: No, I couldn't consider death.

MR. CARTER: Thank you.

Billy McGee. Mr. McGee, understanding that no one can tell you how to vote or force you to vote any particular way, that it's totally up to you based on the evidence that's presented, and that you have to vote your conscience and not anybody else's, could you give both options, life without possibility of parole or death, consideration then decide which way you want to vote?

JUROR BILLIE MCGEE: I can't consider death.

MR. CARTER: Can't consider death. Thank you.

Miss Billie McGee. Billie McGee.

JUROR BILLIE MCGEE: That is me.

MR. CARTER: I'm sorry.

Miss Harrison. Miss Harrison, now understanding that nobody is telling you how you have to vote, that it is totally up to you based on your conscience, your own conscience after hearing evidence from both sides, Mr. Evans and from us, can you tell us whether you could consider both options, then vote your conscience?

JUROR CRISTIN HARRISON: I don't feel it is my position to judge him. I don't feel I should be able to judge him in any way even listening to the information given.

MR. CARTER: And given the fact you don't feel you could judge, that would make it impossible for you to serve.

JUROR CRISTIN HARRISON: I think I would have a hard time with it. I do not believe in the death penalty. As far as anybody else can give the death penalty, but I don't feel that I should do it, if that makes sense.

MR. CARTER: Well, it makes sense. But so you are saying you couldn't give both options any consideration or you could?

JUROR CRISTIN HARRISON: I really don't think I could.

MR. CARTER: Don't think you could.

Mr. Chamberlain, now that there has been a little bit of clarification and nobody is telling you you have to vote for death or life without possibility of parole. It is totally up to you based on your conscience after you hear evidence from both sides. Are you saying despite that that you could not consider both options and then vote?

JUROR JOHN CHAMBERLAIN: I, I don't think so.

MR. CARTER: Mr. Wilson, now understanding that no one is trying to tell you how to vote. Nobody is saying you have to vote for death or that you have to even vote for death and that you have two options, either life or death. Are you still telling us that you couldn't listen to evidence from both sides and then give both options consideration and pick the one you think is appropriate?

JUROR JAMES WILSON, JR.: (Shook head.)

MR. CARTER: That is no, I assume.

JUROR JAMES WILSON, JR.: (Nodded.)

MR. CARTER: Thank you.

Miss Wesley, let me try to be clear. Realizing that it is your decision how you vote, that you can vote for either life or death, no one can make you choose. And all you are asked to do is vote your conscience after you hear evidence from both sides. Are you telling us that you still could not consider both options?

JUROR DORA WESLEY: I can consider it, but I'm against death.

MR. CARTER: Okay.

JUROR DORA WESLEY: But, you know, if I had to choose one, it would be life.

MR. CARTER: Okay. I understand that. I understand life might ordinarily get preference. What I'm trying to find out is could you give both, life option and the death option --

JUROR DORA WESLEY: I can consider --

MR. CARTER: -- equal consideration?

JUROR DORA WESLEY: Um-hum.

MR. CARTER: You can give both equal consideration and then choose the one you want.

MR. EVANS: Your Honor, again, I object. This is just not following the law.

THE COURT: I need quiet. I have an objection.

I want to ask a follow-up.

Miss Wesley, the question is could you consider the death penalty. Not --

JUROR DORA WESLEY: I don't believe in it.

THE COURT: Okay. Whether you believe in it or not is not the issue. If you had it before you, the case of whether to -- whether the death penalty was appropriate or not, would you be able to consider imposing the death penalty or would you automatically not even consider that as an option?

JUROR DORA WESLEY: Not even consider it.

THE COURT: You could not even consider it as an option.

JUROR DORA WESLEY: No.

THE COURT: Okay. Thank you.

MR. CARTER: What number was she?

JUROR DORA WESLEY: Forty-five.

MR. CARTER: Miss Swims, you've heard the question I've been asking over and over. Could you sit on this jury or any jury and listen to both sides and give both punishment options equal weight? Could you consider both of them and not just consider one or another one? Could you consider both and then decide how you want to vote?

JUROR MAMIE SWIMS: I believe with the explanation you have given, I believe I can. I know I can.

MR. CARTER: Thank you.

Miss Alicea, again, knowing that it's your decision how you vote, no one can tell you how to vote or force you to vote any particular way. And knowing that you have two options, not one option, but two options, could you sit on this jury or any jury and listen to the facts, the evidence from both sides, and then consider, give thought to, both options, life or death, and then choose --

JUROR MARIA ALICEA: No.

MR. CARTER: -- which one you so wanted to vote for?

Miss Holman.

JUROR WILLOLA HOLMAN: Yes, sir.

MR. CARTER: Again, knowing it's your decision and no one can tell you how to vote, which option to choose, it's totally your decision that you have both options at all times, could you listen to the facts from both sides and give consideration, and I mean some thought to either side without any force from anybody and decide based on the evidence and your conscience of life or death?

JUROR WILLOLA HOLMAN: Being honest.

MR. CARTER: Yes, ma'am.

JUROR WILLOLA HOLMAN: I did not want to be on a murder trial period. So, no. I just don't feel comfortable.

MR. CARTER: Don't feel comfortable in sitting in judgement of anyone else.

JUROR WILLOLA HOLMAN: We just had that in mission in Sunday School. It just worries you.

MR. CARTER: You have religious scruples against sitting in judgment of others.

JUROR WILLOLA HOLMAN: When it comes to taking a chance of what is going to happen to a person's life.

MR. CARTER: Is it fair to say because you are saying that it's a case where death could be possible --

JUROR WILLOLA HOLMAN: Um-hum, I understand.

MR. CARTER: -- that you could not consider the life option or the death option?

JUROR WILLOLA HOLMAN: I would not want to. No.

MR. CARTER: I understand you wouldn't want to. I don't think any of us would want to. I know I wouldn't want to. But if you were in a situation, could you do it despite not wanting to?

JUROR WILLOLA HOLMAN: No.

MR. CARTER: Okay. Thank you.

Okay. Miss Hubbard, understanding this is your decision and your decision alone, that you have two options, that neither I nor Mr. Evans can tell you how to vote. It is totally your decision based on your own conscience and moral values. Could you sit on this jury or any jury and hear evidence from both sides and then give consideration to both options, life without possibility of parole or death?

JUROR TABATHA HUBBARD: No, sir.

MR. CARTER: Thank you.

Miss House, understanding now that you have both options, that it's totally your decision. No one can tell you what to do or force you to do anything, with that being the case and realizing you have two options, not just one, could you sit on a jury where the death penalty is possible and give equal weight and consideration to the life option and the death option?

JUROR STACEY HOUSE: No, sir.

MR. CARTER: Mr. Redditt, having heard that question -- I assume you heard it. Do I need to go through it?

JUROR MICHAEL REDDITT: I heard it. No, I cannot.

MR. CARTER: Could you give equal consideration to both options?

JUROR MICHAEL REDDITT: No, sir.

MR. CARTER: Mr. Kincaide, realizing that you have both options and no one can tell you how to vote, it's your decision based on your own conscience, could you on this case or any case, hear facts from both sides and decide and consider both options, life or death, then make your decision as to which one you choose?

JUROR JIMMY KINCAIDE: No.

MR. CARTER: Miss Hammond, hopefully with a little explanation, could you -- realizing that you have two options, and that it's totally up to you which option you take, nobody can make you choose either one, could you realizing that sit on a case where death was a possibility and listen to evidence from both sides? Then based on your conscience, your moral values, give consideration to life or death and give consideration to both?

JUROR GERTHY HAMMOND: No.

THE COURT: Mr. Carter, you overlooked one on that page and I just wanted to -- I believe number 58. And I didn't --

MR. CARTER: I'm sorry. I didn't mean to.

THE COURT: I didn't think you did. That is why I want to -- just before we went on to the next page.

MR. CARTER: Miss Brexton. Fifty-eight.

JUROR OPHELIA BREXTON: Yes, sir.

MR. CARTER: Now realizing that in a case like this that you have two options, life without possibility of parole and death, and that it will be your decision as to which way to vote and no one could tell you how to vote or make you vote any particular way, could you sit on a case like this and hear evidence --

JUROR OPHELIA BREXTON: No, sir.

MR. CARTER: -- from both sides?

JUROR OPHELIA BREXTON: No, sir.

MR. CARTER: When you say no, sir, that means you could never consider one of the options.

JUROR OPHELIA BREXTON: No, sir.

MR. CARTER: What option would that be?

JUROR OPHELIA BREXTON: Either one.

MR. CARTER: Either.

JUROR OPHELIA BREXTON: I wouldn't vote for the death penalty. I wouldn't vote for life. I am like her. I couldn't make a decision on judging somebody else.

MR. CARTER: All right. Thank you.

Mr. Kincaide, you already -- I'm sorry.

Miss Hammond.

MR. EVANS: Sixty-six. You skipped 66.

MR. CARTER: Sixty-six.

I apologize, Your Honor.

Mr. Pryor. Mr. Pryor, now understanding that you have two options and it's totally your decision as to

how you want to vote and no one can make you vote any particular way, could you sit on the jury such as this and consider both options, both options equally, and then decide which option you think is appropriate based on your own moral conscience?

JUROR HENRY PRYOR, JR: No, sir. Not for death.

MR. CARTER: You couldn't ever consider that.

JUROR HENRY PRYOR, JR: (Shook head.)

MR. CARTER: Okay. Thank you.

Miss Journigan. Susie Journigan. Miss Journigan, now understanding that there are two options, totally your decision how you would vote. Nobody can make you vote any particular way. Can you sit on a jury such as this and listen to evidence from both sides and give both sides, not one side but both sides, equal consideration?

JUROR SUSIE JOURNIGAN: No.

MR. CARTER: Okay. Thank you.

Miss Hubbard, understanding now that there are two options, life without possibility of parole and death, and that it would be your decision, nobody could force you to vote any particular way, could you sit on a jury such as this, listen to the evidence from both sides and give equal consideration to the life or death option, then make a selection?

JUROR THELMA HUBBARD: I would have to say no, because I've already stated that I'm not in agreement with the death penalty period. So I would say no.

MR. CARTER: Thank you.

Miss Bounds, understanding that there are two options that you will always have, that is up to you which way you vote, no one can force you to vote either way, could you sit on this jury or a jury like this and give equal consideration to both options?

JUROR JOYCE BOUNDS: No.

THE COURT: I didn't hear that response.

JUROR JOYCE BOUNDS: No.

THE COURT: Okay. Thank you.

MR. CARTER: Miss Gladys Hubbard, now understanding that you have two options, you will always have two options. No one can tell you how to vote. It is totally your decision. Could you sit on a jury such as this or any jury and listen to evidence from both sides and then make a selection as to life or death based on your own personal moral conscience?

JUROR GLADYS HUBBARD: No, sir.

MR. CARTER: Mr. Gilbert, now understanding that you are not automatically being asked to vote either way, that you have an option to vote for life or death and nobody can tell you how to vote, that it's totally up to you, understanding that could you sit on a case such as this one and listen to the evidence from both sides and then based on your own moral conscience make a selection as to life or death?

JUROR GILBERT CHAIRS: (Shook head.)

THE COURT: You were nodding your head no.

JUROR GILBERT CHAIRS: Oh, no, sir.

MR. CARTER: And finally, Mr. Parker. Mr. Parker, now understanding that you have two options, not one. I'm not saying you were confused, but often there

is some confusion. But understanding you have two options, life without possibility of parole or death. That is totally your decision. No one can tell you how to vote. Could you sit on a case such as this and listen to evidence from both sides and then treat both options equally, then make a selection as to which way you want to vote?

JUROR ROBERT PARKER, JR.: No, sir.

MR. CARTER: Now, the judge also asked you if any of you would automatically vote for death. Having been a lawyer for a while and having tried a lot of cases, I also know that often times we don't really know exactly what that means. So let me see if I can clarify that and then see how you feel about it. When the judge asked you that I don't know what you thought but it's a possibility you thought as of now before you hear any evidence. I want you to understand. Before you ever -- although the judge explained that, you still might have been confused by it. I want you to understand before you can consider life or death you have already found a person guilty. You have already found a person guilty.

So knowing you would vote for death or not, you would have to have sat and heard the case. So let me ask you this. Try to put you in that situation for a second. After you found a person guilty of capital murder and you go on to the next phase and you found the person guilty of capital murder, you would have decided that this person knowingly and on purpose without it being in self-defense --

MR. EVANS: Your Honor, I object --

MR. CARTER: -- kill somebody.

MR. EVANS: -- because at this point we are trying to go into what may be proven in the case. That is not appropriate.

MR. CARTER: That is not what I'm doing, Your Honor.

THE COURT: I will let him finish. I can see where he was heading, so I will overrule the objection.

MR. CARTER: I'm trying to -- we have to get good answers. We have to get an answer that you understand what you are doing and what you are being asked. I think you may understand by now in order to vote for life or death a person is already guilty. You would have found him guilty and you would have decided that this person killed somebody. He knew what he was doing. He intended to do it. And that there is no defense to it.

If you were to sit on a jury like that and decide that this person was guilty without there being a defense or an excuse, would at that point any of you automatically believe that the person deserves death because they killed somebody?

Now, some of us believe - and if you believe it, that is fine - that if you take a life, your life should be taken. Anybody in here believe that if you take a life your life should be taken? We are not judging you. If you feel it, you just feel it. But if you feel it, I am just simply asking.

Anybody on the first row feel that? Anybody on the second row? Anybody on the jury panel period believe that if you kill somebody you should automatically be killed too?

Now, you heard me a few minutes ago talk about mitigation and aggravation and you probably have never heard of mitigation before. Maybe you have. I never have before I became a lawyer. I'm not sure if I heard of aggravation either, especially not in the context of a trial.

But mitigation, which is something I have to put on at trial, goes to a person's life story, a person's life, a person's background. It goes to who that person was before you met them. Mr. Pitchford is 19, just turned 19, I think, or maybe 20. I'm getting old.

Does anybody here who thinks what happened to you, if anything, or during your lifetime before you got charged with a crime should not count in deciding whether you receive life or death?

MR. EVANS: Your Honor, I object again because we are getting into the jury deciding on mitigators and aggravators at this point. And this is definitely not proper.

MR. CARTER: Your Honor --

MR. EVANS: They will be given an instruction --

THE COURT: If you hold all your objections until you come forward.

(MR. EVANS, MR. HILL, MR. CARTER AND MR. BAUM APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE PROSPECTIVE JURORS.)

MR. EVANS: The jury will be given instructions by the Court on what mitigators are appropriate for him. At this point to start trying to pin the jury down on

what you believe about mitigators is definitely improper.

MR. CARTER: Okay. Your Honor, I certainly don't intend to do that. All I'm trying to find at this point is whether they are open to mitigation. I am not going to set forth what our mitigation is.

THE COURT: You were.

MR. CARTER: I wasn't specifically. Some jurors actually think that a person's background before they got in trouble doesn't count period, that they shouldn't have to consider that. All I want to make sure is that they at least consider it.

THE COURT: You can ask them in such a way will they consider the instructions of the Court -- the mitigating factors as given by the Court. And I think that's appropriate because I am going to instruct them on what the mitigating factors are. You can ask them if they would consider mitigating factors or would they be automatically disposed to the death penalty.

MR. CARTER: Your Honor, if they don't know what mitigation is, I mean how --

THE COURT: You were telling me just a second ago you weren't meaning to get into --

MR. CARTER: What I'm saying -- if I can make myself clear. I want to ask them if they would consider the person's life up to this point.

All I want to ask them is whether they will consider a person's life before he got in trouble not any specific incident of their life. Although, you know, I can go find the cases that actually says --

THE COURT: If you are not intending to go any further than that.

MR. CARTER: I just wanted to make sure they consider it.

MR. EVANS: I objected when he started going into specific --

MR. CARTER: I won't go into specifics.

THE COURT: That is fine then.

(THE BENCH CONFERENCE WAS CONCLUDED.)

THE COURT: Ladies and gentlemen, I know you have been sitting awhile. Let's just take a ten-minute recess to allow you to stretch and move around. You can't talk during the recess among yourselves about the case.

(A RECESS WAS TAKEN. PROCEEDINGS RESUMED IN OPEN COURT. MR. EVANS, MR. HILL, MR. CARTER, MR. BAUM AND THE DEFENDANT WERE PRESENT.)

THE COURT: Okay. I'll ask you to look around. Anybody that was sitting by you earlier -- okay. We've got one person, two . . .

(A FEW JURORS RETURNED TO THE COURTROOM.)

THE COURT: Court will come back to order.

Mr. Carter, you may proceed.

THE BAILIFF: We are missing another one.

THE COURT: Okay. Now, double check again. Is there a vacancy next to any of you that was not vacant earlier this morning? Okay. I think everybody is back then. We will come back to order.

Mr. Carter, you may proceed.

MR. CARTER: Thank you, Your Honor.

Ladies and gentlemen, at the time we stopped I was asking and you -- maybe I should ask it this way. I was talking about that word mitigation and aggravation that I'm sure you are familiar with in this context. Again, you'll be real familiar with this, some of you will, before it's all said and done. Mr. Evans put on what is called aggravation. I put on what is called mitigation. None of us can tell you what specific aggravation or mitigation we will put on. But it is important that you listen to both. And the judge will give an instruction telling you that you have to listen to both, both sides.

What I'm trying to find out from you is there any person who would refuse to listen to either side if the judge told you that you had to give both consideration? In other words, you would follow the judge's instruction and you would do what you are told to do regardless of how you might personally feel about it? Is that fair to say? Anyone couldn't? Okay.

A few minutes ago I asked -- most of you, you received questionaries and you filled the questionnaires out. I asked a few minutes ago is there anyone here that believes in an eye for eye, tooth for tooth. And nobody said anything. That is fine if that is the case.

But I got a few questionnaires that actually said that there were people who felt that. There is nothing wrong if you feel that. We are not judging you. You certainly are welcome to your opinion. But if you believe that you need to be honest about it. And all it means is that you may or may not be -- may or may

not be the right person for this particular jury. That is all it means. It is not saying anything else about you.

So again, I ask are there any persons who actually believe in an eye for an eye and tooth for tooth, if you kill somebody, you should die too?

Do we have a Misty Tillman?

JUROR MISTY TILLMAN: Yes, sir.

THE COURT: If you will, stand if you are going --

Anybody that is -- that you are specifically asking questions of they need to be standing.

MR. CARTER: Miss Tillman, I believe you said in your questionnaire if you do something punishable by death and you are found guilty, you should get the death penalty. So doesn't that mean -- what do you mean by that?

JUROR MISTY TILLMAN: If it's -- if it's decided to be chosen for death then, yeah, you should be for death.

MR. CARTER: Okay. So you are not saying that if a person kills somebody, they automatically get death also. Get the death penalty. Is that what you are saying?

JUROR MISTY TILLMAN: If the evidence points that way then yeah, they should get the death penalty then. If it don't, then . . .

MR. CARTER: Correct me if I am wrong but I believe you are saying if a person gets charged with murder and it's proven that they murdered a person it's your position that they should be killed too.

JUROR MISTY TILLMAN: Somewhat. It just depends on the evidence of how it was committed and, and -- you know what I'm saying? You understand.

MR. CARTER: You gotta understand that I don't know. We don't know unless you tell us exactly what you mean. So you have to tell us. I really don't know exactly what you mean. So are you saying -- and I want to understand. I am sure the judge wants to understand. Mr. Evans wants to understand. Based on what you wrote --

JUROR MISTY TILLMAN: Um-hum.

MR. CARTER: -- are you saying that if it's proven that a person killed another person on purpose, he knew what he was doing, wasn't in self-defense, that that person should be killed also?

JUROR MISTY TILLMAN: Yes.

MR. CARTER: All right. Thank you.

JUROR DAVID FEDRIC: That is not what you asked awhile ago. In that context, I do believe that. If somebody was killed in a car wreck and they killed something, no, I don't necessarily think they should be killed for it. It depends on the context of what you are talking about.

MR. CARTER: That was 41. Mr. Fedric.

JUROR DAVID FEDRIC: Yes.

MR. CARTER: Let me see if I can clarify that. In a situation where a person kills someone, not an accident, not in self-defense, does it on purpose, knows exactly what he is doing, did it for that purpose, in that situation do you believe the person should get the death penalty also?

JUROR DAVID FEDRIC: I would listen to mitigating circumstances but probably so.

MR. CARTER: Okay. When you say listen, what do you mean?

JUROR DAVID FEDRIC: I would listen to your case for mitigating circumstances. There may be reasons. The man -- they could have had previous problems. It could be a marital thing. It could a lot of different reasons that I would listen to.

MR. CARTER: Okay. I understand. With that explanation, do we have anyone else who believes that if you kill someone on purpose, knowingly, intend it, not in self-defense, not a mistake, not an accident that you should be killed too? Do I have anyone else?

THE COURT: Anybody that is responding, if you will please stand.

MR. CARTER: Number 85. How strong is that opinion? Is it real strong?

JUROR TERRY WELCH: It's real strong. If you kill someone on purpose with intent to kill that man, for whatever reason, especially for money, for personal gain, he ought to die.

MR. CARTER: Thank you.

JUROR KENNETH ARTMAN: I feel that way too. You talking about cold-blooded murder?

MR. CARTER: You don't get that term --

MR. EVANS: Your Honor, we are getting into the facts of the case. We haven't proven anything.

THE COURT: I agree. We are getting way ahead of ourselves. The only issue right now is whether you would automatically if you found somebody guilty of

murder. And obviously, under the definition of murder, it has to be intentional. It's not an accident If somebody intentionally kills somebody, are you automatically just going to say okay, I'm going to impose the death penalty because I think they should be executed?

Or are you going to listen to the evidence, listen to the aggravating factors why the district attorney thinks they should get the death penalty and listen to the mitigating circumstances to consider why they should not get the death penalty and decide it then? Or are you automatically going to just decide that they should receive the death penalty if they are convicted of, of murder? And with that in mind, I want to know if any of you just automatically think if somebody is convicted that they should get the death penalty. Any of you think that?

MR. CARTER: I noticed you stood number 84.

JUROR TERRY WELCH: I would listen. I would listen to the facts. But if you intentionally go in to rob somebody, as Mr. Welch said, for personal gain, I do believe in an eye for an eye.

MR. CARTER: Thank you.

Number 19.

One moment, Your Honor.

Okay. Number 19. Mr. Brantley, I read your questionnaire and based on something you said I'm not really clear in terms of how you feel about that. Can you just tell us?

JUROR BRANTLEY CLARK: I mean if it's proven and if it's -- I mean, you know, can you ask me a better question?

MR. CARTER: I believe you said on your questionnaire that if they have been charged for a crime deserving such a penalty and proven guilty without a doubt then you believe they should be killed.

JUROR BRANTLEY CLARK: Yes, sir. I would listen to both sides. But I would not say okay, they are -- they did it. They are getting the penalty in my head. I would listen to both.

MR. CARTER: Okay. Thank you.

Number 34 Mr. Barrett.

JUROR WALTER BARRETT, III: Yes, sir.

MR. CARTER: In your questionnaire -- I'm not sure exactly what you meant. I believe you said, I believe, a person should actually pay for their crime if guilty. And this is what you wrote in respect to the question about the death penalty.

JUROR WALTER BARRETT, III: I believe in the death penalty, but it would not be automatic.

MR. CARTER: You would listen to all the evidence before making a decision.

JUROR WALTER BARRETT, III: Yes, sir.

MR. CARTER: Thank you.

Brandi Smith, I believe you said on your questionnaire with respect to the death penalty if someone killed someone on purpose that person ought to die too.

JUROR BRANDI SMITH: Yes, but I would listen to both sides of the story.

MR. CARTER: You wouldn't make the decision until you listen to both aggravation and mitigation.

JUROR BRANDI SMITH: Right.

MR. CARTER: I take it at the time you said this you said that without realizing your responsibilities, without realizing your responsibility. You are supposed to listen to both sides, aggravation and mitigation. You wouldn't have any problem.

JUROR BRANDI SMITH: No.

MR. CARTER: James Pate. Now, I really don't want to read what you wrote, but can you explain to us your position on that?

MR. EVANS: Your Honor, may we approach?

THE COURT: You may come forward and approach.

(MR. EVANS, MR. HILL, MR. CARTER AND MR. BAUM APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE PROSPECTIVE JURORS.)

MR. EVANS: This is the one I think we need to do this outside the presence of the jury.

THE COURT: I need quiet in the courtroom. We are not anything here to be laughing about.

We can individually voir dire him at the conclusion.

MR. CARTER: Yes, sir.

(THE BENCH CONFERENCE WAS CONCLUDED.)

MR. CARTER: No further questions, Mr. Pate, right now.

Miss Betty Joyce Dunn. Miss Dunn, based on what you said - correct me if I'm wrong - but I believe you are saying that it would have to be proven that the person actually committed the crime through witnesses and various other -- the proof would have to

be there. Once that is done, are you saying that at that point you believe a person should automatically be killed?

JUROR BETTY DUNN: No.

MR. CARTER: What are you saying?

JUROR BETTY DUNN: If they intentionally did it, it is just like going in and robbing with robbing on their mind, then yes.

MR. CARTER: Thank you.

Miss Lancaster. Number 83. Miss Lancaster, I am not real sure exactly what your opinion is. I'm trying to be clear on it. I believe you said the death penalty - correct me if I'm wrong - should be instituted or carried out if they have been charged with murder. What are you saying? Are you saying if they have been charged with murder, found guilty of murder they should automatically be killed? Is that what you are saying?

JUROR CANDICE LANCASTER: Not automatically.

MR. CARTER: What do you mean?

JUROR CANDICE LANCASTER: It is an option.

MR. CARTER: Okay. Are you saying at this point now that you have heard us talk about the rules and how the process works that you would consider both options, listen to both sides and give it consideration?

JUROR CANDICE LANCASTER: Um-hum.

MR. CARTER: You have no doubt, no reservations about that.

JUROR CANDICE LANCASTER: Hum-hum.

MR. CARTER: Thank you.

Your Honor, may we approach about this?

THE COURT: You may.

(MR. EVANS, MR. HILL, MR. CARTER AND MR. BAUM APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE PROSPECTIVE JURORS.)

MR. CARTER: Number 84. He said an eye for an eye.

MR. EVANS: I don't think that needs to be approached in front of the panel.

THE COURT: They have already heard about the case and said they can't be fair and impartial so I don't know that --

MR. CARTER: Okay then.

THE COURT: That was the one I believe where a codefendant was charged with murdering somebody that was in jail and so I don't know --

MR. CARTER: That's fine, Your Honor.

(THE BENCH CONFERENCE WAS CONCLUDED.)

MR. CARTER: No further questions for that witness.

Now, Miss Gladys Hubbard. I'm sorry. I misread what you wrote. My apologies.

There were a few other quick questions, and I'll be finished.

Ladies and gentlemen, it's your job to come here and listen to all the evidence, evidence from both sides, evidence that comes from the witness stand. Do you understand that you have no duty to either side to

come here and give any particular kind of relief to either side? Your job is to listen to the evidence and make whatever appropriate decision after you hear the evidence.

I think I'm finished.

May we approach for one final question?

THE COURT: You may.

(MR. EVANS, MR. HILL, MR. CARTER AND MR. BAUM APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE THAT WAS HAD OUTSIDE THE HEARING OF THE PROSPECTIVE JURORS.)

MR. CARTER: Your Honor, we think we saw a juror talking to some of the -- but I don't know. It just come out. I guess what I ask now is that the Court ask - and I'm not going to take it any further than that - if anybody inadvertently talked to family and just caution them not to do that if anybody has done that.

MR. EVANS: That would apply to either side.

THE COURT: I can do that. I want to -- I want to -- there is about three or four or five that I think we ought to individual voir dire. I want you to get your list and come back up here just a second. I am going to ask a few of them to stay around.

MR. CARTER: I tender, Your Honor.

THE COURT: Mr. Carter, if you will. There were about four or five of them that, you know, when Mr. Hill was asking in no way consider death and then when you asked them they said they could so I want to -- I want to ask, you know, individual on number 3, number 5 and number 15 and then number 62 and

number 49. I'm sorry. Sixty-three. I apologize. I said 62, but I want 63.

Do either of you see any others that -- what I'm going to do is I'm going to have them step out and have these hang around close to the door so they can be brought in. Do any of you see any others that need to be --

MR. EVANS: No, sir. That's the only ones I have marked.

(THE BENCH CONFERENCE WAS CONCLUDED.)

THE COURT: Ladies and gentlemen, at this time in just a couple of minutes we are going to recess.

I want to just make sure during the recess, none of you have talked to anybody involved with the case, have you? I mean have any of you had even incidental contact with anybody involved? Have any of you, even by accident, run into the Britt family or run into Mr. Pitchford's family or talked to anybody?

I just want to caution you. I guess I am just doing this to make sure you understand throughout the course of this trial you can't talk to anybody about the case. You are going to have to walk by any family members of either side or whatever and just be completely, you know, almost like with tunnel vision with blinders on where you are just going to have to walk right on by and not say anything to anybody involved in the case.

There are a few of you that we need to -- and I'm going to call your names. If you will, hang around and stay forward. And the remainder of you, I will let go. Not let go permanently; I mean during the recess. If

you will, except for these, we will be in recess until 4:15.

But I need number 3, Crawford; number 5, Coleman; number 15, Willis; number 49, Swims; and number 63, Pate to stay around a few minutes. And the remainder of you, if you will, step outside.

MR. CARTER: One moment, Your Honor.

(MR. EVANS, MR. HILL, MR. CARTER AND MR. BAUM APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE THAT WAS HAD OUTSIDE THE HEARING OF THE PROSPECTIVE JURORS.)

MR. CARTER: We have one more, Your Honor.

MR. BAUM: Your Honor, number 34, was talking to one of the Britt family members in the courtroom before we broke earlier and we would just like to individually voir dire them.

(THE BENCH CONFERENCE WAS CONCLUDED.)

THE COURT: And number 34, Barrett, if you will -- and if you will stay around.

The remainder of you, if you will be at the courtroom door at 4:15 and we will announce who has been selected to serve on the jury at that point.

(THE PROSPECTIVE JURORS LEFT THE COURTROOM.)

THE COURT: Now, if those of you that I've asked to stay in the courtroom, if y'all will just step out. What we have to do is there are a couple of questions we need to ask each one of you individually instead of out in front of everybody. So if all of you will step out, except number three, then be close by the courtroom

door. Then we will call the others of you in. We'll start first with Mr. Crawford, and then we will quickly ask each of you the questions.

(THE REMAINING PROSPECTIVE JURORS LEFT THE COURTROOM.)

If you will, shut the door.

If anybody wants out, it's time to go now. You are fixing to be in here until we get through if you don't leave now.

Mr. Crawford, there are a couple of questions I wanted to get clear because at first you were saying that you couldn't judge the case and couldn't consider the death penalty under any circumstances. Then you came back maybe and said --

(THE COURTROOM DOOR WAS OPENED.)

If you will keep that door shut, Mr. Whitten, I would appreciate it.

And so we want to know, Mr. Crawford, could you -- if the Court instructed you that you were to consider the death penalty and had to consider that, could you consider it or would you automatically reject that and not even consider that as an option if it got to the second phase of the trial?

JUROR RODELL CRAWFORD: Not even consider that.

THE COURT: So you could under no circumstances could even consider imposing the death penalty; is that correct?

JUROR RODELL CRAWFORD: That's correct.

THE COURT: If you will, step out. Do not discuss with anyone what we just talked about in here.

And then number five, Miss Coleman is the next one.

MR. CARTER: Your Honor, just for the record, Your Honor, when the Court asks its questions is it possible to ask if they could actually -- and maybe you are doing it. I don't -- I am not trying to tell you to do it to my satisfaction. I just want to make sure that they understand you are asking them to consider both. I don't want them to get the impression that we are just asking them if they will just --

THE COURT: I think if the law is if they say they cannot even consider it that --

(JUROR NADINE COLEMAN ENTERED THE COURTROOM.)

Okay. Miss Coleman, and we are not putting you on the spot. Do not feel ill at ease. I know with all of us in here and just you it might be intimidating but don't let it be. There were a couple of questions we wanted to get cleared up with you before we went any further. I know at one point you had said under no circumstances could you consider the death penalty. And then you came back later maybe and said you could.

The way the law works is if it gets to the second phase of a trial then the State of Mississippi is asking for the death penalty to be imposed. And, of course, you can imagine that the defense does not wish that. And I want to know if I --

(THE COURTROOM DOOR WAS OPENED.)

Lock that door too. I want everybody to stay out of this courtroom until we are through with individual voir dire. I don't want another door opened.

Can you consider the death penalty or would you not be able to consider it?

JUROR NADINE COLEMAN: I wouldn't be able to consider it.

THE COURT: You couldn't even think about it.

JUROR NADINE COLEMAN: No.

THE COURT: Okay. Thank you.

JUROR NADINE COLEMAN: Your welcome.

THE COURT: And if you will, get number 15 now in.

(JUROR LOVIE WILLIS ENTERED THE COURTROOM.)

THE COURT: Miss Willis, we are -- just a couple of questions we wanted to ask you. We are not wanting to put you on the spot or make you feel intimidated sitting here all out by yourself now. But there were a couple of questions we wanted to clear up. During the earlier questioning you had indicated that you could not consider the death penalty. And then you came back and maybe you qualified that.

And so I want to know -- the situation is this. If Mr. Pitchford should be found guilty of capital murder, then we would have a second phase of the trial. And that phase would determine whether he was sentenced to death or life in prison. Could you consider the death penalty as an option or would you automatically reject that?

JUROR LOVIE WILLIS: I could not consider that.

THE COURT: You would not even look at that as an option and could not consider it under any circumstance, even if the Court told you to consider that.

JUROR LOVIE WILLIS: I could not consider that.

THE COURT: You could not consider that.

JUROR LOVIE WILLIS: Hum-hum.

THE COURT: Okay. Thank you.

Okay. If you will, bring number 34 in here.

(JUROR WALTER BARRETT, III, ENTERED THE COURTROOM.)

THE COURT: Mr. Barrett, I wanted to just make sure. There had been somebody that thought they had seen you talk to somebody in the family of Mr. Britt on the way out or something like that. Have you talked to anybody in his family since you have been up here?

JUROR WALTER BARRETT, III: I spoke to Tim McDaniel in passing.

THE COURT: What was the substance of that conversation?

JUROR WALTER BARRETT, III: Just spoke and kept walking.

THE COURT: Just walked by him and spoke but didn't say anything other --

JUROR WALTER BARRETT, III: No, sir. That is all that I remember. Yes, sir.

THE COURT: Well, we -- I wanted to just make sure, get that cleared up. So you hadn't talked to any, any --

JUROR WALTER BARRETT, III: No conversation. No, sir.

THE COURT: Okay. And would the fact that you do know somebody in the family, would that --

JUROR WALTER BARRETT, III: I am willing to go further with that. Now, my son is actually engaged to Lindsey Grant.

THE COURT: How is she related to this?

JUROR WALTER BARRETT, III: Judge, I'm not positive but I believe that Mr. Britt was her great uncle. But don't hold me to that, because I am not positive of that. I did not personally know Mr. Britt.

THE COURT: Now, if you were siting on the case, would that cause you to tend to favor the family or prosecution because of these circumstances?

JUROR WALTER BARRETT, III: No, sir. I don't believe so.

THE COURT: Any doubt in your mind?

JUROR WALTER BARRETT, III: No, sir.

THE COURT: If you found Mr. Pitchford innocent or if you found him guilty and then felt like he did not deserve the death penalty would you feel uncomfortable seeing the family or feel like you owed them any explanation at all for how you had ruled?

JUROR WALTER BARRETT, III: No, sir, I don't believe so.

THE COURT: Any doubt?

JUROR WALTER BARRETT, III: No, sir.

THE COURT: Thank you.

JUROR WALTER BARRETT, III: Yes, sir.

THE COURT: If you will, get number 49 in here now. Miss Swims.

(JUROR MAMIE SWIMS ENTERED THE COURTROOM.)

THE COURT: Miss Swims, just a couple of questions. And we don't want to -- this is not meant to intimidate or anything like that. We just wanted a couple of follow-up questions.

At one point you had indicated that you couldn't judge anybody for any reason and then you had said at one point that you could not consider the death penalty at all. And then later on you came back and you said maybe you could consider it. And so we wanted to get that clear.

The way a trial works is first there is a guilt phase. If you find the person on trial guilty, then there is a second phase to determine what type punishment. Now, if you find them not guilty to start with, you don't ever get to the second phase. But if you get to the second phase, the options are that the jury can find somebody guilty and impose the death penalty. Or if the death penalty is not imposed by the jury, they are automatically sentenced to life imprisonment without parole.

I want to know could you consider the death penalty as an option or would you automatically reject that even, even considering that option?

JUROR MAMIE SWIMS: First of all, I was unaware there was an option. I thought if the person was found guilty and convicted then the death penalty would be the automatic sentence and that was it.

THE COURT: Right.

JUROR MAMIE SWIMS: Until this man here said you have a option, a person can have life without parole or the death penalty. I would not consider the death penalty at all, but I would weigh both options.

THE COURT: Are you -- how could you weigh both options if you are automatically saying --

JUROR MAMIE SWIMS: I would not consider the death penalty. I guess what I'm saying I would consider life without parole.

THE COURT: But you could not under any circumstances --

JUROR MAMIE SWIMS: If somebody said this person should die --

THE COURT: Right.

JUROR MAMIE SWIMS: -- no, I would not do that.

THE COURT: Okay. Thank you. You may step out.

And gentlemen, I believe you both said number 63 just a second ago.

Mr. Evans, you indicated that --

MR. EVANS: We have no problem to strike for cause.

THE COURT: Tell 63 to come in, if you would.

(JUROR JAMES PATE, JR., ENTERED THE COURTROOM.)

THE COURT: Mr. Pate, we've considered everything, and we are going to let you go at this time. You can't talk about the case. And you can go on and not have to stay around any longer, but you cannot discuss the case with anyone, you know, up here that is still waiting for jury duty.

JUROR JAMES PATE, JR.: Can I go back to work?

THE COURT: Yes, sir. You are free to go.

JUROR JAMES PATE, JR.: Thank you.

THE COURT: Okay. Now, let's look at the -- let's look at the ones for cause and do them before we break for you to further look at your list.

And now these are the ones that -- and if there is some disagreement, if there is something that I'm missing, I want y'all to let me know that. But number 3, Crawford, does either side disagree with that one?

MR. EVANS: No, sir.

THE COURT: And number 5, Coleman, either side object to that one for cause?

MR. EVANS: No, sir.

THE COURT: And number 7, Foxx. Either side have any objection to that one for cause?

MR. EVANS: No, sir.

THE COURT: Number 8, Tillman. Either side have any objection to that one for cause?

MR. EVANS: No, sir.

THE COURT: And number 12, Deblois. Does either side have any objection to that one for cause?

MR. EVANS: None from the State.

MR. CARTER: No.

THE COURT: Number 14, Allen. Either side have any objection? Okay.

Hearing none, we will move on to number 15, Willis. Does either side have any objection to Willis being excused for cause?

MR. CARTER: No, sir.

THE COURT: Hearing none, we'll move on to number 16. Does either side -- either side have any objection to Tillman being excused for cause?

MR. EVANS: No, sir.

MR. CARTER: No, sir.

THE COURT: We'll move on then to number 18. Does either side have any objection to number 18 being excused for cause?

MR. EVANS: No, sir.

THE COURT: Move on, hearing none. Number 21, Smith, does either side have any objection to Smith being excused for cause?

MR. EVANS: No, sir.

THE COURT: Hearing none, we will move on to number 22. Does either side have any objection to Mr. Mack being excused for cause?

MR. EVANS: No, sir.

THE COURT: Hearing none, we will move on to number 23. Well, we will take 23, 24 and 25 all up together. Does either side have any objection to them being excused for cause?

MR. EVANS: None from the State.

MR. CARTER: No, sir.

THE COURT: And does either side have any objection to number 32 or 33 being excused for cause? Hearing none, they will both be excused.

And number 35 and 36, does either side have any objection to either one of them being excused for cause? Hearing none we will move on.

Does either side have any objection to number 39, 40, 41, or 42 being excused for cause?

MR. CARTER: One moment, Your Honor. Thirty-nine, 40 and 42, you say.

THE COURT: Thirty-nine, 40, 41 and 42. Thirty-nine and 40 could not consider the death penalty in any way. Then I show number 41, Mr. Fedric, has indicated that he has heard about the case and that he could not be fair and impartial. And then number 42, Miss Goff, indicated that her nephew was murdered.

MR. CARTER: No objection, Your Honor, to any of those.

THE COURT: Those four will be excused for cause.

And then number 45, Wesley. Does either side have any objection to Wesley for cause?

MR. EVANS: No, sir.

MR. CARTER: No objection.

THE COURT: Okay. Number 46, Mr. Caulder, does either side have any objection to him being excused for cause?

MR. EVANS: What was his?

THE COURT: He is law enforcement officer for the City of Grenada. He sat over here on this side. He said he had a lot of friends in law enforcement. He heard about the case.

MR. CARTER: I have no objection, Your Honor. What number is he?

THE COURT: Number 46.

MR. EVANS: No objection.

THE COURT: Number 49, Miss Swims, who was just in here momentarily. Does either side have any objection to Miss Swims?

MR. CARTER: No, sir.

THE COURT: How about number 50, Alicea? Either side have any objection to her being excused for cause?

MR. CARTER: No objection.

THE COURT: Okay. Then number 52 and 53. That will be Holman and Hubbard. Either side have any objection to those for cause?

MR. EVANS: No, sir.

THE COURT: Number 55, number 56, number 57 and number 58, I show all have reasons for cause. Does either side have any objection to any of them being excused for cause?

MR. EVANS: No, sir.

THE COURT: Then number 62, Kincaid. Any objection to Mr. Kincaid being excused for cause?

MR. EVANS: No, sir.

THE COURT: And next is number 66, Pryor. Does either side have any objection to Pryor being excused for cause?

MR. CARTER: No, sir.

MR. EVANS: No, sir.

THE COURT: Okay. Number 71 and 72 are the next ones I see. Does either side --

MR. EVANS: 68.

THE COURT: I'm sorry. Yes. I, I did not see 68. Does either side have any objection to 68 being excused for cause?

MR. EVANS: No, sir.

MR. CARTER: No, sir.

THE COURT: Then 71 and 72. Either side have any objection to either one of those being excused for cause?

MR. EVANS: No, sir.

MR. CARTER: Apparently, I didn't really write anything down for 70. What do you have, Your Honor?

THE COURT: Number 71.

MR. CARTER: Seventy. Did you say 70?

THE COURT: No. I said 71. And 72 as well. Okay. Then 75 and 76 are the next two.

MR. EVANS: No objection.

MR. CARTER: No objection.

THE COURT: Okay. Then number 80 and 81. Does either side have any objection to either one of those for cause?

MR. EVANS: No, sir.

MR. CARTER: No objection.

THE COURT: And they come in bunches 84, 85 and 86. Either side have any objection to any of those -- any one of those three?

MR. EVANS: No, sir.

MR. CARTER: No, Your Honor.

THE COURT: They will be excused for cause. And number 91. Either side have any objection to him being excused for cause?

MR. CARTER: No objection.

THE COURT: And then numbers 94 and 95, Holland and Parker. Either side have any objection to either one of those for cause?

MR. EVANS: No, sir.

MR. CARTER: No, sir.

THE COURT: And then there is the lady, number 47. And Miss Starks indicated that her father was in the hospital and old, that her momma is basically infirmed as well. She has to look after and check in on them at night. I don't know if y'all can agree on that one or not.

MR. EVANS: It sounded like she was pretty well saying that that would affect her, and the State would not object to her being struck for cause.

THE COURT: She has not been stricken yet. Number 46 but not 47.

MR. CARTER: No. No objection, Your Honor. I hate to have him mad.

THE COURT: Does either side now have any others that we have not --

MR. CARTER: Your Honor, we got --

MR. EVANS: It looks like all the State has, Your Honor.

MS. STEINER: With the Court's permission, I believe there were some others, that I was taking notes and not participating to the extent that the whole rest of the courtroom was. I believe number 4 on the Court's voir dire answered the Court's question that his wife's relatives lived in the area of where the crime occurred and that he had formed an opinion. And he is related to Clyde Hall, is cousin by marriage.

MR. EVANS: Hill.

MS. STEINER: He would have to think long and hard. It might affect. I don't believe in response to anybody else's questions he ever came off of his doubts about his impartiality. And defendant would move

that Mr. Artman also be struck for cause for having both preformed an opinion and being inclined to one side or the other of the case because of a personal friendship. I believe he also stated that he had a medication that required refrigeration and injection.

And he might, in fact, be somewhat disruptive to deliberations if the bailiff was having to come in and relay things and take breaks. So we would add both his announced opinion, his personal friendship with the assistant district attorney -- relationship, excuse me, to the district attorney, and also his announced medical concerns, he may not be able to concentrate.

MR. EVANS: I think he was pretty clear on the fact that he would base his decision on the evidence of the case.

THE COURT: I am going to allow him for cause because he does have some medication. He says he has to inject himself into the stomach at times. During the middle of jury deliberations I think that could be real difficult. And so I am going to allow him for cause.

MS. STEINER: Your Honor, did you allow -- have 14. I'm sorry.

Your Honor, the defense would also challenge juror 34, Walter T. Barrett, III. He is the one who acknowledged that he -- sort of like he felt obligated to greet the victim's family because of acquaintance with them. He has -- he's effectively a prospective member of the family. His son is engaged to a family member.

I think he -- you know, he has told us that he wants to be fair. But very frankly, Your Honor, I think it is saying to any relative by blood or by marriage of a victim can you be fair. I don't think it's fair to that person to make them -- you know, give them a

Hopson's choice of worrying once they get in that jury room deliberating. And we would say that his connection to the victim's family --

THE COURT: I am going to allow him for cause, because he didn't follow the admonition of the Court when they broke for lunch. I told everybody not to nod, to have any discussion, not to say anything at all to anybody that was related to anybody in this case. He has already admitted that he did.

MS. STEINER: I'm sorry, Your Honor. Your Honor, Mr. Baum has pointed out that number -- juror 29 had sequestration issues. She had three children. She felt --

THE COURT: I think she just said she would miss her children and all. She has a husband at home and she didn't indicate that they would have a -- it would be an inconvenience. I remember asking her if it would be an inconvenience or a real detriment. I maybe didn't say the word detriment but she has indicated she has got somebody that would be available to take care of the children. It would just be a problem or inconvenience. And so I am sure everybody that is sequestered is going to be inconvenienced by it to some extent.

MS. STEINER: She had an age range that when she talked about carpool, if you have a 13-year-old and 7-year-old, you have two very different car pool routes for those two. I thought she went beyond inconvenience, that it might affect the ability of the children to go to their --

THE COURT: I did not get the impression that it was going to be that detrimental to, to the situation. I am not going to allow her for cause.

MS. STEINER: Your Honor, for the record, although in light of the existing law of Witherspoon, the defense has not interposed an objection to any of the individual cause challenges of the people who expressed an inability to consider the death penalty. We would at this time move under the due process in equal protection clause of the Fourteenth Amendment to have the death penalty quashed and those persons stricken solely because of their scruples with respect to consideration -- and the Sixth Amendment and their scruples with respect to consideration of death as a penalty restored to the venire and the case proceed without the State's being permitted to seek the death penalty.

On Fourteenth Amendment grounds the fact is that it was about -- it disproportionately removed minority jurors. About four to one of the people who were scrupled were identified by themselves on their jury questionnaire as being either Hispanic, one Hispanic woman, or black. And the notion of even racial discrimination by defacto, even though I understand both the United States Supreme Court and the Mississippi Supreme Court have heretofore not recognized this, that nonetheless if death qualification results in this kind of a disproportionate exclusion it violates the Fourteenth Amendment.

Your Honor, we also submit that it violates the fair cross-section requirement of the Sixth Amendment, not merely because of its disproportionate racial effect which would in and of itself be a violation of the fair cross-section requirement. But also, Your Honor, I was impressed in this voir dire at how strongly held this large minority of the jury was with respect to feeling that the morality of this community, this

subset of this community, is such that it does not wish to have to consider and sit in judgement on the death penalty.

With respect to the cross section of this community, it may be that Mississippi as a whole has this law, but this community so clearly has a substantial cross section of it that feels they would like, they can, they want to see justice done. They want to see crime punished. They want to see if -- you know, they want to fairly judge an]d give punishment to people who are done.

And again, I would say on the Sixth Amendment fair cross section, Fourteenth Amendment due process, that in this instance justice is not served by having this truncated, artificially restricted jury and a jury that has disproportionately taken minorities out of sitting.

And that the solution, Your Honor, would be to restore the jury to its fair cross section by quashing the death penalty in the right of State to proceed on the death penalty and restore, although we agree under *Witherspoon* and *Morgan* that the strikes for absoluteness here are, are -- appear to be approached by the Supreme Court of the state and of the United States but that under these circumstances this is an unconstitutional effect on the jury and that it should not be allowed to stand.

THE COURT: Well, I will note the objection but I am not in the habit of overruling the United States Supreme Court or the Supreme Court of this state. They have made clear these procedures to follow, and I think we followed them to the letter of the law. And so I do not find there to be any constitutional

violations. The result may be that there may be more minority members that say they cannot impose the death penalty, but that in no way negates the State's right to seek the death penalty under these prior precedents set by the United States Supreme Court and the Supreme Court of the state.

MR. EVANS: Your Honor, the State does have one other one I would like to move for cause, and that's juror number 30. Because just as juror number 34 disregarded the Court's instruction, juror number 30 was over 15 minutes late coming back in, showing a complete disregard for the whole court system. And I would ask that she be struck for cause also.

THE COURT: She indicated -- and if anybody was having to walk from their house to the courtroom in this weather today, she indicated -- ordinarily I would but when I asked her she said she was having to walk. And that's -- you know, I guess we all assume everybody has got a way to ride now but she didn't. So I feel like that she explained the reason why she was late to the satisfaction of the Court that I do not believe it would be appropriate to strike her for cause. In fact, she is trying real hard to be here and fulfill her civic duty as a juror.

Y'all be back in here in 20 minutes, and we will proceed at that point with jury selection.

MR. EVANS: It is probably going to take longer than 20, Your Honor, if the Court will give us a little bit longer.

THE COURT: Y'all have had questionnaires and you have had the jury list for about four weeks. Be in here at 4:30.

And Mr. Whitten, if you will -- I will tell you what. I told the jury to be back in at 4:20. At 4:20 I am going to come back out here and I am going to tell the jury to be back in here at 4:45. And I don't know if y'all want to be present when I tell them that or not. It does not matter. But I did tell them. I don't want them to be wondering what is going on. I am going to be in here at 4:20 to advise them to come back at 4:45. I want counsel in here at 4:30.

MR. EVANS: Yes, sir.

(THE PROSPECTIVE JURORS RETURNED TO THE COURTROOM AT 4:20.)

THE COURT: Ladies and gentlemen, I just had you brought back. I asked you to be back at 4:20. And when I ask you to be back, I am going to be back myself because I don't -- we have matters that took a little longer. So it is probably going to be about 4:50. And if you will, be back in here at 4:50.

I just wanted -- you were all waiting to come in. I didn't want you to think that we were being late. Because if I ask everybody else to be here on time, we are going to do it ourselves or I am going to come out and let you know. If you will, be back out there at 4:50. When you do come back in, you don't have to sit in any particular order. You can sit where you want after the recess at 4:50.

(MR. EVANS, MR. HILL, MR. CARTER, MR. BAUM, MS. STEINER AND THE DEFENDANT WERE PRESENT IN THE COURTROOM. THE PROSPECTIVE JURORS WERE NOT PRESENT. PROCEEDINGS RESUMED AS FOLLOWS:)

MS. STEINER: Your Honor, before the jury comes in, may we do something on cause challenges that we

discovered? Jurors number 1 and number 69 never provided juror questionnaires. I think A, that's in violation of the clerk's instructions. And B, we are at a serious disadvantage being defense team with lead counsel outside the county. And really, I think due process and fairness to the defendant would make it inappropriate to leave juror 1 and 69 on without having obeyed the Court's orders with respect to the questionnaire.

THE COURT: Miss Barnett, did we ever get a jury questionnaire from those two?

CIRCUIT CLERK: No, sir.

MR. EVANS: Your Honor, there is several we haven't gotten on.

THE COURT: Are there any others we haven't -- didn't get one?

CIRCUIT CLERK: No, sir. I don't know if the sheriff's office brought over any this morning but that was -- we checked it real closely on here.

THE COURT: There is nobody else on the panel that we didn't get questionnaires.

MS. STEINER: Not that we detected.

MR. EVANS: There was some that we looked at awhile ago.

THE COURT: Well, if the State wants to offer strike challenges on others that we didn't get cards on, then I'll allow those. But again, you know, jurors were told to fill that out, and they obviously can't follow the instructions of the Court. Because I instructed them by letter to fill that out, send it in within, I believe it was, five working days. And, and the entire purpose of having them do that was to shorten the process

here. So if I don't have -- if there are not cards on those, then I am going to allow them for cause.

Now, if the State will tender a panel.

MR. EVANS: Just a second, Your Honor. That was 1 and which one?

THE COURT: One and 69.

MS. STEINER: If the Court please, I -- as we were striking, I realized that juror 87, Betty Sue Downs, describes that her father had been murdered in his store. It sounded like very much --

THE COURT: I asked her at length and she said he was murdered seven years ago and that would not be a factor, that would not affect her in any way. And I've got no reason to believe that she was not being totally truthful with the Court on that.

And so if the State will now proceed.

MR. EVANS: Juror number -- juror number 2 will be S-1. State will tender juror number 6. State will tender juror number 9. State will tender number 10. State will tender number 11. State will tender number 13. State will tender number 17. State will tender number 19. State will tender number 20. State will tender number 26. State will tender number 27. State will tender number 28. State will tender number 29.

THE COURT: Which of, of you defense counsel wants to go forward now?

MR. BAUM: Your Honor, we accept number 2.

THE COURT: No. S-1 is number 2. The next one is number six.

MR. BAUM: Number 6. We accept number 6. Number 9 will be D-1. We accept number 10. Number 11 will be D-2. Number 13 will be D-3.

MR. EVANS: Hold on just a second, Ray.

I'm sorry, Ray. Go ahead.

MR. BAUM: Okay. Number 17 will be D-4. Number 19 will be D-5. Number 20 will be D-6. Number 26. We accept number 26. We accept number 27. Number 28 will be D-8 -- D-7. We accept 29.

THE COURT: Okay. We need the State to now tender seven more.

MR. EVANS: Okay. Thirty will be S-2. Thirty-one will be S-3. Tender 37. Tender 38. Forty-three will be S-4. Tender 44. Forty-eight will be S-5. Tender 51. Fifty-four will be S-6. Tender 59. Tender number 60. And tender number 61.

MS. STEINER: If the Court please, at this point, we on the basis of State's objections S-2 to juror 30, S-3 to juror 31, S-4 to 43, S-5 to 48, we would -- we would raise an --

MR. CARTER: S-6. I think S-6 is 52.

MS. STEINER: No. No. She is out already.

MR. CARTER: Oh, I'm sorry.

MS. STEINER: We would object on the grounds of *Batson versus Kentucky* that it appears there is a pattern of striking almost all of the available African-American jurors. They have tendered one African-American juror out of the five that have thus far -- four that have thus far arisen on the venire. As we had noted previously, due to the process of cause challenges, particularly death qualification challenges, this is already a disproportionally white

jury for the population of this county. And we make a Batson challenge. It appears to be a pattern of disproportionately challenging African-American jurors.

And I would invite the Court's attention to the United States Supreme Court case. The most recent *Miller-El versus Dretke* case in which the United States Supreme Court on habeas actually reversed a conviction where the prosecutors had used most, though not all, of their strikes. They had left either one or two black jurors on the venire, but the United States Supreme Court nonetheless reversed.

THE COURT: I'll hear from the State.

MR. EVANS: Strike number S-1 is a white female.

THE COURT: I didn't know if you had any, any -- so the State is prepared to go forward with race neutral reasons.

MR. EVANS: Yes, sir. If the Court would like for us to.

THE COURT: I think it would be appropriate given the number of black jurors that were struck.

And does counsel want the State to give race neutral as to all or just as to the individual -- there were, I understand, four black jurors. And I don't know if the State -- if the defense wants the State to put forward race neutral as to all or just to the minority members.

MS. STEINER: Well, Your Honor --

THE COURT: A lot of times on Batson I just have the State gave race neutral as to all.

MS. STEINER: I think the jurisprudence speaks for itself.

THE COURT: If your objection is just as to members of the black panel -- black jurors, then I will just have the State go forward and give them as to black members of the panel.

MS. STEINER: Your Honor, I think the jurisprudence simply states that the Court must make a determination on the basis of all relevant circumstances to racial discrimination.

THE COURT: I'll have the State give race neutral reasons.

MR. EVANS: All right. Your Honor, number one was a white female. If I understood what the Court's ruling, the Court is wishing us to give race-neutral reasons on the black jurors; is that correct?

THE COURT: Well, I mean if you strike a white juror, I don't think that is a pattern of any race discrimination.

MR. EVANS: Yes, sir. S-2 is black female, juror number 30. She is the one that was 15 minutes late. She also, according to police officer, police captain, Carver Conley, has mental problems. They have had numerous calls to her house and said she obviously has mental problems.

Juror number S-3 --

THE COURT: That would be race neutral as to -- as to that juror.

MR. EVANS: S-3 is a black male, number 31, Christopher Lamont Tillmon. He has a brother that has been convicted of manslaughter. And considering that this is a murder case, I don't want anyone on the jury that has relatives convicted of similar offenses.

THE COURT: What was his brother's name?

MR. EVANS: I don't even remember his brother. He said that he had a brother convicted of manslaughter.

THE COURT: On that jury questionnaire?

MR. EVANS: Yes, sir.

THE COURT: I find that to be race neutral. And you can go forward.

MR. EVANS: S-4 is juror number 43, a black female, Patricia Anne Tidwell. Her brother, David Tidwell, was convicted in this court of sexual battery. And her brother is now charged in a shooting case that is a pending case here in Grenada. And also, according to police officers, she is a known drug user.

THE COURT: During voir dire, in fact, I made a notation on my notes about her being kin to this individual. I find that to be race neutral.

MR. EVANS: Juror number 5 is juror number 48 on the list, a black male, Carlos Ward. We have several reasons. One, he had no opinion on the death penalty. He has a two-year-old child. He has never been married. He has numerous speeding violations that we are aware of.

The reason that I do not want him as a juror is he is too closely related to the defendant. He is approximately the age of the defendant. They both have children about the same age. They both have never been married. In my opinion he will not be able to not be thinking about these issues, especially on the second phase. And I don't think he would be a good juror because of that.

THE COURT: The Court finds that to be race neutral as well. So now we will go back and have the defense starting at 37.

MR. BAUM: 37 is --

MS. STEINER: Is that eight, Your Honor?

MR. BAUM: Are we up to eight?

THE COURT: You have used seven strikes. You have five left.

MR. BAUM: Thirty-seven is D-8. We accept 38. Forty-four will be D-9. Fifty-one will be D-10. Accept 59. We accept 60. We accept 61.

THE COURT: Okay. I need three more tendered.

MR. EVANS: State will tender 64. Tender 65. And tender 67.

MS. STEINER: Your Honor, the tendered juror 64 is the spouse of another juror, and I had thought we were going to deal with not -- with excusing spouse -- at least one of each spouse. Are we going to flip a coin for that?

THE COURT: Sixty-four was the first one that came up so that one has been tendered. So, you know --

MS. STEINER: Will we treat it as having struck -- I think she is juror --

MR. EVANS: Nobody is struck yet.

MS. STEINER: Seventy-nine is his spouse.

THE COURT: We will take 79 up in a minute. Right now the ones that are tendered are --

MR. EVANS: That is not the couple that said --

THE COURT: It was actually a couple that had a ten-year-old child at home that said that one of them needed to be with that child. That is one -- the ones that this morning that everybody when we went through the qualifications had assured them that one

of them would be home to take care of the child. This is the couple that did not indicate they had any children at home or anything that would interfere with them both serving.

So again, we've got 64, 65 and 67 tendered as present. I believe two strikes left by the defense -- for the defense.

MR. BAUM: We accept number 64, Your Honor. Number 65 will be D-11. Number 67 will be D-12.

THE COURT: We need two more tendered by the State.

MR. EVANS: Give me just one second, Your Honor.

THE COURT: Okay.

MR. EVANS: Number 70.

THE COURT: You got 69.

MR. EVANS: You struck that for cause, Your Honor.

THE COURT: Right. I neglected to write through that. I wrote out there cause.

MR. EVANS: Seventy will be S-7. We will take 73 and 74.

THE COURT: That puts 73 and 74 on the panel since the defense is out of strikes.

I will now have the State tender two alternates.

MR. EVANS: Tender 77 and 78.

MS. STEINER: Your Honor, will there be strikes on the alternate?

THE COURT: You get two strikes, the same number of strikes as you do alternates. So you do have two strikes.

MR. BAUM: Number 77 will be D-A-1. We accept number 78 as an alternate.

THE COURT: State to tender one more alternate.

MR. BAUM: Your Honor, 79 is the wife of the juror picked. I am not clear on that, whether she was going to be excused because of that.

THE COURT: We will see if the State tenders.

MR. EVANS: I don't have any problem with agreeing to just strike her since the husband is already --

THE COURT: Is that agreeable to the defense?

MR. BAUM: Yes, sir, Your Honor.

THE COURT: Okay.

MR. EVANS: All right. So that gives me -- we will tender 82.

MR. BAUM: We accept 82, Your Honor.

THE COURT: Eighty-two will now be the alternate, second alternate.

Let me now read what I show my list to show who the jurors are. If I have missed something, I definitely want you to speak up.

I show Andrea Louise Richardson, number 7. Chad Kirk.

MR. EVANS: Six.

THE COURT: I'm sorry. Six. I got the name right and number wrong.

Andrea Louise Richardson, number 6. Chad Kirk Eskridge, number 10. Johnny Clifton Stewart, 26. Mary Kathyren McCluney, number 27. Laura Candida Ward, number 29. Mary Wylene Brewer, number 38. Then Sidney Eugene Hendricks, number

59. Leonard Jones, number 60. Gloria Gean Howell, number 61. William Fred Johnson, number 64. David Little, number 73. Jeffrey Shane Counts, 74. And then the alternates, Nathalie Drake Tramel, number 78; and Lisa Shirley Wilburn, number 82.

Do both sides show that?

MR. EVANS: Yes, sir, Your Honor.

MR. BAUM: Yes, sir.

THE COURT: Those of you in the courtroom, if you will, have the a seat in the back of the courtroom until the jury has been seated. Then you can move wherever you want.

You can bring them in.

(THE JURY RETURNED TO THE COURTROOM.)

THE COURT: Court will come back to order. As your names are called, if you would, come forward please and take a seat in the jury box. You have been selected as jurors to try the case. Andrea Louise Richardson. Chad Kirk Eskridge. Johnny Clifton Stewart. Mary Catherine McCluney. Laura Candida Ward. Mary Wylene Brewer. Sidney Eugene Hendricks. Leonard Jones. Gloria Gean Howell. William Fred Johnson. David Little. Jeffrey Shane Counts.

And the next two, you will be the alternates. What happens is we have 12 regular panel members. But should one of them fall sick or have some reason where they had to be discharged during the course of their service, we would move the first alternate up. And then if we had a second juror that had to be dismissed, excused for something, then the second alternate would be moved up in that place.

So the alternates are Nathalie Drake Tramel. If you will, come forward and have a seat. And then Lisa Shirley Wilburn.

JUROR NATHALIE TRAMEL: Are the alternates sequestered?

THE COURT: Yes ma'am.

Ladies and gentlemen, you are welcome to remain and view the proceeding but you certainly are free to go at this time. I do appreciate your attendance and your service here today.

MS. STEINER: Your Honor, may we approach?

(MR. EVANS, MR. HILL, MR. CARTER, MR. BAUM AND MS. STEINER APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE JURY.)

MS. STEINER: At some point the defense is going to want to reserve both its Batson objection and a straight for Tenth Amendment racial discrimination.

THE COURT: You have already made it in the record so I am of the opinion it is in the record.

MS. STEINER: I don't want to let the paneling of the jury go by without having those objections.

THE COURT: I think you already made those, and they are clear in the record. For the reasons previously stated, first the Court finds there to be no -- well, all the reasons were race neutral as to members that were struck by the district attorney's office. And so the, the Court finds there to be no Batson violation.

And then as to the other issues, the Court has already ruled that based on prior rulings from the

United States Supreme Court and the State of Mississippi that jury selection was appropriate.

As I say, they are noted for the record.

MS. STEINER: Allow us to state into the record there is one of 12 -- of fourteen jurors, are non-white, whereas this county is approximately, what, 40 percent?

MR. BAUM: The county is 40 percent black.

THE COURT: I don't know about the racial makeup, but I will note for the record there is one regular member of the panel that is black, African-American race.

MS. STEINER: And only one.

THE COURT: Right. There is one period.

MS. STEINER: Right. Thank you.

(THE BENCH CONFERENCE WAS CONCLUDED.)

* * *

IN THE CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,

Plaintiff,

v.

TERRY PITCHFORD,

Defendant.

Cause No.: 2005-009-CR

Filed: Feb. 17, 2006

MOTION FOR A NEW TRIAL

COMES NOW, Terry Pitchford, by counsel, and moves this court pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, Art. 3 Sections 14, 26 and 28 of the Mississippi Constitution of 1890, and the applicable laws of this state to grant him a new trial or judgment notwithstanding the verdict. In support of his motion, Mr. Pitchford states as follows:

1. On Thursday, February 8, 2006, Mr. Pitchford was convicted of capital murder, and on February 9, 2006, he was sentenced to death.

2. The verdicts were against the weight of the evidence.

3. The evidence was insufficient to support verdicts of guilt as to the charge. Mr. Pitchford reiterates his motions for directed verdicts of not guilty.

4. All the motions that he filed that were denied should have been granted. Mr. Pitchford reiterates all of the objections he made during the pre-trial and trial proceedings.

5. The motions made by the State that were granted should have been denied. The objections made by the State should have been overruled. Mr. Pitchford reiterates his opposition to all of these rulings, either explicit or implicit, in his desire to present the evidence excluded at the behest of the State.

6. Various jurors who were excused for cause on motion of the State or on the Court's own motion should not have been excused. Mr. Pitchford reiterates all of the objections he made during the jury selection proceedings.

7. Various jurors who were not excused for cause on motion of the defense should have been excused. Mr. Pitchford reiterates all of the objections he made during the jury selection proceedings.

8. Mr. Pitchford was denied copies of NCIC reports and any and all other information on potential jurors in the possession of the state and used during the jury selection process, including the identities of the jurors that information was gathered on that would

establish a racially improper use of government resources.

9. Mr. Pitchford's voir dire of potential jurors was improperly limited.

10. The state was allowed to use all of its peremptory challenges to remove all but one African-American from the jury resulting -- in a jury composed of less than 10% African-American citizens selected from a county with nearly a 45% African-American population.

11. The court erred in failing to grant defendant's motions for a continuance, especially motion 26A.

12. The court erred in not granting a continuance or delay in the sentencing portion of the trial to await the testimony of Dr. Kahn Kermedy Bailey, psychiatrist hired by the defense, after the Court had a phone conversation with Judge Kelly in Texas regarding Dr. Bailey having to be there in Texas Thursday morning to finish his testimony started the previous day.

13. The court erred in not allowing individual voir dire or voir dire in panels.

14. The court erred in admitting gruesome photographs of the victims.

15. The court erred in not suppressing the defendant's statements, especially the fifth statement to District Attorney Investigator Jennings.

16. The court erred in not suppressing evidence of the gun found in the defendant's car.

17. The court erred in admitting evidence of "other crimes" evidence and in failing to give a limiting instruction on the purpose of its admission.

18. The court erred in failing to grant the motion for mistrial following the testimony brought out by Hathcock regarding buying drugs from the defendant.

19. The court erred by improperly re-voir diring jurors who said they could consider both options of life without possibility of parole and death equally pursuant to defense voir dire.

20. The court erred in allowing the introduction of victim character evidence at the culpability phase of the trial.

21. The court erred in denying jury instructions offered by the defendant that explained the burden of proof of aggravation and mitigation, as well as all other sentencing phase instructions that were refused.

22. The court erred by refusing to hear, ex parte, defendant's motion to video Pitchford and his son interacting, by not granting said motion after a full hearing between all parties, and by making all kinds of unfounded insinuations and comments running contrary to any understanding of mitigation.

23. The court erred in admitting victim impact evidence at sentencing.

24. The court erred in limiting the presentation of mitigation evidence.

25. The instructions were incomplete and fatally misstated the law as set out in the defense objections made at the time of the instructions conferences. Mr. Pitchford reiterates all of the objections and his requests for instructions made during the instructions conferences.

26. The court erred in not granting defendant's motions 28, 29, and 30.

27. The court erred in allowing unreliable and untrustworthy snitch evidence despite defendant's pretrial motion to preclude it.

28. The court allowed the district attorney to improperly argue during the penalty phase closing that there job was to go back there and vote for death over defendant's objection.

WHERFORE, Mr. Pitchford respectfully moves the court to order a new trial or, in the alternative, judgment notwithstanding the verdict.

Respectfully submitted,

/s/ Ray Charles Carter

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Office of Capital Defense Counsel
Post Office Box 2901
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601-576-2316

IN THE CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,

Plaintiff,

v.

TERRY PITCHFORD,

Defendant.

Cause No.: 2005-009-CR

Filed: Feb. 24, 2006

AMENDED MOTION FOR A NEW TRIAL

COMES NOW, Terry Pitchford, by counsel, and moves this court pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, Art. 3 Sections 14, 26 and 28 of the Mississippi Constitution of 1890, and the applicable laws of this state to grant him a new trial or judgment notwithstanding the verdict. In support of his motion, Mr. Pitchford states as follows:

1. On Thursday, February 8, 2006, Mr. Pitchford was convicted of capital murder, and on February 9, 2006, he was sentenced to death.

2. The verdicts were against the weight of the evidence.

3. The evidence was insufficient to support a verdict of guilt as to the charge. Mr. Pitchford reiterates his motion for directed verdict of not guilty.

4. All the motions that he filed that were denied should have been granted. Mr. Pitchford reiterates all of the objections he made during the pre-trial and trial proceedings.

5. The motions made by the State that were granted should have been denied. The objections made by the State should have been overruled. Mr. Pitchford reiterates his opposition to all of these rulings, either explicit or implicit, in his desire to present the evidence excluded at the behest of the State.

6. Various jurors who were excused for cause on motion of the State or on the Court's own motion should not have been excused. Mr. Pitchford reiterates all of the objections he made during the jury selection proceedings.

7. Various jurors who were not excused for cause on motion of the defense should have been excused. Mr. Pitchford reiterates all of the objections he made during the jury selection proceedings.

8. Mr. Pitchford was denied copies of NCIC reports and any and all other information on potential jurors in the possession of the state and used during the jury selection process, including the identities of the jurors that information was gathered on that would

establish a racially improper use of government resources.

9. Mr. Pitchford's voir dire of potential jurors was improperly limited.

10. The state was allowed to use all of its peremptory challenges to remove all but one African-American from the jury resulting in a jury composed of less than 10% African-American citizens selected from a county with nearly a 45% African-American population. Additionally, the prosecution's state of mind was clearly racially discriminatory as it deselected black people from the jury panel who had the same familial, living, social or marital circumstances as whites who were not deselected, which is a clear violation of Batson and Miller-El.

11. The court erred in failing to grant defendant's motions for a continuance, especially motion 26A.

12. The court erred in not granting a continuance or delay in the sentencing portion of the trial to await the testimony of Dr. Kahn Kennedy Bailey, psychiatrist hired by the defense, after the Court had a phone conversation with Judge Kelly in Texas regarding Dr. Bailey having to be there in Texas on Thursday morning to finish his testimony started earlier in the week.

13. The court erred in not allowing individual voir dire or voir dire in panels.

14. The court erred in admitting enlarged gruesome photographs of the victims.

15. The court erred in not suppressing the defendant's statements, especially the fifth statement to District Attorney Investigator Jennings.

16. The court erred in not suppressing evidence of the gun in the defendant's car.

17. The court erred in admitting evidence of "other crimes" evidence and in failing to give a limiting instruction on the purpose of its admission.

18. The court erred in failing to grant the motion for mistrial following the testimony brought out by Hathcock regarding buying drugs from the defendant.

19. The court erred by improperly re-voir diring jurors who said they could consider both options of life without possibility of parole and death equally pursuant to defense voir dire.

20. The court erred in allowing the introduction of victim character evidence at the culpability phase of the trial.

21. The court erred in denying jury instructions offered by the defendant that explained the burden of proof of aggravation and mitigation, as well as all other sentencing phase instructions that were refused.

22. The court erred by refusing to hear, ex parte, defendant's motion to video Pitchford and his son interacting, by not granting said motion after a full hearing between all parties, and by making all kinds of unfounded insinuations

and comments running contrary to any understanding of mitigation.

23. The court erred in admitting victim impact evidence at sentencing.

24. The court erred in limiting the presentation of mitigation evidence.

25. The instructions were incomplete and fatally misstated the law as set out in the defense objections made at the time of the instructions conferences. Mr. Pitchford reiterates all of the objections and his requests for instructions made during the instructions conferences.

26. The court erred in not granting defendant's motions 28, 29, and 30 that set forth the need of extensive voir dire.

27. The court erred in allowing unreliable and untrustworthy snitch evidence despite defendant's pretrial motion to preclude it.

28. The court allowed the district attorney to improperly argue during the penalty phase closing over the defendant's objection that their job was to go back there and vote for death.

29. The judge allowed the victim's family and a large host of friends (all white) to show great emotions designed to influence and overwhelm the nearly all white jury that was comprised of 11 whites and 1 black despite a pretrial motion to prevent just that.

30. That the Court improperly allowed the prosecution to make a penalty phase opening statement after the prosecution had waived it.

31. That the cumulative effect of the court's various rulings in favor of the prosecution and against the defendant showed the court was likely not a neutral and detached tribunal as required by law, or was more interested in a speedy conclusion of this trial than in seeing that justice, due process, or the equal protection of the law were accorded the defendant.

32. The court gave an improper response to the jury's note asking for Pitchford's statements to the police.

33. The court erred in not subjecting the victim's wife to the rule of absenting herself from court therefore effectively preventing us from calling her as a witness.

WHERFORE, Mr. Pitchford respectfully moves the court to order a new trial or, in the alternative, judgment notwithstanding the verdict.

Respectfully submitted,

/s/ Ray Charles Carter

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IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-DP-00441-SCT

TERRY PITCHFORD,

Appellant

v.

STATE OF MISSISSIPPI,

Appellee

Grenada County Circuit Court No. 2005-009cr

Filed: Oct. 29, 2008

BRIEF OF APPELLANT

STATEMENT OF ISSUES

I. WHETHER THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM AND REQUIRES REVERSAL OF MR. PITCHFORD'S CONVICTION AND SENTENCE OF DEATH.

A. *Whether The State Discriminated On The Basis Of Race In Its Peremptory Strikes In Violation of Batson v. Kentucky*

B. *Whether The Trial Court Otherwise Deprived Defendant Of A Jury Comprised As Required By The Sixth And Fourteenth Amendments.*

VI. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT MISTRIAL WHEN JAILHOUSE INFORMANT JAMES HATHCOCK TESTIFIED TO INADMISSIBLE AND PREJUDICIAL MATTERS

VII. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE OBTAINED THROUGH A WARRANTLESS SEARCH OF DEFENDANT'S AUTOMOBILE AND THE FRUITS OF THE POISONOUS TREE THEREOF.

VIII. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENTS GIVEN BY DEFENDANT TO LAW ENFORCEMENT OFFICERS AFTER HIS ARREST

IX. WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE CONCERNING ALLEGED PRIOR BAD ACTS OR OTHER CRIMES BY THE DEFENDANT

X. WHETHER THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY FROM DR. STEVEN HAYNE.

XI. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANTS REQUESTED CULPABILITY PHASE JURY INSTRUCTIONS D-9,10,18, 30, AND 34 AND IN GRANTING THE STATE'S CULPABILITY PHASE INSTRUCTIONS S-1, S-2A ,AND S-3 IN THEIR ABSENCE

XII. WHETHER THE TRIAL COURT ERRONEOUSLY LIMITED THE MITIGATION EVIDENCE AND ARGUMENTS THEREON THAT DEFENDANT WAS PERMITTED TO PRESENT DURING THE PENALTY PHASE PROCEEDINGS

XIII. WHETHER THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO PRESENT IMPROPER

STATEMENT OF THE CASE

[The record of the Circuit Clerk of Grenada County cited by page number as "R."; the Supplemental Volume filed 8/18/08 by page to "R. Supp. 2,". The transcript is cited by page number as "Tr." The transcript of post-trial proceedings in "Supplemental Vol.1 of 1 filed 1/28/08" is cited by page number as "Tr. Supp." Exhibits from the trial are cited as Ex. and S or D and number. The Record Excerpts are cited by Tab number as "R.E.".]

Procedural History

Terry Pitchford was indicted on January 11, 2005 in a single count indictment charging Capital Murder. R. 10. R.E. Tab 1 He was appointed local counsel and arraigned on February 9, 2005. R. 24. At that time local counsel requested the appointment of additional counsel R. 22. On June 15, an order appointing the Office of Capital Defense Counsel was filed. R. 175-76. Both parties filed pretrial motions. R. 42-213; 970-1011; 1021-22. Trial was set by the court for February 6, 2006. R. 211. Defendant filed a motion for Continuance on January 19, 2006. R.867-954; 1045-85. It was heard along with all other pending pretrial motions on February 2, 2006, and denied. Tr. 32-54. R.E. Tab 4. Evidentiary hearings were held on Defendant's pretrial motions to suppress a gun found in his vehicle and to suppress his statements to police after his arrest, and they were also denied. Tr. 94-119, R.E. Tab 5 (ruling on motion to suppress gun), 119-56, R.E. Tab 6 (ruling on motion to suppress statement).

Jury selection commenced on February 6, 2006 and the culpability phase of the trial was completed with a guilty verdict on February 8. Tr. 166-652; R. 1169. The penalty phase was held on February 9, and resulted in a jury verdict of death. R. 1234-35. The Court entered its Judgment and Order Imposing the Death Sentence immediately thereafter. R. 1236-3, R.E. Tab 3. Defendant timely filed his Motion for New Trial on February 17, 2006, as amended, February 24, 2006, R. 1248-52; 1261-62, which were denied by the trial court on March 1, 2006. R. 1264-65. Timely Notice of Appeal, Designation of Record, and Certificate of Compliance were filed on March 6, 2008.

While the appeal was pending, this Court remanded the matter to a Special Judge of the Circuit Court for proceedings regarding correction of the record. Supp. Tr. 1-63. The record was further corrected to include record pages omitted by scriveners or copying error. R. Supp 2, adding previously omitted record pages 1251(A) and (B), and 1262(A), (B), and (C).

Statement of Facts

At approximately 7: 30 on the morning of November 7, 2004, Rubin L. Britt was found shot dead at his place of business, a convenience store called Crossroads Grocery, located on Highway 7 in Grenada County, Mississippi. Tr. 348, 365-66. A cash register, some cash, and one of two guns kept at the store, a 38 caliber revolver loaded with "rat shot" pellets, were determined to be missing. R. 349-50. Various shell casings and a live shell were observed on the floor of the store and later collected and sent to the Mississippi Crime Laboratory for examination. They were determined to be casings from two different guns – bullet shell casings from a 22 caliber weapon, and a live shot shell and shot shell casings from a 38 caliber weapon. Tr. 357-58, 483-99, 531-53.

When news got out about the shooting and apparent robbery, police received information from various citizen sources. A neighbor and part-time employee of the store that she had seen a "very clean" silver Mercury with tinted windows riding up and down and pulling in and out of the parking lot of the store earlier that morning. Tr. 375-76. Another store customer gave similar information. Tr. 479-83.

Paul Hubbard and Henry Ross, employees of a business located behind the Crossroads Grocery, also

came forward, bringing with them a man Hubbard knew named Quincy Bullins. Hubbard and Ross reported that approximately a week and a half earlier they had stopped Quincy Bullins and a second man with something in their hands covered by towels heading towards the store. Tr. 584-86. Hubbard also reported that Bullins told Hubbard that Bullins and his companion were "fixing to hit the store." Hubbard, however, told them leave and they did. Tr. 587. Hubbard also saw a "grey Chevy Caprice" with someone sitting on the hood parked nearby, but could not identify that person at all. Tr. 585-86. The State made no attempt to have him identify Mr. Pitchford as that person at trial. Tr. 586-89.

Quincy Bullins was questioned separately from Hubbard and Ross. He was at first reluctant to tell the police anything, Tr. 528-29. reminded of what Mr. Hubbard knew, Bullins admitted to the earlier attempt and identified the person with him that morning as DeMarcus Westmoreland and that they were both armed. Tr. 527. He also gave the police Terry Pitchford's name as the person waiting at the car and claimed that Terry was who had put him and Westmoreland up to the robbery, and had provided Quincy with the gun Quincy was using. Tr. 524. Westmoreland was brought in and, again after some initial reluctance, admitted his part in the attempted robbery with Quincy, also implicating Pitchford, though not also suggesting Pitchford was going to get someone else to do it later until almost a year later. Tr. 450-55. Both Quincy Bullins and DeMarcus Westmoreland testified against Mr. Pitchford at trial. Both also acknowledged that they did so in order to help themselves out with respect to the conspiracy

charges they were facings as a result of the earlier attempt. Tr. 460, 527.

After obtaining Mr. Pitchford's name, GCSO Detective Gregory Conley and four other officers went to Mr. Pitchford's home. There, they found a vehicle similar to the one described by other witnesses. With the permission only of Shirley Jackson, Mr. Pitchford's mother and co-owner of the vehicle, and over resistance from Mr. Pitchford, police made a warrantless search the vehicle and found a 38 caliber pistol loaded with "rat shot" shells. They arrested Mr. Pitchford at that time. Tr. 493-97. A witness later identified this pistol as the one he had given to Mr. Britt for use in his store. Tr. 468-70.

Pitchford gave a total of six separate statements to police. In the first three, taken the day of his arrest he denied any participation in the November 7. Tr. 502-06 In three others, taken the next day, he admitted that he had gone to the Crossroads Grocery to rob it with Eric Bullins, but consistently denied personally shooting Mr. Britt, and instead said Eric Bullins, who had a 22 or 25 caliber weapon, shot Mr. Britt after he saw Mr. Britt with a gun. Tr. 508-09, 568-578. Mr. Pitchford signed a single Miranda Warning/Waiver form on November 7. Ex. S-52 He affirmatively did not sign the Miranda Warning/Waiver form tendered to him on November 8. Ex. S-60.

The State presented all this evidence at trial. It also adduced expert testimony from Dr. Steven Hayne identifying the cause of death as three wounds from projectiles consistent with a .22 caliber weapon and injuries to Mr. Britt from "rat shot," and authenticating two projectiles and some shot and shot

capsule recovered from the decedent and his clothes, Tr. 397-44. A firearms examiner connected the empty 38 shells found at the store and the pellets recovered by the pathologist to the 38 found in Mr. Pitchford's car, and confirmed that some of the empty casings from the store and projectiles recovered by the pathologist were consistent with having been fired from a 22. Two jailhouse snitch informants also testified that Pitchford had admitted to participation in the robbery and murder to them, though the accounts that each reported were somewhat inconsistent. Tr. 426-49; 562-68.

Defendant was convicted of Capital Murder. Tr. 652, R. 1169 After a penalty phase, which was held despite the unavailability of defendant's psychiatric expert to testify, Mr. Pitchford was sentenced to death. Tr. 657-812, R. 1234-35.

SUMMARY OF THE ARGUMENT

Terry Pitchford was denied his Sixth and Fourteenth Amendment right when he was tried by a racially discriminatorily selected jury in violation of *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) The jury selected was also infected by racial discrimination resulting from the death qualification process in violation *of Lockhart v. McCree*, 476 U.S. 162 (1986). In addition, four prospective jurors removed in the death qualification process were eligible to serve under *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The trial court also unconstitutionally restricted voir dire of the jury regarding their ability to consider mitigation of sentence.

When Defendant informed the trial court that his counsel could not, within the time scheduled before

trial, complete the constitutionally required investigation and trial preparation to prepare an effective defense to this capital case in which death was being sought, the trial court abused its discretion in failing to grant him a continuance to complete that preparation. It also abused its discretion in failing to delay the sentencing proceeding when defendant expert psychiatrist was unable to testify, thus further denying him the right to put on a complete and effective mitigation case.

The prosecution engaged in misconduct by examining witnesses on matters not in evidence, and arguing facts not in evidence, and making improper "in the box" and "send a message"-type exhortations to the jury, and eliciting and arguing inflammatory matters before the jury in both stages of the proceedings. At the penalty phase, it not only argued these things, but also attempted to argue additional aggravating circumstances that were not show by the evidence or properly instructed to the jury. The trial court failed to adequately curb the prosecution in this regard, and in general exhibited an overall bias against the defense that rendered a less than fair and impartial tribunal in this matter.

The trial court erroneously permitted the state adduce unduly prejudicial testimony with little or no probative value from two jailhouse snitches, and having done so, failed to properly instruct the jury on how to regard that testimony. It also failed to grant a mistrial when one of those witnesses testified to entirely improper and inadmissible matters.

In violation of the Fourth Amendment, it admitted into evidence a gun that was the product of an invalid

warrantless search and other fruits of that poisonous tree. It erroneously admitted statements from the defendant taken in violation of his Fifth, Sixth and Fourteenth Amendment rights, as well. Similarly, it unconstitutionally allowed the State to make its case on the basis of inadmissible prior bad acts and other crimes of the defendant. It also violated the Due Process clause when it permitted Dr. Steven Hayne to testify as an expert witness after Dr. Hayne perjured himself as to his professional qualifications, and erroneously permitted him to offer purported expert testimony that were not within his field of expertise.

At the culpability phase, erroneously granted a peremptory instruction on the robbery element of capital murder by failing to give the jury a requested lesser offense instruction on non-capital murder, and erroneously failed to give an instruction about inferences required by *Sandstrom v. Montana*, 442 US 510 (1979). It also gave fatally defective cautionary instructions about informant and accomplice testimony. Each of the foregoing errors, individually and cumulatively, require reversal of the conviction here.

The death sentence returned by this same jury was fatally flawed, even assuming *per arguendo* that the conviction itself was not. In addition to depriving the Defendant of the right to have his expert witness testify, it also erroneously limited the lay mitigation testimony and evidence the defendant was able to obtain and present. On the other hand, it permitted the State to adduce unduly inflammatory victim impact testimony beyond the scope of *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), allowed a witness to present hearsay testimony in the form of a letter

from a non-testifying third party in violation of *Crawford v. Washington*, 541 U.S. 36 (2004), and gave the State the opportunity to give a closing argument at the conclusion of the State's penalty phase case before the Defendant presented his own.

The jury was also unconstitutionally instructed at the penalty phase. The instruction given failed to include a mitigating circumstance that had been established. It did not properly limit the consideration of aggravators other than those specifically limited. It failed to fully apprise the jury that the non-death sentence it was considering would preclude any release from custody in the future, that it could return a life sentence even if it found that mitigating circumstances did not outweigh the aggravating ones, or about the statutory consequences of returning a verdict failing to agree on sentence.

The sentence was also unconstitutional under the Eighth Amendment because Mississippi's lethal injection procedure has not been demonstrated to meet the criteria of *Baze*, *et al. v. Rees*, 553 U.S. __, 128 S.Ct. 1520 (2008), because duplicative aggravators, none of them pled in the indictment, were used to make the defendant eligible for the death penalty, and because it is disproportionate to sentences given to other offenders in this case and similar cases.

These errors, individually and cumulatively require reversal of at least the sentence imposed and a remand to the circuit court for a new sentencing proceeding.

ARGUMENT

Standard of Review

Capital murder convictions and death sentences are reviewed on direct appeal under a "heightened scrutiny" standard of review. *Walker v. State*, 913 So.2d 198, 216 (Miss. 2005); *Balfour v. State*, 598 So. 2d 731, 739 (Miss.1992) (citing *Smith v. State*, 499 So. 2d 750, 756 (Miss. 1986)). "[P]rocedural niceties give way to the search for substantial justice, all because death undeniably is different." *Hansen v. State*, 592 So. 2d 114, 142 (Miss. 1991).

Under this standard of review, this Court, *inter alia*, considers trial errors for the cumulative impact; applies the plain error rule with less stringency; relaxes enforcement of its contemporaneous objection rule; and resolves all genuine doubts in favor of the accused. In sum, what may be harmless error in a case with less at stake becomes reversible error when the penalty is death. *Walker v. State*, 913 So.2d at 216 (citing *Irving v. State*, 361 So. 2d 1360, 1363 (Miss.1978)). *See also Fisher v. State*, 481 So. 2d 203,211 (Miss.1985).

I. THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM AND REQUIRES REVERSAL OF MR. PITCHFORD'S CONVICTION AND SENTENCE OF DEATH.

The right to a fair trial by a panel of impartial, indifferent jurors governs every criminal case "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). The jury must also be selected without racial discrimination or other invidious exclusions from service, *Batson v. Kentucky*, 476 U.S. 79 (1986);

Lockhart v. McCree, 476 U.S. 162, 175-76 (1986) and, in a capital case, be able to properly consider not only imposition of the death penalty, but also mitigation of it. *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Morgan v. Illinois*, 504 U.S. 719 (1992); *Tennard v. Dretke*, 542 U.S. 274, 287 (2005). In the instant case the defendant's rights in all these regards were seriously compromised. His conviction and sentence must, therefore, be reversed.

A. *The State Discriminated On The Basis Of Race In Its Peremptory Strikes In Violation o f Batson v. Kentucky*

Over two decades ago the United States Supreme Court held that the equal protection clause of the United States Constitution forbids parties from using race – or assumptions about a prospective juror attitudes based on race – as the basis to peremptorily strike otherwise eligible venire members from serving on a trial jury. *Batson v. Kentucky*, 476 U.S. 79, 97 (1986), *See also Snyder v. Louisiana*, --- U.S. ---, 128 S.Ct. 1203 (2008); *Miller-El v. Dretke*, 545 U.S. 231 (2005) (both refining standards for determining violations); *Williams v. State*, 507 So. 2d 50 (Miss. 1987) (adopting *Batson* as the law in this state); *Flowers v. State*, 947 So. 2d 910, 938 (Miss. 2007) (*Flowers III*) (each juror "must be evaluated on his/her own merits, not . . . on supposed group-based traits or thinking.")

Terry Pitchford is African-American. The prosecuting attorney in Mr. Pitchford's trial peremptorily struck all but one of the otherwise qualified African-American venire members presented to him for acceptance as jurors and, when

challenged, articulating only pretextual or inherently suspect reasons for doing so. Tr. 321-24. This same prosecutor has previously been held by this Court to have engaged in racially discriminatory jury selection practices, *Flowers III*, 947 So. 2d at 936-39. His conduct in the instant case was likewise racial discrimination in violation *of Batson*, and it was error for the trial court to permit it to occur.[1]

Because there is rarely direct evidence of invidious motivation, there is always the "practical difficulty of ferreting out discrimination in selections discretionary by nature" *Miller-El*, 545 U.S. at 238. *Batson* therefore establishes a three stage inquiry which permits circumstantial evidence to establish unconstitutional discrimination during jury selection. *Batson*, 476 U.S. at 98; *Snyder*, 128 S. Ct. at 1207; *Williams* 507 So. 2d at 52; *Flowers III*, 947 So. 2d at 917. The evidence relevant to this inquiry in the instant matter is summarized in Appendix A to this Brief, bound herewith.

At the first stage, the defendant makes out a prima facie case of discrimination. This may itself be established circumstantially, and from the conduct of the prosecutor in exercising his strikes in the case at issue alone. *Johnson v. California*, 545 U.S. 162, 170

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[1] In addition to this Court's findings in *Flowers* III, in 1999, the trial judge presiding over an earlier trial of Mr. Flowers found that this prosecutor had racially discriminated in peremptorily striking a black juror and ordered that the stricken juror be seated on the jury – the only black to serve on that jury. See Record of Mississippi Supreme Court Case No. 1999-DP-01369-SCT at Tr. 1356-64 (conviction and sentence reversed on other grounds, *Flowers v. State*, 842 So. 2d 53 (Miss. 2003) ("*Flowers II*").

(2005). Striking a disproportionate number of the minority members in the venire is generally sufficient to make the prima facie case, as is using a disproportionate number of the strikes actually employed on minorities or any other practice that results in a jury disproportionate to the venire from which it is drawn. *See Miller-El*, 545 U.S. at 240-41; *McFarland v. State*, 707 So.2d 166, 171 (Miss. 1997); *Flowers III* 947 So. 2d at 936. In Mr. Pitchford's case, the trial court found the requisite facts existed when the State struck four of the five African-American prospective jurors presented to it. Tr. 323-24.

Once a *prima facie* showing is found, the burden shifts at the second stage to the State to proffer a race-neutral justification for the strike. The State need not, at this stage, offer proof of either the veracity or legitimacy of these reasons, and may rely on a wide range of reasons. *Lockett v. State*, 517 So.2d 1346 (Miss. 1987). Nonetheless, this is not a "mere exercise in thinking up any rational basis" for its strike. *Miller-El*, 545 U. S. at 252. The reason must, at the very least, be inherently non-discriminatory. *Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); *McGee v. State*, 953 So.2d 211, 215-16 (Miss. 2007).

If it is not facially non-discriminatory, no further inquiry is needed. Discriminatory motivation is deemed established; its taint is deemed to infect the entire process; and that single act of discriminatory jury selection requires immediate reversal of any conviction obtained from the tainted jury. In *McGee* this Court reversed a conviction as a matter of plain error where one of several reasons advanced by the prosecution for the strike mentioned the venire member's sex as contributing to the decision to strike.

953 So.2d at 215-16 (Miss. 2007) (citing *J.E.B. v. Alabama*, 511 U.S. 127, 139-41 (1994); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n. 14 (1977), *Duplantis v. State*, 644 So.2d 1235, 1246 (Miss.1994) and holding on the basis of that precedent that the single identified instance of invidious purpose infected "the entire judicial process" and negated any other reasons propounded). At least one of the reasons advanced in the instant case was facially discriminatory. *See* Appendix A at 3.

Even if the reason is not deemed to be facially discriminatory at the second stage, its validity – including its accuracy, plausibility and the credibility of the prosecutors claim that he actually used it, and not race as its basis – is subjected to scrutiny at the third stage. *Randall v. State* 716 So.2d 584, 588 (Miss.1998 ("A facially neutral reason at step two however, is not always a non-pre-textual one for step three."). At the third stage the inquiry is whether the totality of the circumstances establish that the reasons advanced – although facially race neutral – were pretextual, and the decision was, therefore, "motivated *in substantial part* by discriminatory intent." *Snyder*, 128 S.Ct. at 1212 (emphasis supplied), *Batson*, 476 U.S. at 98; *Williams* 507 So. 2d at 52; *Flowers III*, 947 So. 2d at 917.

The pretext inquiry "requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it." *Miller-El v. Dretke*, 545 U.S. at 252 (citing *Miller-El v. Cockrell*, 537 U.S. at 339; *Batson* 476 U.S. at 96-97, 106 S.Ct. 1712); *Snyder*, 128 U.S. at 1208 ("[s]tep three of the Batson inquiry involves an evaluation of the prosecutor's credibility"). If the circumstances place the credibility of the prosecutor

or the plausibility of his justifications in doubt, then a finding of pretext, and reversal of the conviction, is warranted. *Id.*

The inquiry examines the reasons *as they were actually propounded at the time* to see if they are masks for racial discrimination, rather than the real reason for the strike.

> If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El, 545 U. S. at 252. ("[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reason as best he can and stand or fall on the plausibility of the reasons he gives."); *Flowers III*, 947 So. 2d at 936-39.

In determining pretext the following things must, as a matter of law, be considered "indicia of pretext" that cast suspicion on the bona fides of the articulated reasons:

> 1) disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge; 2) the failure of voir dire as to the characteristic cited; 3) the characteristic cited is unrelated to the facts of the case; 4) lack of record support for the stated reason; and 5) group based traits.

Lynch v. State, 877 So.2d 1254, 1272 (Miss.2004). The reasons articulated by the State for removing four of the five available blacks from the jury panel in Mr. Pitchford's case are replete with these indicia of

pretext, including in most instances disparate treatment of white venire members. *See* Appendix A.

The listed indicia are not exclusive. Anything that suggests an invidious motivation affected the strike—including things that established the prima facie case or were inconsistent at the second stage – must be taken into account. *Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995). *See also Miller-El*, 545 U.S. at 252 (inherent implausibility of articulated reason); *Randall* 716 So. 2d at 588-89 & nn. 2-5 (same); *Flowers III*, 947 So. 2d at 929, 936 (strong prima facie case; disparity of jury composition with composition of county or of venire drawn from it; "suspect" reasons advanced for strikes found valid on other grounds). These additional indicia of pretext are also present in many of the strikes made to eliminate blacks from sitting on Mr. Pitchford's jury as well as in the State's overall conduct in striking the jury.[2]

Flowers III contains an exceedingly thoughtful discussion of the *Batson* problem. It expresses a well founded frustration that racial discrimination in peremptory strikes had not been eradicated despite having been condemned for over two decades, *Flowers III*, 947 So. 2d at 937 (agreeing that "racially-

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[2] Batson does not require that an historical pattern of discrimination be shown to establish discrimination, if there is a history of discriminatory behavior on the part of the prosecutor whose strikes are under scrutiny in a particular matter, that history may be used as support for a finding of discrimination as well. See *Miller El v. Dretke*, 545 U.S, at 236; *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003). In the instant case we have that history. *Flowers III*, 947 So. 2d at 93 8 (finding by this Court); MSSC No. 1999-DP-01369-SCT at Tr. 1356-64 (finding by trial judge).

motivated jury selection is still prevalent twenty years after *Batson* was handed down.") (*citing Miller-El*, 545 U.S. at 273 (Breyer, J., concurring) and suggesting that

> [w]hile the *Batson* test was developed to eradicate racially discriminatory practices in selecting a jury, prosecuting and defending attorneys alike have manipulated *Batson* to a point that *in many instances the voir dire process has devolved into an exercise in finding race neutral reasons to justify racially motivated strikes.*

947 So. 2d at 937 (citations and internal quotation marks omitted) (emphasis supplied).[3]

In uncharacteristically blunt terms, the decision characterizes the problem as attorneys "racially profiling jurors" during jury selection and not only reverses the conviction and sentence obtained as a result of this racial profiling in the case under review, but suggested that further systemic corrective action might be in order if such conduct persisted in future. *Id.* at 939.

In *Snyder*, 128 S.Ct. 1203, the United States Supreme Court took a similar hard line when it reversed the conviction and death sentence of the defendant because of racial discrimination by the

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[3] Though *Flowers III* is a plurality opinion, the concurring justice agrees that "[t]he plurality has provided a very thorough and instructive analysis of the *Batson* process, which should be useful, not only to the prosecutors who will be trying this case upon remand, but also to all prosecutors and defense attorneys alike, as they engage in future jury selection arguments," 947 So. 2d at 940 (Cobb, P.J. concurring).

State in exercising its peremptory strikes even though the State had articulated non-racial reasons, some of them unrebutted, for each of the strikes, the trial court had accepted those reasons, and the State court of last resort had deferred to that determination. 128 S.Ct. at 1212. Justice Alito's majority opinion, joined by Chief Justice Roberts and five others, reiterated its discomfort at using scattershot fallback reasons to justify a strike after one reason cited by the State for it has been found to be pretextual. It therefore expanded the prohibition against appellate courts saving strikes by looking beyond what was actually articulated at the time to include, in addition to reasons that had not been mentioned at all by the State, some non-racial justifications that were not susceptible to capture in a written transcript—such as a prosecutor's alleged observation of things like demeanor or nervousness of a particular juror. It found that although such demeanor-based justifications were not then being held invalid *per se*, the justification could not be retrospectively credited or deferred to by an appellate court, even if it had not been expressly rebutted, if there was no on the record contemporaneous record evidence or finding regarding its existence. 128 S. Ct. at 1208-12. Lower courts have found *Snyder* to require more scrutiny of the facts on both the trial and appellate court level.[4]

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[4] *See Haynes v. Quarterman*, 526 F.3d 189, 197-202 (5th Cir. 2008) (granting COA on *Batson* challenge in light of *Snyder*); *People v. Collins*, 187 P.3d 1178, 1183-84 (Colo. Ct. App. 2008) (finding *Batson* violation where some articulated reasons for a strike were found to be pretextual, and others, though unrebutted, were not expressly credited by trial court); *State v. Cheatteam*, 986 So.2d 738, 743-45 (La. Ct. App. 2008) (discussing

For Mr. Pitchford's February 2006 trial, a special venire of 350 people was summoned from the registered voters of Grenada County. One-third (40) of the 122 individuals returning jury questionnaires and appearing upon their summonses were African-American. After excusals for statutory or other cause unrelated to the case itself, 35 (36%) of the remaining 96 veniremen were black. R. 349-862, R.1107. These proportions were not statistically significantly different from the racial makeup of the population of Grenada County.[5] However, by the end of the process, of the 14 jurors empanelled to actual try Mr. Pitchford, only one was black.[6]

The almost lily-white jury was achieved by the prosecutor accepting 16 of the first 18 white venire members tendered to him while simultaneously, in four consecutive strikes, eliminating four of the five

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the changes in the legal landscape wrought by, *inter alia*, *Snyder*). *See also Pruitt v. State* 986 So. 2d 940, 947-51 (Diaz, J., dissenting).

[5] In 2006, the population of Grenada County, Mississippi was approximately 40% African-American, Tr. 331. *See also* http://quickfacts.census.gov/qfd/states/28/28043.html

[6] The fact that the State permitted one black juror to be seated does not vitiate either a prima facie or ultimate finding of discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 250 (2005) A single discriminatory act in an otherwise nondiscriminatory jury selection process is sufficient to establish *Batson* violation. *Johnson v. California*, 545 U.S. 162, 169 n.5 (2005); *McGee*, 953 So.2d at 214 In the instant matter, the lone black juror was seated only after it was evident that the trial court would, as it in fact did when the challenge was made immediately thereafter, have to find that a prima facie *Batson* showing had already been made. Tr. 321-24.

African-American venire members who were sitting beside them, often for reasons that had not bothered the state when they were also applicable to the accepted whites. Tr. 321-22. Appendix A. After that, again with remarkable lack of attention to details that it deemed relevant to its strikes of black venire members, the State accepted 9 of the next 10 whites on the panel. Tr. 326. Tr. 326-29; R. 1104-09 (judge's strike list). *See also* R. 395-401, 471-74; 479-80, 515-18; 631-34; 715-18. The Defendant made his objection to this process at the time the State exercised its strikes, and renewed it prior to the seating of the jury and in his motion for new trial. At all times, the trial court erroneously failed to conduct the necessary third step inquiry and erroneously denied the *Batson* objection. Tr. 322-32, R. 1250, 1262. This is legal error,. *Miller-El v. Dretke*, 545 U.S. 231 (2005) (reversing without remand).

Because the record in the instant case clearly establishes the pretextuality of the reasons advanced for each of the four discriminatorily stricken jurors, this court can, and should, itself find the totality of the circumstances establish a *Batson* violation and reverse the conviction without a remand for further trial court action as it did in, *e.g. Flowers III*, *McGee. Burnett v. Fulton*, 854 So.2d 1010, 1016 (Miss. 2003).

Venire Member 48*, *Carlos Fitzgerald Ward

The reason given for the peremptory strike exercised by the State against Venire Member 48, Carlos F. Ward. Tr. 322, a 22 year old black man, was discriminatory on its face and requires reversal for that reason alone. *McGee* 953 So.2d at 215-16. The entire record made by the State in support of this

strike (including the trial court's ruling that the strike was proper without completing the required *Batson* process) was as follows:

> MR. EVANS: Juror number 5 is juror number 48 on the list, a black male, Carlos Ward. We have several reasons. One, he had no opinion on the death penalty. He has a two year old child. He has never been married. He has numerous speeding violations that we are aware of. *The reason that I do not want him as a juror is he is too closely related to the defendant.* He is approximately the age of the defendant. They both have children about the same age. They both have never been married. *In my opinion he will not be able to not be thinking about these issues*, *especially on the second phase. And I don't think he would be a good juror because of that.*[7]
>
> THE COURT: The Court finds that to be race neutral as well. So now we will go back and have the defense starting at 37.

Tr. 325-26 (emphasis supplied).

The State here expressly admits that Mr. Ward's close demographic resemblance to Mr. Pitchford is what motivated the strike. It is clear from the four comers of the reason given that it was the entire panoply of those demographics, and most particularly Mr. Ward's race, not merely his age, marital status

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[7] On the basis of responses during general voir dire, is clear that Mr. Ward and Mr. Pitchford are not related to each other by blood or marriage and that the prosecutor was using the term "related" to mean the demographic similarities, not any sort of actual kinship. Tr. 188-93.

and age of his child that were on Mr. Evans mind when he decided that Mr. Ward wouldn't be a good juror from the State's point of view. [8] Reversal is thus warranted for that reason alone without proceeding any further *McGee*, 953 So.2d at 215-16 *See also Purkett v. Elem*, 514 U.S. 765, 767-68 (1995); *State v. Harris*, 820 So.2d 471 (La. 2002) (reversing conviction and death sentence for similarly stated reason).

Even if there could be doubt about the facially discriminatory meaning of Mr. Evans proffered demographic reasons without looking beyond his words, the evidence of pretext is overwhelming and requires reversal. *Randall*, 716 So.2d at 588. The State accepted 11 white venire members who shared at least one of the demographic characteristics Mr. Evans said he found unacceptable in Mr. Ward. Six of them shared more than one.[9]

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[8] On their face, the prosecutor's words make it clear that "closely related" is meant to expand upon the articulated non-racial or gender demographics which the two men had in common, not merely rehash them. Mr. Evans further elaboration that he worried that the similarities might affect the juror's ability to deliberate at the penalty phase because he would instead be "thinking about these issues" similarly makes no sense if the issues of concern to him were limited to age, marital status and age of children. Sentencing instructions to which the prosecutor interposed no objection actually *required* deliberation at the penalty phase about at least the defendant's age and the fact that he was the father of a young child as mitigating sentence. Tr. 726-3 8; 768-77. R. 1206. The state did not cite any concern that the similarities would bias the juror against imposing a death sentence.

[9] White venire members with young children accepted by State:

Sherman, Michael, (tendered by State Tr. 321) daughter 2 1/2 years old, son 3 months; R. 763;

Wilbourn, Lisa, (Alternate 2, R. 1104) son 23 month old, R. 837;

Parker, Lisa, (tendered by State Tr. 321) child 6 year old, R. 701

Tramel, Nathalie Drake, (Alternate 1, R. 1104), 4 year old daughter, 5 year old son; R. 808

Ward, Laura Candida (Juror 5, R. 1104), daughter 6, R. 817

Marter, Stephen Abel, Jr., (tendered by State Tr. 321) 4 year old son, R. 657;

Curry, Michael, (tendered by State Tr. 328), 5 year old son, R. 497.

Unmarried whites accepted by State:

Eskridge,Chad, never married, R. 527 (Juror 2, R. 1104);

Denham, Kenton L, divorced, R. 525 (tendered by State Tr. 322);

Counts, Jeffrey Shann, divorced, R. 481 (Juror 12, R. 1104);

Brewer, Mary Wylene, widowed, R. 421 (Juror 6, R. 1104)

White venire members of similar age accepted by State:

Clark, Brantley, age 22, R. 417, (tendered by State Tr. 321);

Eskridge,Chad, age 25 R. 527 (Juror 2, R. 1104);

Sherman, Michael, age 27 R. 761 (tendered by State Tr. 321);

Wilbourn, Lisa, age 28, R, 835 (Alternate 2, R. 1104);

Parker, Lisa, age 29, R. 699, (tendered by State Tr. 321)

White venire members accepted by State but sharing more than one of the cited traits:

Eskridge,Chad, similar age, unmarried, R. 527-29 (Juror 2, R. 1104);

Ward, Laura Candida, young children, no d.p. opinion (Juror 5, R. 1104) R. 817-18

Tramel, Nathalie Drake, young children, no d.p. opinion, R. 805-06; Tr. 255; (Alt. 1, R. 1104)

Parker, Lisa, similar age, young children, R. 699-701, (tendered by State Tr. 321)

Wilbourn, Lisa, similar age, child same age, R. 835-37 (Alt. 2, R. 1104) ;

The record also establishes other indicia of pretext. These are also group-based traits. There was no voir dire of Mr. Ward or any other jurors regarding these things or whether they would affect the juror's ability to serve. Appendix A at 2-3. The State's purported concern with ability to deliberate is implausible given the actual circumstances known to at the time it made the strike. *See Snyder*, 128 S.Ct. at 1212. There is thus abundant evidence that this articulated reason was pretext for a strike based on race. *McGee*, 953 So.2d at 215-16; *Flowers III*, 947 So.2d 910.

The other reasons articulated for striking Mr. Ward – that he had numerous speeding violations and that he had expressed no opinion on the death penalty, Tr. 326 – are rendered spurious by disparate treatment of comparable whites and substantial proof that undercuts the credibility of the assertion that the State actually cared at all about this.

On the speeding violations, the juror questionnaire asked about criminal charges and convictions, but specifically, with the assent of the State, excluded speeding or traffic violations from what venire members were required to report. R. 352-53, Tr. 4. Given that it had not asked for this information on all venire members when it could have done so, it is also evident that if the State actually did research Mr. Ward's traffic offense history it was interested only in him, and not in the rest of the panel. There is also no record proof or even reference to a court docket establishing that these offenses acually existed. This justification is thus unsupported by the record,

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Sherman, Michael, similar age, child same age R. 761-63; (tendered by State Tr. 321)

implausible, and like the demographic one, based on disparate treatment of this black panel member from white ones.

As to the lack of opinion on the death penalty, this Court has previously held that the State's use of death penalty attitudes to justify striking blacks renders the whole process "suspect," if it fails to strike white jurors with similar death penalty attitudes. *Flowers III*, 947 So. 2d at 935-39. The state did exactly that here, accepting two white jurors who had answered their questionnaires in identical fashion to Mr. Ward. This, is a record sufficient to establish that this reason for the strike of Mr. Ward is also pretextual.[10] This Court must therefore reverse. *Id.*

Venire Member 30 — Linda Ruth Lee

The first black venire member presented to the State, and the first one it struck, was Linda Ruth Lee, a 26 year old black female. R. 635. Tr. 324-25. Like over half of the white venire members the State found acceptable, Ms. Lee's jury questionnaire showed that she "generally" though not "strongly" favored the death penalty R. 638. The State offered the following as its sole purported non-racial reasons for striking Ms. Lee:

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[10] White venire members with same lack of opinion on death penalty accepted by State:

Ward, Laura Candida (Juror 5, R. 1104) R. 818 (no relation to Carlos Ward Tr. 212-19)

Tramel, Nathalie Drake (Alternate 1, R. 1104) R. 806; Tr. 255

Both of these individuals also have young children, one of the demographic characteristics cited by Mr. Evans as a putative reason for its strike of Mr. Ward.

> MR. EVANS: Yes, sir. S-2 is black female, juror number 30. She is the one that was 15 minutes late. She also, according to police officer, police captain, Carver Conley, has mental problems. They have had numerous calls to her house and said she obviously has mental problems. Juror number S-3 –
>
> THE COURT: That would be race neutral as to – as to that juror.

Tr. 324-25. As with Mr. Ward, the trial court conducted no further inquiry. Had it done so, it would have had to conclude that the stated reasons were pretextual.

The first reason cited, late return from lunch is not factually disputed. However, the record concerning it also establishes without dispute that the tardiness was fully explained by the juror and accepted by the court as being the result of her having to walk to and from the courthouse at lunchtime because she had no car. Tr. 239-40. In fact, when the State attempted to have this individual (though not any of the several other jurors who were late back from lunch that day, Tr. 238-39) removed for cause, the trial court found the tardiness to be irrelevant to her service, and actually commended Ms. Lee for "trying real hard to fulfill her civic duty as a juror." Tr. 318. This record explanation made her tardiness that day completely without pertinence to Ms. Lee's ability to serve as a juror. The jury was going to be sequestered. They would be transported in a group by the bailiffs to and from the courthouse not only at lunch time, but at all times, so there is no possibility this could happen during trial.

This reason is invalid in the same way way the one rejected by the Supreme Court for the strike of the black juror in *Snyder* was invalid. In *Snyder*, the State attempted to justify the strike of a black juror because the juror had mentioned a concern that lengthy jury service would prevent him from completing his student teaching obligations. The prosecution in *Snyder* contended that it feared this would lead the juror to not deliberate carefully, and possibly to go for a compromise lesser verdict, and had stricken him for that reason, not because of his race. As in the instant case, however, the record in *Snyder* established that the prosecutors fears were unfounded. Subsequent inquiry had established that the *Snyder* juror's teaching obligations would not be interfered with if the trial was a short as the state had already told the court it would be, and the fact that a compromise verdict would require all 12 jurors to agree made the reason even less persuasive. The Supreme Court therefore found the justification in *Snyder* to be specious, 128 S. Ct. at 1211. This Court should do the same with the State's first reason for striking Ms. Lee.

The second reason advanced by the prosecutor for striking Ms. Lee – her alleged history of mental problems – is likewise a mere pretext for discrimination based on her race. With respect to this reason, the record establishes most of the "indicia of pretext" and affirmatively calls into question the veracity of this reason and the legitimacy of the prosecutor's claim it was of significance to him in striking her from the jury.

First, there is nothing at all in the record to verify the truth of the hearsay information upon which the prosecutor claimed to be relying, though the officer

named as its source was actually under subpoena returnable to the day of jury selection and could have confirmed it if it were true or really something the State was interested in. R. 215. Failing to make a record when it is possible to do so is suggestive of discrimination in and of itself. *See Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). Second, the prosecutor did not voir dire Ms. Lee or any other juror about whether they suffered from any mental illnesses and/or whether those illnesses were affecting them at the time of the trial. Tr. 239-62. Third, the prosecutor engaged in disparate treatment regarding lateness. Though several other jurors were apparently not back from lunch at the time prescribed by the Judge for their return, requiring a delay in the proceedings, Tr. 238-39 the State made no effort to have anyone except Ms. Lee removed from the jury for that shortcoming. Tr. 307-18. Fourth, to the extent that he presumed anyone who had a history of mental illness would be an unfit juror, the prosecutor was also relying on a group based trait and not the actual status of the individual juror.

Finally, and perhaps most destructive of the credibility of the claim that it was the reason for striking Ms. Lee, the State did not even raise this potentially disqualifying medical condition less than 30 minutes earlier when it was attempting to have Ms. Lee struck for cause for being late to court. Tr. 318. This sequence suggests that the prosecutor simply went looking for another excuse to rid itself of this black juror when the original one was rejected. This scenario is also borne out by the fact that immediately after the court rejected the entire premise of lateness as affecting her ability to serve,

the State's attorney requested additional time to prepare before making its peremptory challenges. Tr. 319.

Both reasons advanced for the strike of this juror are therefore clearly pretextual, and the conviction and sentence of Mr. Pitchford must be set aside because of this, as well.

Venire member 31 -- Christopher Lamont Tillmon

Mr. Tillmon's juror questionnaire, R. 799-802, shows that he was a 27 year old black male who, like two white venire members of his age or younger accepted by the State, "strongly favor[ed]" the death penalty. Appendix A at 3.[11] He had also been previously employed in law enforcement. Despite Mr. Tillmon's possession of these highly-desirable-to-the-prosecution characteristics, the prosecutor peremptorily struck him from the jury panel:

> MR. EVANS: S-3 is a black male, number 31, Christopher Lamont Tillmon. He has a brother that has been convicted of manslaughter. And considering that this is a murder case, I don't want anyone on the jury that has relatives convicted of similar offenses.
> THE COURT: What was his brother's name?
> MR. EVANS: I don't even remember his brother. He said that he had a brother convicted of manslaughter.
> THE COURT: On that jury questionnaire?
> MR. EVANS: Yes, sir.

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[11] Michael Sherman, Venire Member 17, R. 761-64; Brantley Clark, Venire Member 19, R. 417-20.

> THE COURT: I find that to be race neutral. And you can go forward.

Tr. 325.

While a juror having a relative convicted of a crime can be a legitimate non-racial reason for striking that juror, *Lockett v. State*, 517 So.2d 1346 (Miss. 1987), in this instance it was entirely pretextual because of disparate treatment by the State of two similarly situated white venire members. Appendix A at 1.[12]

This disparate treatment alone is sufficient establish pretext, but other indicia also apply here as well. Neither Mr. Tillmon nor the two comparable whites was questioned on voir dire about the convictions or whether they actually bore or did not bear any resemblance to the crime with which Mr. Pitchford was charged. Tr. 239-62. The prosecutor's actual knowledge concerning these matters was revealed on the court's inquiry to be virtually non-existent. It knew nothing about the facts of the manslaughter or even name of the brother. Tr. 325. It is abundantly clear that this strike, too, was motivated more by the race of the juror than any criminal conduct of any of his family members, and the Defendant's conviction must be reversed as a result.

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[12] Venire member 74, Jeffrey Counts, a 37 year old white male was seated as Juror 12 notwithstanding that his juror questionnaire revealed that he had an uncle who was a convicted felon. R. 479-80, 1104. Tr. 328. The State also accepted white male venire member 65, Henry Bernreuter, whose juror questionnaire disclosed not one, but two, close relatives convicted of serious felonies – a son convicted of burglary and a stepson convicted of forgery. R. 399-400. Tr. 326.

Venire Member 18 Patricia Anne Tidwell

Ms. Tidwell, a 37 year old black female who generally favored the death penalty was the prosecutor's strike S-4. R. 787-90. The district attorney gave two reasons for that strike:

> MR. EVANS: S-4 is juror number 43, a black female, Patricia Anne Tidwell. Her brother, David Tidwell, was convicted in this court of sexual battery.
>
> And her brother is now charged in a shooting case that is a pending case here in Grenada. And also, according to police officers, she is a known drug user.
>
> THE COURT: During voir dire, in fact, I made a notation on my notes about her being kin to this individual. I find that to be race neutral.

Tr. 325. Once again, the trial court conducted no further inquiry. Had it done so, it would similarly have had to conclude that the stated reasons were pretextual regarding Ms. Tidwell, as well.

Ms. Tidwell's juror questionnaire establishes that she has a brother, whose name she did not set forth in the questionnaire, who was convicted of sexual battery, R. 788. She also responded to the State's question directed only at her (the only question it asked of any juror in voir dire in any way related to the issue of convicted relatives) confirming that she had a cousin named David Tidwell. Tr. 261. Beyond that, however, the State's proffered reasons are

entirely without record support beyond the bare assertion by the DA that they exist.[13]

What the record does contain, however, is the same irrefutable evidence of disparate treatment of similarly situated whites Jeffrey Counts and Henry Bernreuter. R. 399-400, 479-80, 1104. Tr. 326, 328. Appendix A at 1. Again, as noted in the discussion of the strike of venire member Tillmon, there was no voir dire of any juror on this topic or its effect on the juror other than the single question confirming that Ms. Tidwell had a cousin named David Tidwell. These two indicia of pretext are enough to reject this as a legitimate reason for the strike.

The second purported reason, the deliberately vague allegation that Ms. Tidwell is, by hearsay from unnamed police officers, a "known drug user" would, absent the privilege accorded participants in legal proceedings, likely constitute actionable libel if disseminated without further verification from the purported police source. *See Journal Publ'g Co. v. McCullough*, 743 So.2d 352, 360 (Miss. 1999). The prosecutor does not identify the police officer source for this damaging inside information. However, there were ten Grenada County police officers under

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[13] In stating his reasons to the Court, the District Attorney appears to confound two different relatives of Ms. Tidwell with each other – a brother, name unknown, who was convicted of sexual battery, and a cousin named David Tidwell who had been charged, though not convicted, of a shooting offense. This would indicate that, as with the relative of struck venire member Mr. Tillmon, the DA probably had little or no personal knowledge about at least the closer relative, the brother, or his offense and casts further doubt on the credibility of these as actual reasons for the strike of Ms. Tidwell.

subpoena for that very day. R. 251-53. If Ms. Lee were really generally to law enforcement as an illegal drug user, it is inconceivable in a jurisdiction the size of Grenada County that none of these officers could verify that information. However, as with Captain Conley and Ms. Lee, none was called upon. There were no questions about drug use or uncharged crimes on the juror questionnaire, s no voir dire of Ms. Tidwell or of any other juror about illicit drug use or other uncharged crimes, and apparently no general investigation of the venire for these things either.[14] The totality of the circumstances demonstrates here that both reasons for striking Ms. Tidwell are also pretextual, after-the-fact justifications conjured by a prosecutor whose apparent object was to keep as many blacks off the jury as he could without getting caught under *Batson*.

Other Evidence Of Record That The State Engaged In Discriminatory Jury Selection

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[14] The fact that Ms. Lee had never been arrested or convicted of a drug offense in and of itself calls into question the reliability and veracity of the assertion that she was "known to police" as a user. This unfounded assertion is in contrast to the situation in *Booker v. State*, --- So.2d ----, 2008 WL 4665195 (Miss. 2008) where the prosecutor made very specific representations about prior criminal charges purportedly lodged against the juror and the court in which they were lodged, and the trial court held a full third step hearing on motion for new trial and decided on conflicting evidence that, despite the fact that the information turned out not to have been true, the State had legitimately relied on it. In a 5-4 decision, the majority found it must deferto that finding. However, in the instant case we have neither the specific information nor the third step inquiry. There is thus nothing to defer to, and the record establishing pretext requires reversal. *Snyder*, 128 S. Ct. at 1211.

In addition to the individual instances of disparate treatment of similar white and black venire members itemized above, the State's overall pattern of jury strikes itself demonstrates disparate treatment. The State used only seven of the 12 peremptory challenges available to it, peremptorily striking 4 of 5 (80%) black jurors on the panel but only 3 of 35 (8.5%) white ones. Tr. 321-29. This is a strike rate over 9 times greater for blacks than for whites, and is thus an affirmative demonstration of discrimination.[15]

Similarly, the State's election to forego using five of its remaining peremptories after it had dealt with all the black venire members further establishes the pretextuality of the reasons it claimed it used for striking blacks. It was during this portion of the process, when there were only white venire members remaining on the panel, that the State, despite having several peremptory strikes remaining, accepted both whites with felons in the family (Jeffrey Counts, Juror 12, R. 479-80; Henry Bernreuter, venire member 65, R. 399-400) and one of the two white jurors who had no opinion, and even affirmative doubts, about the death penalty (Nathalie Tramel, Alt. 1, R. 818, Tr. 255). In addition two of these jurors, and two others

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[15] In the employment discrimination context, this selection rate disparity would itself raise a presumption of discriminatory impact. Regulations propounded by the Equal Employment Opportunity Commission prescribe that selection criteria may be deemed discriminatory -- and require that those criteria be dispensed with unless demonstrably necessary to the job-- when the rate of selection of one race resulting from the use of the criteria is less than 4/5ths of the selection rate of the other. *See* 29 C.F.R. § 1607.4(d). The DA's rate of selecting blacks as jurors in the instant case is barely over l/10th of his rate of selecting whites.

accepted at this point, also had young children, and/or had age and/or marital status characteristics that had been cited as reasons for striking black jurors. (Tramel, Counts, Michael Curry, venire member 77, R. 497; Lisa Wilbourn, Alt. 2, R.837). Tr. 326-2. App. A.

Had the State really cared about these things, it would have been able to use its remaining strikes strategically to eliminate at least some of these jurors in favor of panel members further down the list without criminally convicted relatives and with opinions that either generally or strongly favored the death penalty. Tr. 326-29; R. 1107-09 (judge's strike list); 395-98; 471-74; 515-18; 631-34; 715-18 (juror questionnaires of available venire members not reached).

The totality of the circumstances here overwhelmingly demonstrates that the State's peremptory challenges of black jurors were exercised in violation of the Equal Protection guarantees made to both the Defendant and to the rejected venire members by the United States Constitution, and require reversal here. *Powers v. Ohio*, 499 U.S. 400 (1991).

B. *The Trial Court Otherwise Deprived Defendant Of A Jury Comprised As Required By The Sixth And Fourteenth Amendments*

In addition to objecting to the State's racially discriminatory use of peremptories the Defendant also timely objected to exclusions because of the *Witherspoon* death qualification process as a violation of both the fair cross section and equal protection requirements of the United States Constitution. The

trial court erroneously denied those claims as well. Tr. 315-19.

Racial Discrimination as a Result of Death-Qualification Process

At the conclusion of voir dire, the trial court excluded 36 of the 96 otherwise qualified prospective jurors from the jury panel on the grounds that they were philosophically unable to consider imposing the death penalty in the event of conviction. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). R. 307-11. This exclusion disproportionately eliminated black venire members from serving on the trial jury, removing 30 of the 35 (87%) otherwise qualified blacks but only 6 (one of them Hispanic) of the 61 (under 10%) of the otherwise qualified whites. Prior to the elimination of these "*Witherspoon*-excludables," the venire had been 36% African-American, statistically similar the demographics of the general population of Grenada County. After this process, and some additional cause based excusals (entirely of whites) the proportion of blacks on this panel was reduced almost threefold, to less than 13% of a panel in a county that was over 40% African-American. R. 1104-09.

In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court held that the exclusion of people who could not consider the death penalty from trial juries considering a capital defendant's guilt did not, in and of itself, violate the Sixth Amendment's "fair cross section" requirement. *Id.* at 175. However, it did so expressly because such exclusion was NOT, under the facts of that case, the same as excluding people on the

basis of immutable characteristics such as race, ethnicity or gender. *Lockhart*, 476 U.S. at 176.[16]

Lockhart does not dispose of, or even address, the issue of whether death qualification under *Witherspoon* which *does* result in disproportionate racial, gender or other ethnic exclusion from of juries or jury venires was permissible. *Lockhart*, 476 U.S. at 176 -177. The instant case, on the other hand, clearly presents this issue. First, the statistically significant disproportionate exclusion of black jurors as a result of death qualification in this case cannot be denied, and in itself establishes a prima facie case that the Equal Protection Clause has been violated. *Castaneda*, 430 U.S. at 495-97 and nn. 15-17. Second, this Court has already condemned this prosecutor for trying to "arbitrarily skew" the racial composition of trial juries, and singled out his use of information elicited as a result of *Witherspoon*-related voir dire as being a troubling and suspect component of that effort. *State v. Flowers*, (*Flowers III*), 947 So. 2d 910, 921-28 (Miss. 2007). The conviction must be reversed because it was tainted by this racial discrimination as well.

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[16] In fact, *Lockhart* expressly reaffirmed the unconstitutionality, under both the Sixth and Fourteenth Amendment, of practices which disproportionately remove people from jury participation on the basis of race, sex, ethnicity or other immutable characteristics. 476 U.S. at 175 (citing *Peters v. Kiff*, 407 U.S. 493 (1972) (equal protection); *Duren v. Missouri*, 439 U.S. 357, 363-364 (1979) (fair cross section); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (same); *Castaneda v. Partida*, 430 U.S. 482 (1977) (affirming the validity of statistical evidence of disproportionate exclusion to establish an equal protection violation)).

Improper Removal of Jurors Qualified to Serve Under Witherspoon/Witt

Even assuming, *per arguendo*, that *Witherspoon* death qualification is permissible under the demographic circumstances of the instant case, four of the 36 jurors who were excluded under that process actually did not meet the requirements for such removal.[17]

Like the 32 panel members who did meet the requirements of *Witherspoon* for excusal, each of these individuals expressed scruples about the death penalty on his or her juror questionnaire and confirmed those scruples in general voir dire on the subject that. Tr. 225-28; 247-51. Unlike the other 32 scrupled jurors, however, these four individuals qualified their responses when further questioning put the determination they were to make in the legally required context, *i.e.* that they be able consider both aggravating and mitigating evidence and both available sentencing options, *Witherspoon v. Illinois*, 391 U.S. 510 (1968), *Morgan v. Illinois*, 504 U.S. 719 (1992)).

Both stated they could give consideration to both legally permissible sentences in light of the evidence of aggravation and mitigation before them. Tr. 266-76. *See Gray v. Mississippi*, 481 U.S. 648, 653 (1987) (finding that "[a]lthough the voir dire of member Bounds was somewhat confused, she ultimately

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[17] The four venire members and the record containing their relevant information are as follows: #3 Rodell Crawford, R. Tr. 247; 266-67; 300-01; #5 Nadine Coleman, R. 478 , Tr. 225, 248, 268, 301-02; #15 Lovie Willis, R. 846 Tr. 225, 249, 269, 302-03; #45 Dora Wesley, R. 830 Tr. 228,251, 275-76, 302-03.

stated that she could consider the death penalty in an appropriate case and the judge concluded that Bounds was capable of voting to impose it."); *accord Russell v. State*, 670 So. 2d 816, 824 (Miss. 1995) (panel member was qualified to serve as juror based on indication in the record that he would impose the death penalty "if the circumstances were bad enough.").

The trial judge undertook individual voir dire of these four panel members and re-elicited their earlier responses, but did so only when, in contravention of the requirements of *Morgan*, and over the objection of the defendant, the judge committed legal error by isolating the query from its proper context and asked only about considering the death penalty standing alone. Tr. 300-03; R. Supp. 2 1263(A).

Based on their answers to the only legally proper questions asked them concerning their ability to comply with the law regarding imposition of the death penalty, these individuals were qualified to serve as jurors under *Witherspoon* and its progeny. A death sentence must vacated where the trial court erroneously excludes even one juror who had conscientious scruples against the death penalty but was still eligible to serve under *Witherspoon* and its progeny. *Gray v. Mississippi*, 481 U.S. 648, 659 (1987) (reaffirming the *per se* rule in *Davis v. Georgia*, 429 U.S. 122 (1976) (*per curiam*)). Under *Gray* and *Davis*, Mr. Pitchford's death sentence must be vacated based on the erroneous removal of any one of these panel members.

C. *The Trial Court Erred In Precluding The Defense From Questioning Prospective Jurors*

Concerning Their Ability To Consider Mitigation Evidence

In a capital case, prospective jurors must be examined not only for biases or knowledge of the case, the parties or the witnesses pertinent to the specific facts of the case, but must also be questioned regarding their views on the death penalty, and whether those views would interfere with their being able to fairly consider guilt or innocence and/or to consider everything needed to weigh the sentence options before them *Witherspoon*, 391 U.S. *510*, *Morgan*, 504 U.S. 719.

Full voir dire is the key to the parties being able to identify and make cause challenges to jurors who cannot comply with their oaths and consider mitigating circumstances:

> Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

Morgan, 504 U.S. at 733-34 (emphasis in the original).

This includes within it the right to query the jurors about their understanding of mitigating circumstances that might arise in the particular case and their ability to balance those against aggravating circumstances that are expected to be shown. *See, e.g.*, *Foster v. State*, 639 So. 2d 1263, 1275-76 (Miss. 1994) (jurors "properly voir dired on considering the facts and following the law including the critical issue of

being able to balance aggravators against mitigators in considering a death penalty.")

In the instant case, the defense attempted to voir dire certain panel members about their understanding of mitigation evidence and that balancing process. It had previously raised its right to do so by way of pretrial motion, and the trial court reserved ruling pending objection by the State at trial. Tr. 74-78. R. 979-81. At trial, the defense merely asked if the juror understood that mitigation went "to who that person was before your met them" and alluded to Mr. Pitchford's age. The State objected, Tr. 285, notwithstanding that age is a statutory mitigating circumstance on which it was going to ask that the jury be instructed, Tr. 726-38; 768-77. R. 1206. The Court sustained the objection, ruling that "[y]ou can ask them if they would consider mitigating factors or would they be automatically disposed to the death penalty" but restricting any inquiry into any "specifics" beyond that. Tr. 286. The Defense had no choice but to comply for the entire balance of its voir dire. Tr. 297-97.

This was clearly error. The questions being asked by defense counsel, went directly to the inquiry the Supreme Court contemplated would be necessary for the parties and a trial court to carry out their duties in empanelling a fair jury within the parameters of *Witherspoon* and *Morgan.* As this Court has noted, even though it would be inappropriate to elicit in voir dire a commitment from jurors to vote one way or the other if certain hypothetical facts are proven, that restriction cannot preclude examination of jurors by attorneys "to probe the prejudices of the prospective jurors to the end that all will understand the jurors'

thoughts on matters directly related to the issues to be tried." *West v. State*, 553 So. 2d 8, 22 (Miss. 1989). The seating of even one juror who had not been vetted for his or her ability to fairly consider sentences other than death would vitiate the sentence; this error therefore requires reversal of the sentence in this matter. *Morgan*, 504 U.S. at 729 ("If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.").

II. THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A FULL, COMPLETE AND ADEQUATELY DEVELOPED DEFENSE AND TO HAVE HIS COUNSEL RENDER CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN DOING SO

For over seventy years, the trial courts have been given the duty to assure appointment of capital counsel to the indigent "at such a time or under such circumstances as to [not] preclude the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U.S. 45, 71 (1932). *See also Strickland v. Washington*, 466 U.S. 668 (1984). Where the death penalty is involved even more stringent obligations of investigation and preparation are imposed. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (adopting ABA Guidelines); *Williams v. Taylor*, 529 U.S. 362 (2000); *Smith v. Dretke*, 422 F.3d 269, 280 (5th Cir. 2005) (granting COA on ineffectiveness claim for failure to investigate criminal and penal history of client); *Anderson v. Johnson*, 338 F.3d 382, 392-93 (5th Cir. 2003) (failure to conduct independent investigation renders counsel ineffective); *Lockett v.*

Anderson, 230 F3d 695 (5th Cir. 2000) (two Mississippi death sentences reversed where trial counsel failed to follow investigative leads, gather records and present these to competent experts).

This includes the right to have adequate time for the defense to prepare and reasonable accommodation of the needs of the myriad and distinctive witnesses whose testimony is essential to an adequate defense. In the instant matter, the defense attorney endeavored to obtain all these things from the trial court and was refused them. This, as counsel told the trial court it would when he sought these accommodations, Tr. 46, deprived Terry Pitchford of effective assistance of counsel and requires reversal here.

A. *The Trial Court Erred In Failing To Grant A Continuance Of The Trial*

Whether or not to grant a continuance is within the discretion of the trial court, and it is reviewed on appeal under an abuse of discretion standard. *Stack v. State*, 860 So.2d 687, 691-92 (Miss. 2003). However, even where discretion is the standard, in a capital case, the required heightened scrutiny must still be applied, and the discretion examined in that light, "with all genuine doubts to be resolved in favor of the accused." *Walker* 913 So.2d at 216. Where, under the standards of *Wiggins* what is needed by the attorney is additional time to do what the constitution requires of him to mount an effective defense, it is an abuse of discretion to refuse him that time. *See, e.g. Edge v. State*, 393 So.2d 1337, 1342 (Miss.1981); *Thornton v. State*, 369 So.2d 505, 506 (Miss. 1979); *Lambert v. State*, 654 So.2d 17 (Miss. 1995).

Defendant's continuance request in this matter was made in writing in advance of the trial date and included, as required, a clear and specific, statement of both the factual and legal grounds and the facts for the request. *Stack*, 860 So.2d at 691-92 (upholding denial of continuance because the request was made only ore tenus on morning of trial). The written request was also supported by affidavits concerning those grounds. R. 867-954; 1045-85. At the date which the trial court made available for hearing pretrial motions, the Defendant and reiterated these grounds, Tr. 32-38, expressly representing to the trial court that it would render him ineffective under constitutional standards to have to proceed on the date set for trial. Tr. 46. R.E. Tab 4. He renewed this motion on the morning of trial. Tr. 339 and cited the denial as grounds for a new trial in his motions for that relief as required to preserve this issue for appellate review. R. 1249-52, 1261-63; Supp. R. 2 1251 (A) and (B), 1263 (A), (B), (C).

The ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (February, 2003) ("ABA Guidelines") have been adopted as the standards for representation in capital cases. *Wiggins*, 539 U.S. at 524-25.[18] Hence, they are

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[18] The ABA also addresses the requisites for capital defense in other guidelines:

> [t]he workload demands of capital cases are unique: the duty to investigate, prepare and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea.

ABA, *The Ten Principles Of A Public Defense Delivery System*, February 2002, citing *Federal Death Penalty Cases:*

not merely aspirational, but are constitutionally required to be followed. Relevant portions of the substantive requirements of these Guidelines were also included in the record on the continuance request. R. 925-54.

As the record on the continuance motion showed, almost the entire burden of putting in the required pretrial preparation attorney time in Mr. Pitchford's case fell to Mr. Carter, whose schedule did not permit him to follow the requirements of these guidelines and complete the extensive investigation into matters relevant to mitigation of sentence in the event the defendant is convicted and found eligible to receive the death penalty, even where there are genuine defenses to guilt and/or to that eligibility which must also be investigated and prepared for presentation to the jury. *See e.g. Ross v. State*, 954 So.2d 968, 992-92 (Miss. 2007).[19]

Recommendations Concerning the Cost and Quality of Defense Representation (Judicial Conference of the United States, 1998). *See also ABA Standards For Criminal Justice: Providing Defense Services*, Standard 5-5.3cmt. (3d ed. 1992). *See also Model Code Of Professional Responsibility*, EC 2-30 (1997); *Model Rules Of Professional Conduct Rule* 1.3 cmt. 1 (1997) ("A lawyer's workload should be controlled so that each matter can be handled adequately.").

[19] Ray Baum, the local counsel appointed several months before Mr. Carter was and compensated by Grenada County was, according to his Itemized Statement, able to devote less than 71 hours to the case prior to trial, perhaps because the hourly compensation was so low. R. 1253-57. The conflicting obligations of Mr. Carter, were set forth in detail in the continuance motion, which included a timeline showing how the ten other cases, nine preexisting his appointment in this one, in which Mr. Carter had

Affidavits of two experts in the investigation and preparation of death penalty defense, one of them a highly experienced Mississippi practitioner, explained in detail exactly how the circumstances of defense counsel in the case *sub judice* prevented him from fulfilling the minimum standards of investigation and preparation he owed Mr. Pitchford. R. 1067-85. Mr. Carter also, in writing and at the motion hearing on the continuance, described in specific detail what he and his team needed to do to prepare for both phases of the trial and why they had not been able to do it. R. 867-75, 1045-85, Tr. 35-38. R.E. Tab 4.

The trial court disregarded, and even disparaged, this unrefuted evidence, often interrupting counsel's argument regarding the request to do so. Tr. 38-39, 42-45. R.E. Tab 4. Instead, the trial court focused on its own desire for speed, finding that there had already been too many continuances (all granted prior to Mr. Carter's initial appearance in the matter by local counsel, and not by Mr. Carter), Tr. 49-54, R.E. Tab 4, and even going so far as to regard the request for time to complete a mitigation investigation as "in effect a concession that there is not much chance of him being found innocent" rather than the process that must precede making any decisions with respect to strategy or concessions of any kind. Tr. 50. R.E. Tab 4.[20] This was error, and renders the denial of the

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obligations from the time of his appointment affected his ability to prepare and supported granting the continuance. R. 1047-48.

[20] Both this Court and the U.S. Supreme Court have made investigation *before* determining what evidence would or would not be useful in mitigation the keystone of effectiveness, *Rompilla* 545 U.S. 374; *Ross* v. *State*, 954 So.2d 968, 992-93; *Wiggins*, 539 U.S. 510. Mr. Carter thus appropriately focused his

continuance a manifest injustice and a denial of defendant's rights to effective assistance of counsel under the Sixth Amendment, and his due process right to fundamental fairness and to present the defense of his choice.[21]

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factual explication of the need for the continuance on why, for reasons unrelated to his or his team's diligence, this investigation had not yet been completed. Tr. 32-34, Supp. Tr. 25. The trial court, however premised its ruling on ultimate conclusions about whether or not the as yet uncompleted investigation would yield witnesses that were of benefit to a theory of mitigation, at one point disparaging a potential witness from whom he had no other information other than that he had been retained by the defense as a non-credible "hired gun." Tr. 38-45, 53. It went so far as to affirmatively finding opinions of the Mississippi State Hospital mental health evaluation regarding things largely irrelevant to the actual mitigation theories being considered as sufficient for presentation of mitigation, despite the fact that Mr. Carter had specifically disclosed and was planning to call a psychiatrist who had evaluated Mr. Pitchford for other purposes who was going to testify to things that the State hospital people could not. Tr. 40-42, R.E. Tab 4, Supp. Tr. 19-20; 27; 30-31; 34.

[21] The United States Supreme Court has observed that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964) (citing *Chandler v. Fretag*, 348 U.S. 3(1954)). The "denial of a motion for continuance is fundamentally unfair when it results in a denial of a defendant's constitutional rights." *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986). *See also Bennett v. Scroggy*, 793 F.2d 772, 774 (6th Cir. 1986) citing, *inter alia*, *Washington v. Texas*, 388 U.S. 14, 19 (1967) (relying on the sixth amendment and due process of law). *Nilva v. United States*, 352 U.S. 385 (1957). *See also Morris v. Slappy*, 461 U.S. 1,11 (1983) ("an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel").

The actual adverse effect on the guilt phase, and resulting prejudice to the Defendant as a result of the denial of the continuance comes in the cumulative effect of numerous lesser

weaknesses that an attorney would not have if he had not been required by erroneous trial court rulings to make hobson's choices about how to allocate his preparation. *See Moore v. Johnson*, 194 F.3d 586, 619-20 (5th Cir. 1999) (addressing cumulative effect in context of attorney-caused errors at trial).

Because these weaknesses are product of trial court error in denying the defendant's counsel the required time to prepare, they cannot be deemed informed strategic decisions that would vitiate a finding of ineffectiveness if their genesis were soley with counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Any "strategy' that may have entered into these decisions was generated in a context where the lack of time to complete investigation and preparation was created by the trial court's erroneous refusal to accord that time, and to the extent it prejudiced the defendant, requires reversal. *Edge v. State*, 393 So.2d 1337, 1342 (Miss.1981); *Thornton v. State*, 369 So.2d 505, 506 (Miss.1979); *Lambert v. State*, 654 So.2d 17 (Miss. 1995). Some nonexclusive examples illustrate the problem.

Despite having announced ready prior to the commencement of jury selection at 9:00 a.m. the first day of trial, Mr. Carter had to inform the court that he was not fully prepared to begin his opening at 5:00 p.m. that day and renewed his motion for continuance. The trial court did not accord that announcement the courtesy (or possibly the constitutionally mandated

deference to a defense attorney's announcement of his inability to proceed at a particular time, *Edge*, 393 So. 2d at 1342) of recessing the case till the next morning, even though it would have added no more than 20 minutes to the next day's proceedings. Tr. 337, 339. This was in fact one of many times the trial court refused to give defense counsel small accomodations requested in order to deal with the exigencies that the denial of the continuance had placed them under.[22]

Another toll of the denial of continuance was evident at the guilt-phase jury instruction conference. Towards the start of that conference, defense counsel was forced to admit that because of the time pressure the court had put him under, he might have filed duplicate instructions on some points, but "I can't say my mind is working well enough to know." Tr. 594. Instead of working with him in light of what had to have been a painful admission, however, the trial

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[22] THE COURT: I don't know with Mr. Carter having had this case for almost a year why he can't be ready for opening statements on the day that the trial is scheduled to commence. So I don't find that motion in the least bit to be well taken. And we will have opening statements, and that will be all we will do until we resume in the morning." Tr. 339. Actually, Mr. Carter had only been appointed and entered his appearance in the matter *sub judice* in June, 2005, somewhat less than 8 months earlier. Other defense requests for even a few minutes to gather counsel's thoughts and comply with the trial court's requests were similarly rejected. *See*, *e.g.* Tr. 581 (break at 11:30 before commencing defense case) 590, 610 (giving only 5 minutes during instruction conference to review case found by court over lunch hour on which court was relying to refuse previously granted instructions; another 5 prepare instruction to meet one hastily prepared by the State), 704-05 (according only 10 of 15 minutes requested to determine final order and content of mitigation testimony)

court became increasingly annoyed and pressuring Tr. 604-05. When the defense requested time to respond to a state's instruction about to be hastily drafted, the trial court unleashed an unnecessary torrent of chastisement on him for having not been sufficiently diligent to avoid duplicated or miscaptioned instruction. Tr. 611-12.

Performance by defense counsel was also evidently affected during testimony. When questioning his witnesses, the prosecutor made egregious use of leading questions to "coach" the snitches and the co-participants in a separately indicted conspiracy case into testifying to his satisfaction and to make sure and to present the defendant's statements in a way that elided the information from them that the jury needed to assess whether defendant's degree of participation in the crime itself. Very few objections to this were made by the defendant, and those that were either overruled summarily or simply ignored. Tr. 502-09; 522-25, 530-31; 564 -66, 571-73.

The impediment to preparation of the penalty phase by the lack of a continuance was even more extreme. Because of the short time frame, no witnesses from Mr. Pitchford's paternal family in California were able to be interviewed to possibly testify from a more detached perspective than local family members and add to the jury's understanding of who that father was, and why his death was of such significance to Terry. Tr. 37-38.[23]

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[23] Contrary to the trial court's dismissive assumptions that their lack of connection with Mr. Pitchford would make them irrelevant, Tr. 38-39, they could offer insight into who their father was from a more objective point of view than people who

The most significant restriction, however, was the inability to present the mental health testimony needed to explain the dynamics of that relationship, as well as other physical and psychological traumas operating on Terry during the nine years between his father's death and the murder of which the jury had just convicted him. Tr. 40-42, Supp. Tr. 19-20; 27; 30-31; 33-34.[24]

Failure to fully investigate and develop such evidence where its presentation is warranted is clearly ineffectiveness in a capital case, whether it is failure of the lawyer to know to do it or of the trial court in giving a lawyer who does know how to do it

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were emotionally invested in Terry, his mother and his full siblings in Mississippi, who did testify, but who were more subject to impeachment because of that emotional investment. Tr. 695-720. Although some teachers who were familiar with Terry's father's presence in Terry's life before his death were able to testify from a slightly more objective perspective, they were not able to share the emotional realities of what the man was like from a son or daughter's perspective. Tr. 673-85.

[24] Mr. Pitchford had been examined by Dr. Rahn K. Bailey regarding how these issues had affected him psychologically, and the doctor provided a preliminary report containing information which the defense would have presented to the jury if Dr. Bailey had been available to testify, Supp. Tr. 30-31, 33-34. However, because the report from the examination at the state hospital whose shortcomings Dr. Bailey was needed to supplement was not available until February 2, 2006, Dr. Bailey had had to make a very hasty visit to Mississippi the week before the trial to do his examination of the defendant. The exigencies of that trip prevented putting him under subpoena. Supp. Tr. 27, 33-34. Nor, even if nor could any subpoena issued that recently have trumped any pre-existing subpoenas to which Dr. Bailey was already subject in other courts, which is what ultimately prevented his appearance at the trial. (See Argument II B., infra).

the time necessary to do so. *See Wiggins*, 539 U.S. at 523-25; *Ross* 954 So.2d at 1006.

Moreover, the too-short time frame that the trial court had erroneously placed on the defense also forced defense counsel to focus more narrowly than he should have done, and to tradeoffs in what he could and could not attend to that he would not have had to make had he been accorded the time he needed to fully prepare, particularly in dealing with the unavaiblility of his penalty phase expert. Supp. Tr. 29, 31, 34.[25] Again, because these errors in strategy or performace were forced upon counsel by the rulings of the trial court, they do not vitiate the ineffectiveness that resulted. Because those rulings worked a manifest injustice on the defendant, the conviction and sentence must be reversed. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Morris v. Slappy*, 461 U.S. 1, 11 (1983); *Lambert v. State*, 654 So.2d 17 (Miss. 1995).

B. *The Trial Court Erred In Failing To Grant A Delay Of The Sentencing Proceedings to Permit a Necessary Mitigation Witness to Be Present to Testify*

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[25] Q. And why on the morning, on the record, did you not seek a continuance?

A. [Mr. Carter] :Because I did not believe I would get one. And the second phase of these trials is real important. It takes a toll on me. And I must admit that in the second phase, I might even have tunnel vision. I might be zeroed in on calling witnesses and, and what I plan to ask them and not much else going on around me like to get much attention from me I hate to say.

Supp. Tr. 31.

Although there was no express request for a continuance made at the time, Supp. Tr. 61, the record clearly establishes that after court recessed for the day on February 8, 2006, the trial court was made fully aware that the Defendant desired to present the testimony of Dr. Rahn Bailey in support of its mitigation at the penalty phase and that he would be unavailable on February 9, 2006 due to an obligation in another court that day that would not be released from that subpoena by the judge of that court. Supp. Tr. 39-40, 61. Despite that the conflict was not likely to last beyond the single day, the trial court nonetheless ordered that the penalty phase commence on the day the witness was unavailable, and in fact proceeded on that day.

Because this decision caused prejudice to Mr. Pitchford's penalty phase defense, it was plain error for the trial court not to recess the proceedings in the instant matter to permit Dr. Bailey to be available to testify. *Porter v. State*, 732 So.2d 899, 902-05 (Miss. 1999) (violations of fundamental rights are also subject to plain error review); *Grubb v. State*, 584 So.2d 786, 789 (Miss. 1991) (plain error will allow an appellate court to address an issue not raised at trial if the record shows that error did occur and the substantive rights of the accused were violated). In a capital case such review may be undertaken even if it would not be appropriate where the death penalty is not involved. *Flowers 1*,773 So 2d at 326.

In this case, the harm was extreme. Dr. Bailey was the only witness who could address the issues he did. Tr. 30. His testimony was about matters not addressed in the hastily done examination by the Mississippi State Hospital ("Whitfield") which had

been ordered in September 2005, but not done until January 2006, or reported on till January 26, less than two weeks before the trial setting. R. 1023.[26] Dr. Bailey, on the other hand, focussed his evaluation on non-statutory mitigation factors that had been noted in passing by the doctors at Whitfield, but which they had not investigated or made specific findings on how these things had affected Mr. Pitchford; nor would they have been expected to do so, since that was not part of the order upon which they acted.[27]

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[26] The charge to Whitfield in September 2005, when the order was entered, was to examine Mr. Pitchford on issues of competency, sanity and ability to waive his constitutional rights pertinent to the guilt phase, and to make findings on only three mitigation- relevant issues:

> to be tested to determine whether or not he is considered retarded under the standards set forth by the Atkins case and to determine any mitigating circumstances; especially whether the offense with which the defendant is charged was committed while he was under the influence of extreme mental or emotional disturbance; and whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

R. 177-78 (Order for Psychiatric Examination); R. 1023-24 (Whitfield Report). By the time the examination was conducted, the mitigation investigation that had been done over those four months indicated that the items evaluated by Whitfield would likely not be components of an effective mitigation strategy. The State hospital also made findings related to those irrelevant matters that might, nonetheless, be employed by the State against him. All this was made known to the trial court during the discussion of the pretrial motion for continuance. Tr. 42-43.

[27] The report from Whitfield also identified certain areas of "non-statutory mitigation" that were more likely to be relevant, including a "history of head injuries," the relationship between Mr. Pitchford and his deceased father, and reported substance

In light of this, the defense, having been denied the time it requested to complete a full forensic mental re-evaluation in light of the information in the Whitfield report and time to complete investigation that would permit this to happen, nonetheless went forward and retained the expert to do as much of the reevaluation as he could on the areas identified but not evaluated by Whitfield. When he was unavailable, there was no one who could present the testimony he did. Tr. 722-23; Supp. Tr. 30-31, 33-34.[28]

A defendant has the right to present expert testimony in support of his case. He is not limited to using the same experts as are available to the State if he wishes to address a subject matter the other experts cannot offer the testimony supportive of his

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abuse and violence issues with the stepfather who had replaced him. R. 1025. Supp. Tr. 33. No further evaluation or expert opinion was, however, offered regarding why or how any of these reported factors affected Mr. Pitchford or related to his life history. R. 177-78. Dr. Bailey on the other hand had been retained specifically to follow through with these things. Supp. Tr. 30-31, 33-34

[28] On February 8, the trial court announced it would be proceeding with the penalty phase the next day. The record in open court on February 9 established that Dr. Bailey remained unavailable and was the only mental health expert that the defendant wished to call. Tr. 722-23. The trial judge recalled an off-record conversation earlier that day in which the defense had said that it were not going to call Dr. Bailey, Tr. 43. Defense counsel had no recollection of discussing the matter off record at all other than the night before, but reiterated that he did not call Dr. Bailey or pursue anything further regarding him on February 9 because of his belief that the decision of the trial court the evening before not to delay the penalty phase was a final decision that he would have to work around, and the "tunnel vision" of preparing the witnesses he did have. Tr. 31.

theory of defense. *Richardson v. State*, 767 So.2d 195, 199 (Miss. 2000) (finding that defendant is entitled to have testing done where there forensic testing by the defense "could significantly aid the defense.") *See also Harri*son *v. State*, 635 So.2d 894, 900-02 (Miss. 1994) (reversing because defense not accorded right to obtain expert odontologist or pathologist to meet testimony by prosecution's experts in those fields; fact that state's experts testimony was adverse to the defense sufficient to require allowing such assistance); *Polk v. State*, 612 So.2d 381, 393-94 (Miss.1992) (right to obtain independent analysis of DNA results implicating the defendant in the crime). Where time to obtain and present this evidence is required, it must be accorded to the defendant. *Jenkins v. State*, 607 So.2d 1171, 1178 (Miss. 1992) (citing *Acevedo v. State*, 467 So.2d 220, 224 (Miss. 1985) and *West v. State*, 553 So.2d 8 (Miss. 1989) and reversing for failure to grant a continuance where defense counsel announced that "he was not prepared to meet the expert testimony that would be presented by these witnesses").

It is not optional for the defense to develop and, where the evidence is useful, present this sort of mitigation testimony in a capital case where in the informed strategic judgment of the defense it would be useful to do so, as was done in the instant case by retaining Dr. Bailey. *See Wiggins*, 539 U.S. at 523-25; *Ross*, 954 So.2d at 1006. Hence, the trial court's decision not to accommodate the availability of Dr. Bailey, he only expert witness who could present the necessary evidence was plain error that must be corrected by this Court. *Flowers v. State*, 842 So.2d 531 (Miss. 2003) (*Flowers II*) (citing heightened

scrutiny standard and reversing conviction for numerous culpability phase errors, including some reviewed under plain error standard).

III. PROSECUTORIAL MISCONDUCT AND THE TRIAL COURT'S FAILURE TO CURB IT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

Prosecutorial misconduct violates a criminal Defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to United States Constitution and Article 3, §§ 14, 26, and 28 of the Mississippi Constitution, *Berger v. United States*, 295 U.S. 78 (1935). Where it prejudices the outcome of the case, it requires reversal of any conviction obtained. *See Brown v. State*, 986 So.2d 270 (Miss. 2008); *State v. Flowers*, 842 So. 2d 531, 538 (Miss. 2003) ("*Flowers II*"); *State v. Flowers*, 773 So. 2d 309, 317 (Miss. 2000) ("*Flowers I*"); *Griffin v. State*, 557 So.2d 542, 552-53 (Miss. 1990); *Hickson v. State*, 472 So.2d 379, 384 (Miss. 1985).

Secure in his belief that "[w]e have dealt with the Court long enough that we pretty well anticipate what the Court is going to let us do," Tr. 56, the prosecution obtained the conviction and condemnation to death of Terry Pitchford by doing a great many things that the Constitution of the United States, and this Court, do not in fact or law permit him to do.

In the instant case, these included knowingly violating the rules of evidence to present inadmissible or misleading evidence for the purpose of enflaming the jury, and making improper appeals to the jury at both phases of the trial. *See e.g. Flowers I*, 773 So 2d at 326; *Brown* 986 So.2d at 276-77 (agreeing that when such arguments are made, it can become the

responsibility of the trial judge to step in and remedy it him or herself even without an objection from the defense) (citing *Gray v. State*, 487 So.2d 1304, 1312 (Miss.1986); *Griffin v. State*, 292 So.2d 159, 163 (Miss. 1974)).

To the extent that there were not contemporaneous objections, the offenses were brought to the trial court's attention by way of Motion for New Trial R. 1249-52, 1261-63; Supp. R. 2 1251 (A) and (B), 1263 (A), (B), (C), which preserves at least the argument errors for review. *Ahmad v. State*, 603 So. 2d 843, 847 (Miss. 1992). Moreover, the conduct was harmful enough that plain error review is warranted here. *Flowers I*, 773 So 2d at 326, *Mickell v. State*, 735 So. 2d 1031, 1035 (Miss. 1999).

Prosecutorial Misconduct –Culpability Phase

Taking full advantage of the fact that defense counsel were still playing catch-up in preparation due to the denial of the continuance, the prosecution engaged in several kinds of misconduct while examining witnesses in the guilt phase. It used egregious leading or near leading of its own witnesses; such objections to this practice as were interposed were overruled or ignored by the trial court. Tr. 379, 390-92, 415-18, 453, 473, 530, 565. It led its experts in order to elicit opinions that would not otherwise have been obtained, and some of which were improper. *See, e.g.*, Tr. 415-17, 400-01, 411 (Dr. Hayne); 543 (CSI Claire Nethery). It coached its informant and co-participant witnesses not only with such questions but also by feeding them additional information to bolster their shaky credibility, *See, e.g.* Tr. 530, 522-25, 531 (co-participant Quincy Bullins); 564-65, 567

(informant Dantron Mitchell); 430, 447-48 (informant James Hathcock), 453-54 (co-participant DeMarcusWestmoreland). It did similar things with other witnesses who departed in any way from what was obviously the scripted version of events the prosecutor wanted to argue to the jury. *See, e.g.* 376, 378-79, 390-92; 473.

It moved from merely leading into the realm of having the prosecutor being, effectively, the person offering the testimony, during its examination of the officers who took statements from the defendant. Tr. 502-510; 570-576. Faced as it was with six different statements from a tearful, frightened defendant, who at no time, even when inculpating himself, ever offered any support for the State's theory that he had fired the fatal shots, the prosecutor did not content himself with letting the officers recount what was said by the defendant. Instead, he interjected his summary of what the statements said, including things which had not actually been said in the statement as if they had been. *See, e.g.* Tr. 502, 505, 507-08, 509, 571, 573.

The arguments by the State to the jury rested in large part on facts not in evidence, or on inferences and implications too attenuated from what facts were in evidence to be proper. This is reversible error when those statements are prejudicial, and can be reviewed as a matter of plain error. *Flowers I*, 773 So.2d at 329-30. *See also Randall v. State*, 806 So.2d 185, 212-14 (Miss.2001) (reversing and remanding for new trial in death penalty appeal partly because the prosecutor attempted to infer guilt from the sudden absence of gunpowder residue when absence of gunpowder residue was not in evidence); *Sheppard v. State*, 111 So.2d 659, 661 (Miss. 2000) (reversing conviction);

West v. State, 485 So.2d 681, 689-90 (1985) (reversing and remanding for new trial in death penalty appeal partly because the prosecutor inappropriately implied in closing argument the defendant had threatened teenaged witnesses); *Augustine v. State*, 201 Miss. 277, 28 So.2d 243, 244-47 (1946) (reversing and remanding for new trial partly because the prosecutor made references to facts not on the record, including, but not limited to, references to a gun used to commit the crime when there was no evidence of a gun on the record).

The most egregious misconduct occurred in the final closing, where there were two separate uses of facts not in evidence to persuade the jury that Pitchford fired the fatal shots. First, attempting to bolster the shaky credibility of Quincy Bullins, who claimed that he had attempted a robbery a week earlier at the behest of Mr. Pitchford with 22 pistol furnished by him, the prosecutor argued that the detective in charge of the investigation had testified that Mr. Bullins had voluntarily turned himself in the morning of the murder in order to admit his participation in the earlier attempt. Tr.648. In fact, the officer stated only that he had "talked to" Quincy Bullins that morning in company with the two men who had prevented him from completing his own robbery, expressly without suggesting how he came to interview him, but suggesting, if anything, that Bullins' attendance was affirmatively involuntary. Tr. 482, 512. This argument clearly overstepped any right

to argue inferences and was well into the territory of extra-record, and likely non-existent, facts.[29]

> The prosecutor further improperly argued as follows:
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> [In] two different statements [Pitchford] admitted that him and Eric went in the store. They robbed Mr. Britt, and they killed him. They both shot him. It doesn't matter which one shot with which gun. That hasn't got anything to do with this case. *I think because it was his 22*, *he probably had it but that doesn't matter.* All we have got to prove is that they went in that store together to rob it and they killed him.

Tr. 649. This argument is improper for several reasons. First, it contains a statement unsupported by the evidence, at least as that evidence was otherwise being argued. The assertion that Mr. Pitchford "probably" had the 22 that fired the lethal shot has absolutely no evidentiary basis as long as the State is also asserting that there were two people involved in the shooting, as its argument to this jury, and its

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[29] Quincy's testimony establishes without contradiction that that far from "owning up" voluntarily to police that he had tried to rob the store the previous week, Quincy was "reluctant" to admit his involvement. Tr. 528. He went to the police only after two people who saw him en route to rob the store the week before and thwarted the earlier attempt forced him to do so by going there themselves to tell what they had seen. Tr. 525, 627. These men identified only Quincy as a robber. Tr. 583-88. Far from coming forward as a repentant wrongdoer trying to come clean, Quincy came forward only because he was implicated by third parties, and successfully prevented his own arrest for the November 7 murder by claiming Pitchford was the force behind the October attempt, not himself.

indictment of a second person for this crime, clearly establish. The only evidence concerning who had what gun under that scenario is Pitchford's statement that the co-indictee in that crime had it Tr. 573.[30]

Second, the argument does not even purport to be based on evidence, but is based on the prosecutor's personal opinion which, in this instance has the effect of being an improper "vouching" for otherwise exceedingly incredible snitch witnesses. *Griffin v. State*, 557 So. 2d 542, 552 (Miss. 1990). This not only affected the verdict on guilt, it was laying the groundwork for similar arguments at the penalty phase, though they are based on equally factually uncertain grounds. There, the Eighth Amendment comes into play, as does "the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he [or she] had no opportunity to deny or explain.'" *Skipper v. South Carolina*, 476 U.S. 1,7 n. 1 (1986).

The State also stepped outside the bounds of the evidence when it argued, in its opening closing argument, that "the gun that you saw . . . . that *was* Mr. Britt's gun . . . . And Officer Conley found *that* gun in Terry Pitchford's car the same day of the murder." Tr. 628. This was simply unsupported by the evidence. The firearms expert testified that some of the shells found on the floor of the store were fired from the gun found in Pitchford's car, which could have been fired

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[30] The only evidence from which an inference could be drawn that Pitchford personally wielded the 22 was a statement from informant Dantron Mitchell that at one point Pitchford told him he did it alone. That, however, is not the theory being argued here by the State. Tr. 565-66

at any time during the decedent's ownership of the gun, but that the pellets and wad found on the decedent's person were only "consistent with" a gun of that caliber loaded with shot pellets. Tr. 552,560-61

The prejudice of each these fact arguments is self-evident. The only gun connected with Mr. Pitchford is the 38, and the prosecutor's opening argument exaggerates that connection. The statements in the final closing exaggerate the defendants connection to the fatal bullets that came from the .22. There was no forensic connection to defendant for that gun. Without the improper argument by the prosecutor here the case for intent would be much weaker. To permit argument of this as a fact has "the natural and probable effect of the improper argument [and] create[d] 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.2001) (citing *Ormond v. State*, 599 So. 2d 951, 961 (Miss.1992)). Together, they are incurably prejudicial. *Forrest v. State*, 335 So. 2d 900, 903 (Miss. 1976) (reversing for cumulative effect of otherwise individually harmless misconduct by prosecution in closing argument).

The prosecutor coupled these arguments without factual support with inherently inflammatory and impermissible exhortations to the jury, speculating, over defendant's improperly overruled objection, that merely because of the time the body was discovered, "we could have had two more dead people" and offering his opinion that Mr. Pitchford was "as close to a habitual liar as I have ever seen" Tr. 649. The first clearly appeals, with no evidentiary support, to jurors to find Mr. Pitchford guilty on the basis of harm to

people against whom the purported crime was not committed, including by extension themselves. It is therefore an improper attempt to incite prejudice and fear *Sheppard v. State*, 777 So. 2d at 661. It also does much the same harm that a "send a message" or "protect the community" argument does, and is equally improper. *Brown v. State*, 986 So.2d at 275. *See also West*, 485 So.2d at 689-90.[31]

The "habitual liar" argument is not only an improper personal opinion on veracity, *Griffin*, 557 So. 2d at 552, it also improperly treats the prior crimes evidence as going to general character of the defendant, and did so only after the State had successfully had language instructing the jury about how to consider evidence of bad character removed from the instructions on the grounds that there was no evidence of that sort in the case. Tr. 608-10. Also, to the extent this argument comments on purported unexplained inconsistencies in the statements given by Pitchford, it is also an indirect comment on Mr. Pitchford's failure to testify, and violates the Fifth Amendment. *See West*, 485 So. 2d at 627-88. *See also Emery v. State*, 869 So.2d 405 (Miss. 2004) (reversing where, although defendant testified, prosecution made several comments during examination and in closing regarding his failure to give a statement after being Mirandized.). These improper arguments,

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[31] To the extent that this argument remained in the jury's mind at sentencing, it also is an appeal to the jury to find the aggravating factor of creating risk of harm to many people, Miss. Code Ann. § 99-19-101(5)(c), on which it had not been instructed, and which the evidence in the instant matter clearly did not support their considering. *Simmons v. State*, 805 So.2d 452 (Miss. 2001).

individually and certainly when looked at collectively, require reversal here. *Forrest v. State*, 335 So. 2d 900, 903 (Miss. 1976).

Prosecutorial Misconduct – Penalty Phase

At the penalty phase, not only did the seeds planted by the misconduct at the guilt phase bear fruit, independent misconduct occurred as well. In examining witnesses the State persistently violated the long established rule, reiterated in *Flowers I*, 773 So 2d at 330-31 that "[a] prosecutor is prohibited from 'insinuating criminal conduct which is unsupported by any proof." *Smith v. State*, 457 So.2d 327, 334 (Miss.1984) (citing *Stewart v. State*, 263 So.2d 754 (Miss.1972); *Tobias v. State*, 472 So.2d 398, 400 (Miss.1985)).

Without giving the required advance notice for the introduction of prior bad act evidence required by Miss. R. Evid. 404(b), and without offering any testimony to support its factual accuracy, the State queried Defendant's mother and sister (the latter over defendant's objection, Tr. 709-10) about specific incidents of misconduct by the defendant as a child and youth, including a two purported expulsions from middle school in 7th or 8th grade. Tr. 709-10; 718-19. It did not, however, offer any testimony of its own to establish that this misconduct happened.[32] This was

[32] Neither witness opened the door to these questions. Each had testified about Pitchford's distress at the death of his father and the fact that he did not do well in school afterwards. Mrs. Jackson, the mother, testified only that the Defendant had received no ameliorative counseling for his grief. Ms. Dorsey, the sister, testified only that she picked him up from elementary school 3 or 4 times after his father's death and he had gotten in trouble there.

clearly inadmissible and prejudicial evidence used improperly by the prosecutor, and, as with similar efforts in *Flowers* I, requires reversal here.

In a similar vein, Dominique Hogan, the mother of the defendant's 22 month old son DeTerrius, testified at the penalty phase concerning the Defendant's relationship with their child. She was not asked anything about how Defendant treated her or the nature of their personal relationship other than as a predicate to their being co-parents of the child. Tr. 685-87. Nonetheless, the State asked her if she and the defendant had been doing "a lot of fighting," Tr. 688 and whether "ya'll were going with other people at that time." The defendant objected to on grounds of relevance and of the absence of factual basis, and as improper character impeachment of the witness. The court permitted the questions. Tr. 689-92. The only basis cited for asking the questions was alleged interviews of Mr. Pitchford by doctors at the State Hospital and by the defense expert, Dr. Bailey. Tr. 690. *Flowers* I requires more than a mere basis to ask the question. It requires admissible testimony to establish the truth of the implications. 773 So 2d at 330-31.

In the instant matter, there could be no such testimony. Mr. Pitchford could not, of course, be called by the state to testify at all. The doctors, whose evaluations were clearly being done for testimonial purposes, would be testifying only to hearsay if they were called. Although these statements are arguably admissible hearsay in other contexts, admitting this against Mr. Pitchford would violate his Sixth Amendment rights. *Crawford v. Washington*, 541 U.S. 36 (2004) (overruling precedent that permitted

reliable hearsay admissible under established hearsay exceptions to come in despite the Confrontation Clause) *Davis v. Washington*, 547 U.S. 813 (2006) (defining investigative statements taken in anticipation of use in prosecution to be "testimonial" and therefore subject to exclusion under *Crawford*). In any event, the State made no effort to call these witnesses, though at least the doctors from the State Hospital were present and available to testify. Tr. 722-23.

The other objectionable question from the prosecution came during Mr. Evans' cross-examination of Mr. Pitchford's sister Veronica:

> Q. Now, you said it was hard on him because his daddy only had about a month before he died.
>
> A. Yeah. Yes. Yes.
>
> Q. Okay. At least he did have a month, didn't he?
>
> A. Yes, he did.
>
> Q. *That is better than somebody just being murdered and their family not-*
>
> MR. CARTER: Your Honor, that is absolutely improper question and he knows it.
>
> THE COURT: I'll overrule the objection.
>
> ***
>
> Q. (By Mr. Evans:) *Him having about a month before his daddy died is a lot better than a family that doesn't have any time, that family member is just shot down and murdered, isn't it?*

A. I agree.

Tr. 711-12 (emphasis supplied). This Court has repeatedly made it clear that such inflammatory questions are improper.

> Prosecutors are not permitted to use tactics which are inflammatory, highly prejudicial, or reasonably calculated to unduly influence the jury. *Hiter v. State*, 660 So.2d 961, 966 (Miss.1995). The standard of review that appellate courts 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. *Ormond v. State*, 599 So.2d 951, 961 (Miss.1992).

Sheppard, 777 So. 2d at 661-62. *See also Ross v. State*, 954 So.2d 968, 1001 (Miss.2007) Verdicts obtained with this kind of argument cannot stand. *Fuselier v. State*, 468 So.2d 45, 53 (Miss. 1985). There can be no doubt in the instant case that these questions had an inflammatory effect.

An outburst from the audience ensued as soon as the question was asked and the objection to it made, and the trial court's tepid admonition to the audience afterwards served only to underscore the prejudicial nature of the inquiry. Tr. 711-12. *See West*, 485 So. 2d at 688 (noting that remedial efforts can often "call attention to and enlarge" prejudicial or inflammatory prosecutorial behavior).

In its closing at the penalty phase, the State was equally egregious. The only two aggravating

circumstances the jury was instructed to consider were that the death occurred in the course of a robbery for pecuniary gain and that the crime was committed to avoid arrest or facilitate escape. R. 2006. Nonetheless the State argued in its final closing as if the jury were also to consider the "heinous atrocious and cruel" aggravator, Miss. Code Ann. § 99-19-101(5)(h), by claiming that

> Y'all saw the autopsy photographs. There is not much of a place that you could touch on his body that didn't have some gunshot wound to it. Brutal. This is the ultimate crime. This is the type of crime that the death penalty is for. This is the type of person the death penalty is for, somebody that could commit a crime like that.[33]

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[33] Admission of even gruesome autopsy photographs is permitted as long as the photos are probative of a fact properly in issue.. Their admission is reviewed on appeal for abuse of discretion. However, there is a concomitant responsibility for the State not to use the photos so admitted for any improper purpose. *See Manix v. State*, 895 So.2d 167, 178 (Miss. 2005) ("[W]e have often allowed gruesome photos, including photos after autopsies, *with warnings to the prosecution and the trial court to guard against excess. Walker v. State*, 740 So.2d 873, 880-88 (Miss.1999); *Manning v. State*, 735 So.2d 323, 342 (Miss.1999); *Jordan v. State*, 728 So.2d 1088, 1093 (Miss. 1998)"). In the case *sub judice* the defendant objected to enlarged and numerous autopsy photos being introduced, both by way of pretrial motion and at trial. Tr. 62, 406-07. The trial court ruled them probative to the testimony of the pathologist, Tr. 407-08, and to the firearms expert Tr. 553-4. Though this may not have been an abuse of discretion standing alone, the excessive and improper use to which they ended up being put in this improper and inflammatory evidence is not within that scope, so this abuse of these documents retroactively renders their admission improper.

Tr. 804. Even where this aggravator is permitted to be considered, a very specific limiting instruction is required if its use is to pass Eighth Amendment muster. *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Knox v. State*, 805 So.2d 527, 533 (Miss.2002). Here, the state through its misconduct incited the jury consider this aggravator not only without such an instruction, but also without sufficient evidence to support its being given in the first place. *West v. State*, 725 So.2d 872 (Miss. 1998), *Taylor v. State*, 672 So.2d 1246 (Miss. 1996).

The State also, over the objection of the defendant and its erroneous denial by the court, Tr. 799, made improper "in the box" arguments to condemned by this Court in *Stringer v. State*, 500 So.2d 928, 938-39 (Miss. 1986). Citing the jurors representations in voir dire that they could consider the death penalty as the reason they were on the jury, the State argued that [ii]*[y]'all know what you are here for.* The law is clear in this state. The death penalty is an appropriate punishment." Tr. 799. It followed that with " [i]t would make y'all's decision easy if you just said well, we will just go ahead and sentence him to life. *But that is not your job. Your job is to go through the instructions and give him the appropriate sentence for what he did.*" Tr. 804. (emphasis supplied). By these arguments, the jury was improperly told by the prosecutor that it was in the box to give Mr. Pitchford the death penalty. This was done in the final closing, where no response was possible. Thus, even had the defendant wished to take the risk of attempting to rebut this by counter-argument he could not have done so. *See West*, 485 So. 2d at 688. The sentence that ensued must be reversed.

In addition, in support of the jury making the statutory *Enmund mens rea* finding, the prosecution's opening closing expressly alluded to the improper arguments of Mr. Evans at the guilt phase. With that support, it repeated its arguments, unsupported by any firearms evidence at all, or by any other evidence consistent with the State's theory of the case being argued, that the Defendant was wielding the 22 caliber gun which discharged the fatal bullets, but also argued that the use of force by the companion meant that Mr. Pitchford killed, intended to kill, attempted to kill or contemplated that lethal force would be used. Tr. 773-4.[34]

Overall, the State's cumulative conduct in this trial was an exercise by the prosecuting attorneys in skirting their ethical "obligations to see that tire defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Ms. R. Prof. Conduct 3.8 (comment).[35] These instances

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[34] Mr. Hill (discussing the statutory *Enmund* findings required by the verdict form): "The first one is that the defendant actually killed Ruben Britt. Remember, Mr. Britt was shot with what? He was shot with at 22 caliber pistol. What kind of pistol did Defendant Have? He had a 22 caliber pistol. Was it an automatic? Yes it was. Did it leave traces? Yes it did. . . . So did the defendant actually kill him? Those 22 rounds actually killed him. And that was the defendant's gun. I submit to you that it is what the proof shows, that it was the defendant's gun that killed him." Tr. 773

[35] Unlike other advocates, it has long been recognized that a prosecutor has a "duty to . conduct himself with due regard to the proprieties of his office." *Adams v. State*, 30 So.2d 583, 597 (Miss. 1947); *accord*, *Jenkins* v. *State*, 136 So.2d 580, 582 (Miss. 1962); A.B.A. Standards, *The Prosecution Function*, Section 3-1.1(d). *See also* Ms. Conduct Rule 3.8 (comment) (assigning prosecutors the role of "minister of justice" and commending the

of prosecutorial misconduct, alone and/or in conjunction with one another, violated Pitchford's rights under state law, *Jenkins v. State*, 607 So.2d 1171, 1184 (Miss. 1992); *Griffin v. State*, 557 So.2d 542, 552-53 (Miss. 1990), and deprived him of a fundamentally fair trial, *Donnelley v. De Christoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), and a reliable sentencing proceeding in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article 3, §§ 14, 26 and 28 of the Mississippi Constitution, *Caldwell v. Mississippi*, 472 U.S. 320 (1985), and thus mandate his convictions and death sentence be vacated.

The trial court's failure to curb the misconduct

The trial court's handling of the State's misconduct was part and parcel of a troubling pattern of judicial partiality. A look at the prosecutorial misconduct that it permitted here in the context of the cumulative record, all of its rulings, and its differential treatment of the defendant and the State, leads to the unfortunate conclusion that it was likely not a neutral and detached tribunal as required by law, or was more interested in a speedy conclusion of this trial than in seeing that justice, due process, or the equal protection of the law were accorded the defendant.

ABA Standards as "the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense"). Prosecutorial zealousness must be directed towards his minister of justice duties, not simply towards trying to win cases. *Id. See*, *e.g. In re Jordan*, 913 So.2d 775, 781 (La. 2005) (discussing this obligation and concluding in case involving failure to turn over *Brady* materials that Louisiana's Rule 3.8 had been violated.)

Dodson v. Singing River Hosp. System, 839 So.2d 530 (Miss. 2003).[36]

Although there is a presumption "that a judge, sworn to administer impartial justice is qualified and unbiased" that presumption may be overcome by evidence that creates a "reasonable doubt" about the validity of the presumption. *Turner v. State*, 573 So.2d 657, 678 (Miss. 1990). Though rulings by the trial court rarely, in and of themselves, form the basis of a finding of bias or impartiality, *Liteky v. United States*, 510 U.S. 540, 555 (1994), when determining whether bias has been shown "this Court must consider the trial *in its entirety and examine every ruling* to determine if those rulings were prejudicial to the moving party. *Hathcock v. Southern Farm Bureau*

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[36] Ordinarily, questions of judcial bias come to this Court by way pretrial recusal motion. Here, the full extent of the impartiality and its effect on the defendant's ability to get a fair trial was cumulative over the course of the trial. A midtrial motion to recuse and for a mistrial could have precipitated far more drama, confrontation and, ultimately, harm to the orderly administration of justice and prejudice to the defendant than was necessary for resolving the issue in an orderly fashion. *See*, *e.g. Mingo v. State*, 944 So.2d 18, 31-33 (Miss. 2006). Hence, this issue was preserved for review by way of Defendant's Amended Motion for New Trial Supp. R. 2 1263(B), which gave the trial court exactly the same opportunity to consider the issue, but out of the heat of the moment as a mid-trial recusal motion would have required, *Ruffin v. State*, 481 So.2d 312, 317 (Miss.1985). See *Ahmad* 603 So. 2d at 847 (issue of prosecutorial misconduct at argument properly preserved by motion for new trial). The relief available on a mid-trial motion - recusal and mistrial - is effectively no different than what is available on a new trial motion - vacation of the verdict and a new trial. The latter process has the additional benefit of being able to have the recusal motion considered before any such trial.

Cas. Ins. Co., 912 So.2d 844, 849 (Miss. 2005) (emphasis in original) (*citing Jones v. State*, 841 So.2d 115, 135 (Miss.2003); *Hunter v. State*, 684 So.2d 625, 630-31 (Miss. 1996)). The standard of review is whether the trial court's ruling on the suggestion of its own bias (here, its denial of the motion for new trial) constitutes "manifest abuse of discretion." *Farmer v. State*, 770 So. 2d 953, 956 (Miss). *See also Dodson*, 839 So.2d at 533-34 (once reasonable doubt as to the presumption of impartiality is shown, the bias or prejudice of the judge him or herself need not be shown beyond a reasonable doubt.)

The defendant will not rehash here the incidents of error, disparate treatment of the two parties and unwarranted attacks on the credibility and competence of defense counsel that are discussed elsewhere in this Brief. However, in addition to those examples, differential treatment, in particular, was evident in several other respects throughout the trial, as well.

When the State requested breaks, they were granted, when the Defendant requested comparable treatment, they were denied, often with disparaging remarks concerning counsel. See e.g., 584-612; 705. The State was given great leeway in leading its witnesses over the objection of the defendant; the defendant was not. *Compare*, *e.g.*, Tr. 530 with 699-700. Though the trial court was scrupulous in considering and ruling on every objection made by the state, even to the extent, at times, of improving on the grounds for such objections in granting them, *see, e.g.* Tr. 513, it made no oral rulings at all on many objections made by the defense. It *sub selentio* overruled them, permitting the State to simply

proceed with the objected to behavior without even acknowledging the objection, and letting the jury see this dismissive behavior.[37]

In addition to the prosecutorial misconduct discussed, *supra*, the trial court it permitted the state's attorney use inappropriate language towards defense counsel, Tr. 354-55 and even to instruct defense counsel on how things "are done in this district" Tr. 56, 58. When responding to a defense request to voir dire the jury on its racial attitudes relative to a black accused of killing a white the State countered with a disdainful opinion about "some defense counsels" who "always" inject race into the proceedings. Tr. 77-78. The trial court granted the defense request and itself make the requested inquiry during voir dire, Tr. 212. However, it did not caution the State about the impropriety of making veiled comments on counsel opposite's race. It was also sometimes much less tolerant of defense counsel's shortcomings than of those of the State. *See, e.g.* 603-612 (attacks on counsel's diligence, competence discussed in Argument II, *supra*); suggesting, though ultimately having to acknowledge the inaccuracy of

[37] *See, e.g.,* Tr. 376, 379, 442-43 (ignoring prosecutor's admission of apparent discovery omission despite defense objection to it), 453,473, 530 (made during the egregious leading by the prosecutor of his own law enforcement witnesses in testifying concerning defendant's statements), 565 (overruling objection to form, not addressing more serious objection that prosecutorial misconduct was occurring during state examination of one of its informant witnesses), 690-92 (overruling objection on no factual basis for question, refusing, despite specific request by defense to be allowed to complete objection, to rule on second ground, that the question was improper character attack).

the suggestions, that defense counsel was attempting to put on "hired gun" testimony or had failed to contact the court administrator to obtain settings for pretrial motions. Tr. 51-54, 160-65.

Finally, the trial court repeatedly placed getting speedily through the process over the defendant's request for enough time to do its work properly, not only in the denials of continuance and delay when requested but on such small things as insisting that counsel proceed when not prepared and whittling minutes off of requested breaks and arguments for no apparent good reason. ,Tr. 64-65, 614, 762. The trial court's own bias therefore enabled the prosecutorial misconduct, and the prejudice that ensued to defendant as a consequence requires reversal here.

IV. THE TRIAL COURT ERRED BY ALLOWING THE JURY TO SEE IMPROPER DISPLAYS OF EMOTION FROM NON-TESTIFYING AUDIENCE MEMBERS IN THE COURSE OF BOTH PHASES OF THE PROCEEDINGS.

One source of great emotion arises when the victim's family or supporters of them display grief in the courtroom. *See, e.g.*, *Fuselier v. State*, 468 So. 2d 45 (Miss. 1985) (reversing where trial court allowed the victim's daughter to sit within the rail). See also *State v. Bernard*, 608 So. 2d 966, 968 (La. 1992).

By way of pretrial motion, the Defendant sought to control potential exposure of the jury to these kind of unseemly and prejudicial displays of emotion in the courtroom. R. 170-72. The trial judge denied the motion insofar as it restricted where in the audience relative to the prosecution and jury the victim's family could sit, but did concur that any actual displays

would be inappropriate and would not be allowed by the trial court. Tr. 69-71. However, despite this, such displays from the audience occurred during both the guilt and penalty phases of the trial but the trial court took insufficient measures to ameliorate the prejudicial effect on the jury of such displays.

At the guilt phase, the problem occurred during the testimony of informant James Hathcock – a witness whose testimony is legally suspect in the first place. *McNeal v. State*, 551 So. 2d 151, 158 n.2 (Miss. 1989). Defendant renewed the motion to curtail such displays after members of the victim's family sitting in the back of the courtroom were "crying out loud, loud enough for everybody in the courtroom to hear." Tr. 432-33. The trial judge's response was insufficient. Instead of attempting to get the matter under control, it elected to minimize it and even found that the nature of the testimony justified it:

> There have been no outbursts of any kind. I have heard some sniffling going on. And the type testimony that I just heard, I'm not surprised. *The family has a right to be here*, *and I am not going to order somebody to leave the courtroom*. . . . . I don't think it's been, you know, terrible outbursts or anything like that. It is just, I think, some natural emotional reactions when people are hearing about the brutal murder of their loved one.

Tr. 433-34.

It is, of course exactly when the testimony is at its most inflammatory that the trial court's duty to preserve the jury from anything that accentuates improper emotion is greatest and the court's

intervention must be most immediate. Here it prohibited from the start the one thing that might have lowered the temperature in the courtroom – asking the distressed audience members to remove themselves from the courtroom until they could regain their composure. This was error.

Even in a prosecution where the State does not seek death, appeals to passion and prejudice and other inflammatory appeals to the jury are totally impermissible. *Viereck v. United States*, 318 U.S. 236, 247-48 (1943); *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979). *See also*, *American Bar Association*, *Standards Relating to the Prosecution Function*, Section 3-5.8 (c) (1982). The proscription against irrelevant emotionalism applies with even more force in a capital trial. Miss Code Ann. § 99-19-105(3)(a); *Snow v. State*, 800 So.2d 472, 486 (Miss. 2001) (in a death penalty case, when deciding whether outburst by victim's mother was so prejudicial as to warrant mistrial, reviewing court must use heightened scrutiny). *See also Brooks v. Francis*, 716 F.2d 780, 788 (11th Cir. 1983), reh'g granted and vacated, 728 F.2d 1358 (11th Cir. 1984) ("[a] prosecutor may not incite the passions of a jury when a person's life hangs in the balance"); *Tucker v. Zant*, 724 F.2d 882, 888 (11th Cir. 1984) ("[t]he Constitution will not permit arguments on issues extrinsic to the crime or the criminal aimed at inflaming the jury's passions, playing on its fears, or otherwise goading it into an emotional state more receptive to the call for imposition of death");

Before resuming the testimony of Mr. Hathcock the trial court solicited Defendant's proposed solution, short of removing the overly emotional family

members from the courtroom until they could regain their composure, should it happen again. The Defense suggested that if the offending audience members could not be removed that the jury be excused and the audience be cautioned by the judge not to engage in this excessively emotional behavior. Tr. 434 The trial court made no ruling on that request, but apparently denied it since, when an outburst occurred again at the penalty phase the tepid admonishment it did issue was issued in front of the jury, rather than in its absence as requested. Tr. 711-12. This atmosphere of emotionalism in the trial deprived the defendant of his right to fundamental fairness protected by the Fourteenth Amendment.

V. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER INHERENTLY UNRELIABLE TESTIMONY OF A JAILHOUSE INFORMANT AND/OR IN FAILING TO GIVE A PROPER CAUTIONARY INSTRUCTION CONCERNING IT.

By way of pretrial motion, Defendant objected, to the State presenting testimony from any jailhouse snitches or informants, including James Hathcock and Dantron Mitchell. R. 990-92, Tr. 83. The trial court, without making particular fact findings concerning the relevancy or probative value of the testimony weighed against any possible prejudice, denied the motion. Tr. 84. On the basis of this ruling, Mr. Hathcock and Mr. Mitchell testified at trial concerning a purported in-jail confessions that Mr. Pitchford had made to them. Tr. 426-48, 562-568.

Though each informant denied that any promises were made to him by the district attorney, each did testify to circumstances that suggested he hoped for

and/or had received positive consideration with respect to charges of his own. Mr. Hathcock admitted that shortly after he told the authorities about the purported information he was released from jail, and a few months later, and before he testified in court against Mr. Pitchford, the charges which had put him in jail in the first place were dropped. Tr. 446-47. Mr. Mitchell admitted that though he had spoken with Mr. Pitchford eight months earlier, he only came forward with the information he did when police came to him within the past month, that by that time he had been awaiting trial on marijuana possession charges and had been in jail for 10 months, and that he had only decided to testify in this case after consulting with his attorney in the marijuana case. Tr. 566-67.

This Court has recognized that, too often, there is

> an unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement who [are] running a training ground for snitches over at the county jail, and the prosecutors who are taking what appears to be the easy route, rather than really putting their cases together with solid evidence.

McNeal v. State, 551 So. 2d 151, 158 n.2 (Miss. 1989). For this reason, this Court has long held that the testimony of an informant should be received and considered with caution, as polluted and suspicious. *Dedeaux v. State*, 87 So. 664, 665 (Miss. 1921) (citing *Wilson v. State*, 71 Miss. 880, 16 So. 304 (1894), and that if the jury is not instructed accordingly, a conviction tainted with that testimony must, for that

reason alone, be reversed. *Moore v. State*, 787 So. 2d 1282 (Miss. 2001).

The evidence from these witnesses was so unprobative and so prejudicial that Miss. R. Evid. 403 requires its exclusion. If prejudicial testimony is erroneously admitted under state law, that also violates the defendant's constitutional right to due process. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)). Though the trial court's ruling on this point is reviewed for abuse of discretion, *Ross v. State*, 954 So.2d 968, 992-92 (Miss. 2007), this court requires that the trial court, at the very least make an on the record weighing of the probative vs. the prejudicial value of the evidence and exclude it if the balance tips against probity. *Jenkins v. State* 507 So.2d 89, 93 (Miss. 1987).

In the case of Mr. Mitchell, he was clearly a reluctant and unforthcoming witness whose testimony who had to be led through it even when being directly examined Tr. 563-67. On a crucial point, however, he was entirely inconsistent with the forensic evidence on which the state was basing its theory of the case (and its charges against co-defendant Eric Bullins) that there were at least two people involved in the robbery, one of whom fired a fatal shot from a 22 pistol and one of whom fired non-fatal shots from a 38 loaded with rat shot. Tr. 400-40. Mr. Mitchell's testimony, however, was the inherently incredible statement that Pitchford changed his story and said had done it by himself. Tr. 565-66. Moreover, there was testimony from Mr. Mitchell that, until the prosecutor led him away from it, called into question whether any of this information came from Mr.

Pitchford, and put it in the mouth of Eric Bullins, who did not testify at the trial.

Thus, its probative value was miniscule, and it may have been inadmissible hearsay, and a possible violation of the confrontation clause, as well, in any event.

On the other hand, its prejudicial value was enormous. Mr. Mitchell's testimony about Mr. Pitchford's changed versions might have made the jury that much more receptive to the otherwise improper jury argument that Pitchford was an "habitual liar." At the penalty phase, in support of the death sentence, the State argued, Tr. 772, 804-06, and the jury expressly found that Mr. Pitchford had personally killed, Tr. 811-12, R. 1234-35. Pitchford's statements to police, however, made the actual killer his companion. Mitchell is the only person who says differently. Where the State argues from evidence that should never have been admitted in the first place, that in and of itself is a basis for reversal, even in the absence of a contemporaneous objection. *Flowers II*, 843 So. 2d at 855. It was clear that the jury was struggling with this finding at the penalty phase. It specifically asked during the deliberation to see Mr. Pitchford's statements, in which Mr. Pitchford, even when he acknowledged participation in the events, had always placed possession of the 22 that fired the fatal shot in the hands of his co-defendant, and had offered the explanation that the co-defendant shot only after seeing the decedent with a gun of his own Tr. 505, 508, 571-72.

Mr. Hathcock's testimony is equally unprobative. He, too, appeared to be relying on information

obtained from persons other than Mr. Pitchford in his testimony, and had already received a substantial benefit in the form of having been released from jail immediately after providing the information, and then having his criminal charges dropped. Tr. 431-32; 446-47. It, was far more prejudicial than probative because in the course of it he also, despite having been expressly directed not to do so, offered completely inadmissible testimony accusing Mr. Pitchford of being a drug dealer. Tr. 439. Though the trial court gave a cautionary instruction, the defense was still faced with having to unring a bell that would never have tolled for the jury had Mr. Hathcock been, as he should have been, precluded from taking the stand at all. Because the trial court permitted Mr. Mitchell and Mr. Hathcock to testify it without making the requisite weighing, and because the evidence was inherently unreliable but exceedingly prejudicial, this court should reverse the conviction obtained as a result. *See, e.g. Foster v. State*, 508 So. 2d 1111, 1117 (Miss. 1987).

Even if the Court determines that it was not error to permit the witnesses to testify under Miss. R. Evid. 403, it was clearly error for the trial court to refuse to give the cautionary instruction requested by the Defendant that made reference to the benefit received by Informant Hathcock. Tr. 596, 607-08. R. 1133. Instead, the court gave only the most minimal instruction lumping accomplices and informants together, S-5, R. 1122, and entirely ignoring the evidence before it that at least one informant had received a benefit. Tr. 446-57. Failure to give the requested instruction where it has been furnished in a capital case is enough, by itself, to require reversal

if there is any evidence at all that the informant received a benefit in exchange for the testimony. *Moore*, 787 So. 2d at 1287 (no formal deal offered, but informant was released shortly after providing the information and charges were nolle pressed six months later).

In addition, pertinently to both of these witnesses - and the accomplices - reliability, the district attorney, when asked to "reveal the deal" with the informant witness, acknowledged that though he had made no express deal, "I think anybody with common sense would understand that some of these other defendants, their attorneys hope the Court may take that into consideration when they sentence them." Tr. 82. Mr. Mitchell's testimony makes it clear he fell into that category. He waited until what was apparently the eve of his own trial, when he had counsel to advise him about ways that he might hope for leniency from the state or the Court, to come forward with information he had been sitting on for eight months. Tr. 566-67. Given these facts, this error alone requires reversal of the conviction and remand for a new trial before a properly instructed jury. *Moore*, 787 So. 2d at 1287.[38]

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[38] Because there is clear evidence in the instant case that the DA knew both snitches would be hoping for a benefit, and one in fact received one, and because the defendant timely requested the proper instruction, this case falls within the scope of Moore, and is completely inapposite to the situation in *Manning v. State*, 735 So.2d 323, 335 (Miss. 1999). As this Court has found, the unreliability of a snitch does not necessarily arise out of an overt promise, but also from the hope of benefit Certainly where, as here, the hope is both acknowledged by the DA as a factor, and has been fulfilled with respect to one of the informants, at the very least the jury must be instructed about not only the

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT MISTRIAL WHEN JAILHOUSE INFORMANT JAMES HATHCOCK TESTIFIED TO INADMISSIBLE AND PREJUDICIAL MATTERS

"The trial court must declare a mistrial when there is an error in the proceedings resulting in substantial and irreparable prejudice to the defendant's case." *Parks v. State*, 930 So.2d 383, 386 (Miss.2006) (citing *Tate v. State*, 912 So.2d 919, 932) (Miss.2005)). A trial court's decision on granting a mistrial is reviewed for abuse of discretion, though in a case where death is sought, it is, like all other decisions, subject to heightened scrutiny review.

During his testimony, informant Hathcock testified that "Well, he [Mr. Pitchford] was selling me dope." Tr. 439. This was clearly inadmissible prior bad acts testimony under the 404(b) and the due process clause of the United States Constitution. *Palmer v. State*, 939 So.2d 792, 795 (Miss.2006) ("proof of a crime distinct from that alleged in an indictment is not admissible against an accused."). Defendant immediately, out of the presence of the jury, moved for a mistrial, citing the fact that the prosecution had told him that the witness was under instructions not to mention his claim in that regard under any circumstances. Tr. 439-40. The trial court agreed that the testimony was improper, but denied the mistrial. Tr. 440-41. Instead when the jury returned to the courtroom, it reminded them of the testimony, told them not to consider it, and polled the jury to get affirmative responses to that instruction. Tr. 443-44. This, in all likelihood merely

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unreliability of the testimony, but that exchange that was paid for it.

served to underscore the testimony and its prejudicial effect. *See West v. State*, 485 So.2d 681, 688(1985).

Even by itself, this was exceedingly prejudicial information to come before the jury, and the State had, apparently not instructed its witness as it represented to the defense that it had, and the testimony had come out as a result. In addition, this witnesses testimony had already provoked one incident of intrusive emotionalism in the trial, so the level of prejudice associated with this witness was already high. Tr. 432-34. Under these circumstances, with this amount of harm, the prejudice was such that a mistrial should have been granted.

VII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE EVIDENCE OBTAINED THROUGH A WARRANTLESS SEARCH OF DEFENDANT'S AUTOMOBILE AND THE FRUITS OF THE POISONOUS TREE THEREOF.

Shortly after the death of Mr. Britt at his store, the police obtained a description of a vehicle that had been seen near the store that morning and information that Terry Pitchford owned a vehicle of that description. Tr. 94-97,493. Several law enforcement officers went to the home Mr. Pitchford shared with his mother, Shirley Jackson, and found a vehicle resembling that description that was co-owned by the two of them. Both Mr. Pitchford and Ms. Jackson were present when, without obtaining a warrant, and with the consent of only Ms. Jackson, police searched that vehicle and recovered a 38 revolver loaded with rat shot. Tr. 493-95. This revolver was introduced into evidence at Mr. Pitchford's trial after it was identified as being a gun owned by Mr. Britt and kept at his

store, but which was missing after he was found dead. Tr. 349,468-70; Ex. 32. It was the only piece of physical evidence that connected Mr. Pitchford to the crime scene, and was relied on heavily by the State as a way to bolster otherwise suspect informant and accomplice testimony in obtaining the conviction and death sentence. The State's reliance on this evidence was so heavy that, notwithstanding the fact that the pathology evidence actually did not support the statement, the prosecutor in opening told the jury that the seized weapon was "one of the guns [Mr. Britt] was killed with." Tr. 341-42; 628-30.

The Defendant filed for suppression of this evidence by way of pretrial motion. R. 1021-22. After an evidentiary hearing, that motion was denied. Tr. 94-119, R.E. Tab 5. The admission of this evidence and argument was erroneous as a matter of law, and highly prejudicial, and Mr. Pitchford's conviction must be reversed as a consequence. *Wong Sun v. United States*, 371 U.S. 471, 485-86, (1963); *Robinson v. State* 136 Miss. 850, 101 So. 706 (Miss. 1924).

The Fourth Amendment to the United States Constitution requires that, before they can conduct a search of an individual's automobile, police must have both probable cause and a warrant. *Fields v. State*, 382 So. 2d 1098, 1101 (Miss.1980) (reversing conviction and excluding evidence where "there was ample time to obtain a warrant and no probability that the automobile could be removed beyond the reach of the officers"). The need for a warrant can be eliminated by obtaining a valid and informed consent to search from the occupant of the vehicle, or, if the vehicle is unoccupied, by the person who has ownership and control over it. *Moore v. State*, 933

So.2d 910, 916 (Miss. 2006) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973).

Where there are two people who have equal rights of control, ownership or dominion over the premises to be searched, however, and both are present, the consent of only one of the two is insufficient to operate as consent for the other if the non-consenting party affirmatively makes his objection known to the police. *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (reversing a conviction based on evidence seized from the defendant's marital home after consent by his wife, who also lived there, and was actually the victim of the crime, because "a physically present occupant's express refusal of a consent to a police search is dispositive as to him, *regardless of the consent* of a fellow occupant.") (emphasis supplied), *U.S. v. Sims*, 435 F.Supp.2d 542 (S.D. .Miss. 2006) (suppressing search). *See also Chimel v. California*, 395 U.S. 752 (1969); *Preston v. U. S.*, 376 U. S. 364 (1964); *White v. State*, 735 So. 2d 221 (Miss. 1999); *Ferrell v. State*, 649 So. 2d 831, 833 (Miss. 1995); *Powell v. State*, 824 So. 2d 661 (Miss. Ct. App. 2002); *Marshall v. State*, 584 So. 2d 437 (Miss 1991).

In the instant case, the trial court found, and the evidence is undisputed that, there was no warrant obtained to search the vehicle, and that the police relied on a consent to search given them by Shirley Jackson alone in conducting the search. Tr. 101-02. It is also undisputed that the vehicle that was searched was equally co-owned and equally within the control and dominion of Terry Pitchford and Shirley Jackson, and that both were present when the consent to search was sought, Tr. 97-98, 103, 116, 118. Thus, if Mr. Pitchford objected to the search, the search

violated the Fourth Amendment as to him and the gun and all testimony and argument relying on it was inadmissible against him. *Randolph*, 547 U.S. at 115.

The evidence regarding Mr. Pitchford shows that, though he at first verbally told an officer that it would be okay to search the car, he expressly withdrew that consent though at least three overt acts - established by testimony of the officer conducting the search, not the defendant or his mother - that clearly and unambiguously established his objection to the search taking place and his withdrawal of any previous consent he had given to making such a search. Tr. 98, 101, 105-06, 13. Though withdrawal of consent is not established by merely passively refusing to cooperate, neither need the withdrawal be done by words explicitly saying "I withdraw my previous consent." In the case of *Moore v. State* this Court held that:

> If the consent occurred while the defendant was being generally cooperative, the consent is more likely to be voluntary; however, if the defendant agreed and then changed his mind, the consent should be suspect.

933 So. 2d 910, 917 (Miss. 2006). Even the federal courts, which employ a less stringent standard to establish voluntary consent, *id.* at 916 n.2, recognize that withdrawal of consent can be established by conduct alone. *See e.g.*, *U.S. v. Fuentes*, 105 F.3d 487, 489 (9th Cir. 1997) (consent withdrawn because suspect shouted "no wait" as officer reached in to grab object in his pants pocket, and tried to push one officer away and pull his arm free from second officer); *U.S. v. Flores*, *48 F.3d 467*, *468* (10th Cir. 1995) (consent to

search trunk of car withdrawn because, after initial consent, defendant slammed trunk door shut).

In Mr. Pitchford's case his conduct clearly and repeatedly established that he had changed his mind after his verbal "okay" and conveyed to police that he did consent to their search of the car and withdrew any previous permission to do so. First, he refused to sign the consent to search form presented to him. Tr. 98. This was regarded by the officer as an indication that he did not have valid consent from Mr. Pitchford and would therefore ordinarily seek a warrant, but did not do so because Mrs. Jackson volunteered to sign one instead. Tr. 106. Second, when Mrs. Jackson was preparing to sign her consent. Mr. Pitchford again indicated his objection by, in the presence of the officer, telling his mother not to let them search the vehicle, either. Tr. 98, 100-01, 496-97. Finally, after his mother still signed the consent, but before the vehicle was searched, Mr. Pitchford actually became so angry in his objections to the search that that he had to be physically restrained, handcuffed, and moved to the other side of the house under guard by two other officers in order that the search take place. Tr. 132.

The fact that Mr. Pitchford after the search was concluded, while under pressure from police to demonstrate his innocence by cooperating with them, said that he had consented to the search does not change the circumstances as they existed, and as the police officer admitted he perceived them, at the time the decision to search without a warrant was made. Tr. 106. When this Court agreed that the exclusionary rule can be avoided by an officer's good faith but erroneous reliance on facts that if true would have

made his search lawful it surely imposed a converse responsibility to obtain a warrant or valid consent on officers who did know that the circumstances required them. *See White v. State*, 842 So.2d 565 (Miss. 2003)

The trial court erroneously found that as a matter of law the consent by Mrs. Jackson alone was sufficient to meet the needs of the Fourth Amendment as to Mr. Pitchford because of her equal ownership of the vehicle, and that "Certainly a co-owner of the property has absolute right to give permission to someone else to search it." Tr. 117, R.E. Tab 5. *Randolph* clearly established that is not what the law says and to the extent the authority the trial court relied on suggested differently, Tr. 118, R.E. Tab 5, it has been overruled by *Randolph.* The trial court's fallback findings that Mr. Pitchford had given his own consent was similarly not supported by either the law or facts, nor is the trial court's conclusory statement that there were exigent circumstances for the search. Tr. 118-19. R.E. Tab 5.[39]

VIII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENTS GIVEN BY DEFENDANT TO LAW ENFORCEMENT OFFICERS AFTER HIS ARREST

For a statement to be admissible against him, the accused must give a knowing and voluntary waiver of

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[39] "Exigent circumstances" require that there be an affirmative showing that the vehicle in question is likely to be removed or interfered with by the suspect pending receipt of a warrant. *Fields v. State*, 3 82 So. 2d at 1101. The evidence here was that there was no risk of that, since there were other officers present, they had at least sufficient reasonable suspicion to detain Mr. Pitchford—and in fact did so—even before they found the gun, and Mrs. Jackson was being entirely cooperative with them.

both his Fifth Amendment right to remain silent and his Sixth Amendment right of access of counsel. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Saucier v. State*, 562 So.2d 1238, 1244 (Miss. 1990); *Powell v. State*, 540 So.2d 13, 16 (Miss. 1989). The statement must also be freely and voluntarily given in compliance with the Fourteenth Amendment. *Jackson v. Denno*, 378 U.S. 368 (1964), *King v. State*, 451 So. 2d 765, 768 (Miss. 1984); *Ladner v. State*, 95 So. 2d 468, 471 (Miss. 1957).

At trial in this matter, the State adduced testimony from two officers concerning a total of six statements given by Mr. Pitchford after his arrest, including summaries of the contents of those statements. Tr. 502-509, 513-16 (Statements 1 through 3 on November 7, 2004, Statement 4, on November 8, all taken by GCSO Detective Greg Conley); 570-77 (an unrecorded statement obtained prior to Statement 4 and Statement 5, both taken on November 8 by D.A. Investigator Robert Jennings.) Defendant objected to the admission of all of this material under the Fifth, Sixth and Fourteenth Amendments by way of pretrial Motion to Suppress on which an evidentiary hearing was held. R. 180-93; 970-76, Tr. 119-159. That motion was expressly renewed at trial with respect to the statements in which Jennings participated. Tr. 568. On both occasions the trial court erroneously ruled the statements admissible. Tr. 154-56,569. R.E. Tab 6.

The State relied heavily on these statements, particularly Statement 5, in obtaining the conviction and, especially, the death sentence of the defendant

that is under review here.[40] Tr. 630; 649-51; 768-77; 798-808. The conviction and sentence must be reversed as a consequence. *See, e.g. Pannell v. State*, --- So.2d ---- (Miss. Ct. App. 2008), No. 2006-KA-01882-COA, ¶ 32, (Miss. Ct. App. September 9, 2008) (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)).

In evaluating a *Miranda* waiver claim, this Court requires trial courts to observe the following procedure to ascertain whether the State has carried its burden of establishing that the defendant *both* understood his rights *and* voluntarily agreed to give them up:

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[40] Mr. Pitchford did not admit participation in the robbery or murder in the first three statements. However, in Statement 2, Mr. Pitchford told Conley that Quincy Bullins had a small caliber pistol and speculated that he might have done it, and admitted that he, Pitchford, owned a pistol that was used in the robbery. Tr. 503-04. Though that admission could as easily refer to the .38 loaded with rat shot, which inflicted no fatal wounds, as to the other pistol, the State obtained its conviction and death sentence by arguing that Mr. Pitchford owned the 22 that inflicted the fatal shot and had therefore wielded it himself during the robbery, and was an habitual liar because of inconsistencies within Statements 1, 2 and 3. Tr. 649. In his statements made to Mr. Jennings alone Mr. Pitchford admitted participation in the robbery with Eric Bullins, but said that Eric had commenced firing in a panic and fired the fatal shots. These things were also significant components of the State's argument at the penalty phase that he deserved a death sentence because he had actually killed, intended to kill or attempted to kill Mr. Britt in the course of robbing him, or contemplated that lethal force would be employed in the robbery. Tr. 773-74. These arguments were also tainted with improper arguments and facts not in evidence but gave some bolstering to those improper arguments. See Argument III, *supra.*

> [T]he trial judge *first* must determine whether the accused has been adequately warned. And, under the totality of circumstances, the court *then* must determine if the accused voluntarily and intelligently waived his privilege against self-incrimination. *Layne v. State*, 542 So.2d 237, 239 (Miss. 1989); *Pinkney v. State*, 538 So.2d 329, 342 (Miss. 1988); and *Gavin v. State*, 473 So.2d 952, 954 (Miss.1985). *Accord Edwards v. Arizona*, 451 U.S. 477, 486, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 387 (1981).

McCarty v. State, 554 So.2d 909, 911 (Miss.1989) (emphasis added). In determining whether a valid waiver of the rights to silence and counsel has been made, courts must indulge "every reasonable presumption against" waiver and resolve ambiguities against a finding of waiver. *Tague v. Louisiana*, 444 U.S. 469, 470 (1980); *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Abston v. State*, 361 So.2d 1384,1391 (Miss. 1978).); *Smith v. Illinois*, 469 U.S. 91 (1984).

Where a waiver has been obtained, but the suspect then "indicate[s] a desire" to stop talking, officers must "scrupulously honor" that decision by ceasing questioning for a reasonable time. *See Mosley*, 423 U.S. at 102-103. While, unlike with the invocation of the right to counsel, officers may elect after a reasonable time to resume interrogation, the products of that interrogation are admissible *only if* the defendant knowingly and voluntarily waives his rights *again* with a new and independent *Miranda* warning/waiver given in connection with the resumed questioning. *Michigan v. Mosley*, 423 U.S. 96, 104 (1975); *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). *See also Chamberlin v. State*, 989 So.2d 320, 333-34

(Miss. 2008) (citing *Neal v. State*, 451 So.2d 743, 755 (Miss.1984) and admitting statement taken in subsequent interrogation after right to silence had been invoked in earlier one, but only because the subsequent interrogator re-administered *Miranda* warnings and obtained a new knowing and voluntary waiver of those rights).

In the case *sub Judice*, although the State obtained a written *Miranda* waiver from Mr. Pitchford prior to Statement 1 on November 7, no new written or oral waivers of his Fifth and Sixth Amendment rights were obtained from him in connection with Statements 2, 3, 4 or 5 or the unrecorded statement obtained prior to Statement 4. While the absence of a written waiver is not fatal, there must be at least an oral one. If there is neither, the statement must be suppressed. *Davis v. State*, 320 So.2d 789, 790 (Miss.1975),

Officer Conley testified that before giving Statements 2 and 3 on November 7, Pitchford orally reiterated his understanding of his Fifth and Sixth Amendment rights. However, Conley specifically did not testify that Mr. Pitchford was asked, in addition, whether he desired in either Statement 2 or 3 to waive those rights. Tr. 122. Because the reiteration of the understanding was unaccompanied by an express waiver, the record is insufficient to establish proper waiver of those rights and renders Statements 2 and 3 inadmissible under *Miranda. McCarty v. State*, 554 So.2d 909 (Miss.1989) *See also Smith v. Illinois*, 469 U.S. 91 (1984) (ambiguous statements insufficient to establish waiver).[41]

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[41] The record shows that Mr. Pitchford was arrested at his home around midday on November 7. Tr. 131-32, 520. He

The following morning, November 8, 2004, Mr. Pitchford was brought to Conley's office from the jail for the purpose of having Investigator Jennings give him polygraph examination. Tr. 137. At approximately 9:15 a.m., one of the officers, they disagree about who, went over with Mr. Pitchford, and he apparently signed to acknowledge his understanding of the rights enumerated, the "warning" half of a typed "Warning and Waiver of Rights" form.[42] Both officers agree that Mr. Pitchford did not, however, execute or sign the "Waiver" half of the form at this or any subsequent time. Tr. 123-26, 146-47. Ex. 60.

Conley then left the room so that the polygraph would be administered by Jennings alone, in accordance with how Jennings preferred to operate. Tr. 139. Jennings apparently rehashed Mr. Pitchford's understanding of the rights on top of the form at that

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received his first Miranda warnings at 2:38 p.m. that day from Officer Conley, and executed a written waiver of them at that time. Tr. 119-21, Ex. S-52. Conley took three separate statements (Statements 1 through 3) from Mr. Pitchford on November 7-the first one, initiated by Conley, "slightly after we brought him in," the second, over two hours after the written warning and waiver, at 4:45 p.m. that day, apparently when Mr. Pitchford requested to speak with the officer, and a third one, at the officer's behest, later that evening. Mr. Pitchford was returned to a holding cell between each statement, and had to be affirmatively brought back to Conley's office for each one. Tr. 122, 129-30.

[42] Conley claims that the form was Jennings' form and that Conley was "not in the room when it was prepared" Tr. 125. Jennings maintains that it was Mr. Conley is who "re-advised Mr. Pitchford of his rights" and that Conley then left the room and Jennings, using the form, went over the form and checked each right again as Mr. Pitchford reiterated to Jennings his understanding of each one Tr. 138.

time, though without obtaining any waiver of them, oral or written, and moved on to reading Mr. Pitchford the waiver and consent to the polygraph form. Tr. 140. Neither the consent nor the polygraph was ever obtained, however. According to Jennings:

> After advising Terry of his Miranda rights and also reading the waiver and consent form to him, he started crying and he stated that he had been up all night praying. I told him — I said you realize you said you would take a polygraph. And if you lie to us, we are going to know whether or not you are lying about any of this. He at that point began telling me the chain of events that occurred that — the day before.

Tr. 140. The waiver obtained on Nov. 7 was clearly too remote in time to the questioning the next day to be valid, *Mosley*, 423 U.S. at 104; *Tucker*, 417 U.S. at 450, *Chamberlin*, 989 So.2d at 333-34. Jennings admits he sought no new waiver before either this statement or the subsequent recorded one designated Statement 5. Tr. 144. The information obtained from Mr. Pitchford during this unrecorded statement was offered into evidence at the trial. Though it exonerated Terry of any contemplation of lethal force, or intent or attempt to kill or actual killing—and suggested that he withdrew from the robbery before it was consummated - it also contained information that was used to make him guilty of the crime in ways that the previous statements had not. Tr. 571. Because there was no valid waiver obtained prior to this unrecorded statement, this was prejudicial *Miranda* error and requires reversal in and of itself. *McCarty v. State*, 554 So.2d at 911-12.

Further, to the extent that the information obtained from this unrecorded statement was used as a springboard for further interrogation in Statement 4, taken by Conley immediately thereafter, and Statement 5, taken by Jennings after Mr. Pitchford refused to continue being interrogated by Conley, those statements, too, are infected with its unconstitutionality. They are both, therefore, inadmissible for that reason alone, even if *per arguendo*, there were subsequent valid warnings or waivers obtained prior to either of those statements. *Missouri v. Seibert*, 542 U.S. 600 (2004).[43]

Statement 4, conducted and recorded Conley commenced at 9:43 a.m. Neither officer completed the written waiver process by having Mr. Pitchford sign the waiver portion of Ex. 60, Tr. 124-26. Conley did ask Pitchford if he understood his rights as previously advised and received an affirmative answer from him to the question "is it your own free will to make a statement." Even assuming that this was sufficient to operate as a valid *Miranda* waiver for Statement 4, and Statement 4 was not obtained in violation of *Seibert* however, Pitchford subsequently revoked that waiver and invoked his Fifth Amendment right to silence by indicating he was unwilling to continue the interview with Mr. Conley. Tr. 140 ("when Officer Conley came back in, Terry quit talking. He didn't

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[43] *Seibert* was raised as in the pretrial suppression motion renewed prior to Jennings' testimony. R. 971, Tr. 568-69. The process with Jennings apparently took approximately a half hour, plenty of time for a pre-waiver interview to taint the subsequent ones. Ex. 60 (warnings given 9:14 a.m. and Conley leaves), (Statement 4 commences when Conley brought back in at 9:43 a.m.). Ex. 60; Tr. 126, 138, 139.

want to go back into it"); 151 (saying he did not want to talk to Conley in the statement itself). Statement 4 terminated at that time, and Conley left the room. 141.[44]

Instead of "scrupulously honoring" that invocation, however, Jennings immediately resumed interrogation of Mr. Pitchford with a new recorded statement, designated Statement 5 by the prosecution. He did this, however, without administering a new *Miranda* warning and obtaining a new and independent knowing and voluntary waiver of his rights to counsel and against self incrimination Tr. 139-43; 146-47, 151. He also, at the conclusion of that statement affirmatively reassured Mr. Pitchford that, unlike the interrogation conducted by Conley, the one he had just concluded with Pitchford would remain "just between you and I." Tr. 143, 151, 573. The product of that interrogation was the only "confession" by Mr. Pitchford to having participated in the robbery and was relied on heavily by the State both in its own right and as the platform

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[44] As this Court has recently noted, invocation of the right to silence does not operate as a hard stop of all interrogation in the way as invocation of the right to counsel does. *Chamberlin*, 989 So.2d at 333-34 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)). Thus the clear and unequivocal invocation of the right to counsel required to stop all future contact is not required to find an invocation of the right to silence. *Mosley*, 423 U.S. at 100 ("If the individual indicates *in any manner* . . . that he wishes to remain silent. . . he has shown that he intends to exercise his Fifth Amendment privilege" and the interrogation must cease). However, what is not in doubt is that if the conversation is resumed, a new Miranda warning and a new waiver of the Miranda rights must be obtained. *Id.* at 104; *Tucker*, 417 U.S. at 450, *Chamberlin*, 989 So.2d at 333-34.

from which inferences, some of them unsupported by the evidence at all, were launched. Tr. 649, 773-74. See also See Argument III, *supra.* The undisputed failure to re-*mirandize* however, rendered that statement inadmissible. *Mosley*, 423 U.S. at 104; *Tucker*, 417 U.S. at 450 *See also Chamberlin*, 989 So.2d at 333-34. Because of the prejudicial nature of the admissions elicited during it, despite the fact that the statement was exonerative of Terry with respect to having killed or attempted or intended to kill, or having contemplated the use of lethal force, Tr. 571-72 reversal of the conviction here and retrial omitting the use of that information is required. *Chapman v. California*, 386 U.S. 18, 23 (1967).

The failure to obtain a valid waiver of rights, even without more, has been recognized by this Court as rendering the statement involuntary under *Jackson v. Denno*, 378 U.S. 368 (1964) for 14th Amendment purposes. *Abrams v. State*, 606 So.2d 1015 (Miss. 1992) *overruled on other grounds Foster v. State* 961 So.2d 670 (Miss. 2007); *Miller v. State*, 243 So.2d 558, 559 (Miss. 1979); *Johnson v. State*, 89 Miss. 773, 42 So. 606 (1907). However, in addition to this, Mr. Pitchford's statements were also the product of threats, promises, and inducements by the interrogators and exploitive psychological coercion based on these things, which independently rendered them involuntary.[45] *Bram v. United States*, 168 U.S.

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[45] Involuntariness may be shown not only by physical coercion, *Brown v. Mississippi*, 297 U.S. 278 (1936), but by a variety of other types of coercion. *See*, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385, 398-99 (1978) (inculpatory statements obtained during a hospital interview of wounded suspect after police ignored his request for an attorney held involuntary); *Watts v. Indiana*, 338

532, 543 (1897), *Morgan v. State*, 681 So.2d 82, 86 (Miss. 1996) (citing *Chase v. State*, 645 So.2d 829, 838-39 (Miss.1994); *Layne v. State*, 542 So.2d 237, 240 (Miss.1989)); *Abrams v. State*, 606 So.2d 1015 (Miss. 1992) *overruled on other grounds Foster v. State* 961 So.2d 670 (Miss. 2007); (promises of leniency).

Voluntariness turns solely on the circumstances surrounding the confession and not the probable trustworthiness of the statement. *See Rogers v. Richmond*, 365 U.S. 534, 540-44 (1961); *Denno*, 378 U.S. at 376-77, 383-86 In Mississippi, the prosecution must prove voluntariness beyond a reasonable doubt. *Brown v. State*, 781 So. 2d 925, 927 (Miss. Ct. App. 2001). Involuntary statements cannot be used for impeachment or any other purpose by the prosecution at trial. *New Jersey v. Portash*, 440 U.S. 450, 459 (1977); *Mincey v. Arizona*, 434 U.S. at 1398 ("any criminal trial use against a defendant of his involuntary statement is a denial of due process of law") (emphasis in original).

In the course of the interrogation by Conley on November 7, Conley made several demonstrably false representations to Pitchford: 1) that the police had recovered the cash register and safe from the store; 2) That they had the gun, it had been tested and that the bullets matched; and 3) that Eric Bullins had told

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U.S. 49, 53-54 (1949) *see also Jurek v. Estelle*, 623 F.2d 929, 937-38 (5th Cir. 1980) (en banc). "A finding of coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of unconstitutional inquisition." *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). *See also Rogers v. Richmond*, 365 U.S. 534, 545 (1961); *Harris v. Beto*, 367 F.2d 567, 568 (5th Cir. 1966) (coercion of a confession can result from psychological as well as physical pressure.)

them Terry had done it and that Terry had the safe that the police recovered. Tr. 134. While by themselves, misrepresentations that elicit statements do not render the statement involuntary, they became the preconditions to the threats, promises and inducements the next day that were the components of the improper psychological coercion employed by Jennings to obtain the unrecorded statement and Statement 5.

These efforts began when, having unsuccessfully found a "good cop" foil in any of the other officers present during the November 7 interrogations, Tr. 132-33, he brought in the DA's investigator, Mr. Jennings, to do this, as well as to put pressure on Mr. Pitchford by threatening to give him a polygraph, and misrepresenting the reliability of the outcome of that examination, and to tell Terry that anything Terry said to him was just between the two of them. Tr. 137, 143-44, 151, 573. Again, though these things alone were probably not sufficient to make the statements to Jennings involuntary under the Fourteenth Amendment, together they, and what had transpired the day before became "the perfect storm" of unconstitutional psychological coercion. *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991); *Jurek v. Estelle*, 623 F.2d 929, 937-38 (5th Cir. 1980) (en banc).

This storm was the product of the techniques used by Conley and Jennings that successfully made Pitchford believe that, while what he said to Conley would become part of the record, nothing he said to Jennings would be used against him. Tr. 144, 151, 573. The statements were given only at times that the "bad cop" was removed from the process, the second time - which elicited Statement 5 - specifically when

Terry invoked his rights and declined to talk any more. Tr. 126, 138-141, 151. They also came only after Jennings elected not to give the polygraph (relieving the "threat" implicit in the misrepresentation about the infallibility of the polygraph). Tr. 142, 144 Finally, and perhaps most importantly, these statements came because Jennings never made Terry waive his constitutional rights on the form Jennings was using to warn him, and left the part of the form he was going over with him blank. He also disassociated himself with any of the waivers of rights given earlier to Conley by doing this separate process, and ensuring the absence of Conley during the statements. Ex. 60 *Abrams*, 606 So.2d 1015 (failure to properly obtain waiver renders statement involuntary). This requires reversal.

IX. WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE CONCERNING ALLEGED PRIOR BAD ACTS OR OTHER CRIMES BY THE DEFENDANT

Under the Mississippi Rules of Evidence 404(b) and the due process clause of the United States Constitution, "proof of a crime distinct from that alleged in an indictment is not admissible against an accused." *Palmer v. State*, 939 So.2d 792, 795 (Miss.2006), *Tobias v. State*, 472 So.2d 398, 400 (Miss.1985) (citing *Mason v. State*, 429 So.2d 569 (Miss.1983); *Tucker v. State*, 403 So.2d 1274 (Miss.1981); *Allison v. State*, 274 So.2d 678 (Miss.1973)). *See also Donald v. State*, 472 So.2d 370, 372 (Miss.1985) (well-settled rule in Mississippi that proof of crime distinct from that alleged in indictment is not admissible against accused); *Hughes v. State*, 470 So.2d 1046, 1048-49 (Miss. 1985) (fundamental

fairness demands that defendant retain his liberty unless proven guilty beyond reasonable doubt on indicted offense and that offense alone and proof of other crime is inadmissible). Where evidence in violation of these principles is admitted, it is reversible error. *Snelson v. State*, 704 So.2d 452 (Miss. 1997); *West v. State*, 463 So.2d 1048 (Miss.1985) (both reversing murder convictions);. *Stringer v. State*, 500 So.2d 928 (Miss.l986)(affirming capital murder conviction but reversing sentence due to inflammatory effect on jury at sentencing).

In the instant case, Terry Pitchford was indicted in two separate indictments. The first, and the one that the trial *sub judice* was held on, was the crime of capital murder of Rubin Britt in the course of an armed robbery on November 7, 2004. R. 10. In that crime, Mr. Pitchford's alleged co-perpetrator was Eric Bullins. The second indictment was a joint indictment of Terry Pitchford, Quincy Bullins, and DeMarcus Westmoreland for Conspiracy to Commit A Crime arising out of an thwarted attempt by Westmoreland and Quincy Bullins to rob the store in late October, 2004. [46] According to Westmoreland and Quincy Bullins, Mr. Pitchford was a co-conspirator in that

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[46] Eric Bullins, was indicted for capital murder a separate indictment from Terry Pitchford for allegedly participating in the same crime. R. 26. In September 2006, after Mr. Pitchford's conviction and death sentence, Eric Bullins pled guilty to Manslaughter on that indictment. He is presently serving his 20 year sentence for that offense and another 20 years for various drug offenses not connected to the November 7, 2004 incident. MDOC Inmate Locator http://www.mdoc.state.ms.us/InmateDetails.asp7PassedId—113929 Neither of the co-defendants in the second indictment is presently in MDOC custody.

offense, instructing the other two on how to do it and providing Bullins with a 22 pistol to commit it. However, both Westmoreland and Quincy Bullins denied having anything to do with the subsequent robbery. Tr. 449-65; 522-31.

The state did not attempt to use a multi-count indictment claiming that the two charged crimes were part of the same transaction, nor did it seek to have the two separate charges against Mr. Pitchford tried in a consolidated proceeding. Instead, again reprising a discredited tactic about which it has been warned twice by this Court, it tried Mr. Pitchford on one crime, but introduced evidence about the other crime in order to enflame the jury and bolster otherwise inconclusive proof, particularly proof that would make the crime seem worse when the jury came to deliberate sentence. *State v. Flowers*, 773 So. 2d 309, 322-25 (Miss. 2000) ("*Flowers I*"); *State v. Flowers*, 842 So. 2d 531, 543-50 (Miss. 2003) ("*Flowers II*") (reversing in both decisions because of State's introduction of evidence and arguments concerning deaths of three people in the same incident, but for whom defendant was not being tried at the time) It was error here, as it was in the *Flowers* cases, for the trial court to permit him to do this.

Defendant objected by way of pretrial motion to the admission of this and any other "bad act" evidence. R. 42-45, Tr. 54-56. The prosecution disclosed that it was going to offer testimony concerning the conspiracy involving the earlier thwarted robbery attempt by Quincy Bullins and Westmoreland. Reserving ruling at that time, the trial court overruled the objection just prior to the commencement of trial. Tr. 337-38. The state discussed the events involved in the charged

conspiracy in its opening statement, Tr. 340 and offered the testimony of Westmoreland and Quincy Bullins concerning it in its case in chief Tr. 449-65; 522-31. Defendant was forced by the improper admission of this testimony to call rebuttal witness to some of the testimony given by Quincy Bullins. Tr. 582-89. The evidence concerning the purported conspiracy – for which Mr. Pitchford was not on trial at the time – was also a recurrent subject in the closings by both prosecutors, particularly in attempting to tie Mr. Pitchford to the .22 that had fired the fatal shots at the November 7 robbery. Tr. 629-30, 631, 647-48.

Defendant does not gainsay the principle that other crimes may be admissible under Rule 404(b) to show intent, preparation, plan or knowledge, or where they are necessary to tell the complete story so as not to confuse the jury. *Palmer*, 939 So.2d at 795; *Ballenger v. State*, 667 So.2d 1242, 1257 (Miss.1995). However "even where evidence of other crimes is admissible under M.R.E. 404(b), it cannot be admitted unless it also passes muster under M.R.E. 403. That is, the risk of undue prejudice must not substantially outweigh its probative value." *Ballenger*, 667 So.2d at 1257.

In its guilt phase closing, the State expressly admits that the evidence about the overt acts in connection with the earlier conspiracy was not necessary for the jury to understand the story of what happened on November 7, arguing that the evidence pertaining only to that day "separately would be more than plenty for a conviction." Tr. 648. Hence, the probative value of the testimony from Westmorland and Bullins is relatively slight when it comes to convicting Mr. Pitchford of the only crime for which he was being

tried, at least at the guilt phase of the proceedings. *See Flowers I*, 773 So. 2d at 325.

The possibility of unfair prejudice is extremely high, especially since the prosecutor also expressly argues it as evidence of Mr. Pitchford's character, for which it is clearly inadmissible. *See* M.R.E 404(b) ("Evidence of other crimes, wrongs, or acts *is not admissible to prove the character of a person* in order to show that he acted in conformity therewith). Similarly, even if some parts of what Bullins and Westmoreland testified to might have been relevant to intent, preparation or plan, most of it was inflammatory and irrelevant to those things. Where, as here, there is potentially admissible smidgens of proof mixed into a sea of inflammatory and inadmissible evidence, however, the conviction cannot stand. *Flowers I* 773 So. 2d at 322-25 (holding that even where evidence is part of chain of events, must also be necessary to tell the story; where it is not both, it is not admissible).

X. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY FROM DR. STEVEN HAYNE

Miss. R. Evid. 702 permits an individual who is "qualified as an expert by knowledge, skill, experience, training, or education" to offer expert testimony, including expert opinions

> 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.

See also Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), *Mississippi Transp. Com'n v.*

McLemore, 863 So.2d 31, 35 (Miss. 2003). If evidence is admitted against a criminal defendant in violation of this rule and is unduly prejudicial to him, its admission is also a violation of his rights under the Due Process Clause. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

Dr. Steven Hayne was tendered under Rule 702 and accepted by the Court in the instant prosecution as "an expert in forensic pathology." Tr. 398. His expert testimony was heavily relied upon by the State both in obtaining its conviction of Mr. Pitchford and in securing a death sentence from the jury thereafter, both in its own right and as a means of bolstering otherwise suspect and unreliable testimony from informant or co-defendant witnesses, which, in turn was the only direct evidence that Mr. Pitchford had personally killed or intended to kill the victim in the instant matter. *See, e.g.*, Tr. 629-30, 649, 773-4, 804-05.

Hence, if it were improperly admitted it would be unduly prejudicial to him and violative of the Due Process Clause as well as Rule 702. *Edmonds v. State*, 955 So.2d 787, 792 (Miss. 2007) (holding that opinion offered by Dr. Hayne outside his expertise was inadmissible and required reversal of the defendant's conviction). [47] In the instant matter, there are three

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[47] The court reversed, holding that

> [w]e have no alternative but to find that [the defendant's] substantial rights were affected by Dr. Hayne's conclusory and improper testimony. Juries are often in awe of expert witnesses because, when the expert witness is qualified by the court, they hear impressive lists of honors, education and experience. An expert witness has more experience and knowledge in a certain

reasons requiring reversal on this basis because the testimony of Dr. Hayne was admitted in violation of Rule 702 and the due process clause.

First, even assuming *per arguendo* that Dr. Hayne should have been qualified as an expert in the first place, many of the opinions he did offer—and which were relied upon heavily by the State in obtaining the conviction, were outside the scope of his expertise, and therefore improperly admitted. *Edmonds*, 955 So.2d at 792-93. In particular, in addition to testimony within the general expertise of forensic pathology, [48] Dr. Hayne, over the objection of the defense, was permitted to give what purported to be expert opinions regarding the caliber of the weapons with

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> area than the average person. See M.R.E. 702. Therefore, juries usually place greater weight on the testimony of an expert witness than that of a lay witness. *See generally Simmons v. State*, 722 So.2d 666, 673 (Miss. 1998); see also *United States v. Benson*, 941 F.2d 598, 604 (7th Cir.1991) (an expert's "stamp of approval" on a particular witness's testimony [or theory of the case] may unduly influence the jury).

Edmonds, 955 So.2d at 792. *See also Treasure Bay Corp. v. Ricard*, 967 So. 2d 1235, 1242 (Miss. 2007).

[48] The testimony within his expertise included his autopsy findings that Mr. Britt had five injuries consistent with wounds made by small caliber projectiles and died as the result of bleeding to death from three of those wounds. Tr. 414. He also authenticated "projectiles" and "projectile fragments" that he associated with several of these wounds. Tr. 416-17. Additionally, he offered his opinion that Mr. Britt's body showed non lethal wounds to the chest, abdomen, left thigh and right arm from "shot pellets" Tr. 400-01 and identified some "shot pellets" and "wadding" that were recovered by him during the autopsy as being associated with those wounds and authenticated those items as well. Tr. 400-01, 414.

which each of the injuries were inflicted, and the number of times each weapon was discharged. With respect to the "shot pellets" and "wadding" he associated with certain non-lethal injuries from one of the weapons, his opinion was specifically solicited about whether the non-fatal wounds suffered were "not inconsistent" with having been shot by a 38 caliber weapon loaded with rat shot that had been shot from one to four times." Tr. 404, 415-16. This testimony is similar to that which was condemned in *Edmonds* and is likewise outside his area of expertise. Its admission also similarly irreparably prejudiced the defendant and requires reversal here.[49]

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[49] Defendant first objected to leading nature of the question propounded, and was overruled. Tr. 415-16. Once the doctor's testimony proceeded to its conclusion that the only fatal wounds were from a different gun, it became evident that any findings regarding the number of times the 38 was discharged was not related to his findings as a pathologist. At that point, the defense expressly articulated the outside the expertise objection. Tr. 417-18. The objection was therefore a timely contemporaneous objection. *Sumner v. State*, 316 So. 2d 926 (Miss. 1975). Even if it were not technically contemporaneous, however, it did not prejudice the proponent of the testimony, since it was made while the witness was still on the stand and subject to further examination by both parties. It was certainly made in time to allowed the court to "correct the error with proper instructions to the jury." *Jackson v. State*, 885 So.2d 723, 729(Miss. Ct. App. 2004) (quoting *Baker v. State*, 327 So.2d 288, 292 (Miss.1976). Moreover, in this capital case, even if it was not an abuse of discretion for the trial court to rely on the contemporaneous objection rule, in light of the explicit and highly prejudicial use this very testimony was put to by the state in obtaining the death penalty, Tr. 804, this should be reviewed as a matter of plain error. *Porter v. State*, 732 So.2d 899, 902-05 (Miss.1999) *Grubb v. State*, 584 So.2d 786, 789 (Miss.1991)

The state made devastating use of this clearly improper testimony and inferences from it. In seeking a conviction at the guilt phase, the prosecution argued that "you heard Dr. Hayne testify that he was shot five times with a 22, three of which were lethal wounds" Tr. 629-30 and that the jury should "look at where the wounds are. Whoever was shooting with that 38 meant to kill him with that 38." Tr. 649. At the penalty phase, Dr. Hayne was again invoked as an expert whose testimony established, contrary to the defendant's statement that he was not firing the fatal shots and the shooting was done in a panic by his companion, made death the "only" appropriate punishment. "They didn't shoot him one time . . . They shot five – more than five times." "They were up close on him at some point . . .They were close enough that shot in that 38 sprayed his whole body . . . thigh to shoulder." "They didn't just shoot him, they made sure he was dead" Tr. 773-74. In the States final closing, Mr. Evans specifically invokes the testimony he elicited from Dr. Hayne, and only from him "They went in there and continued to shoot him *up to 9 times*" compare Tr. 804 with Tr. 415 ("you are finding that he was shot anywhere from six to nine times"). Only a new trial can cure the prejudice this error caused the defendant. *Edmonds*, 955 So.2d at 792-93

Second, the State failed to show that Dr. Hayne is "qualified as an expert by knowledge, skill, experience, training, or education" because, the doctor substantially misrepresented, perhaps even perjured himself, regarding, some of his material experience and credentials as a forensic pathologist. This would require exclusion of all of Dr. Hayne's testimony.

In particular, Dr. Hayne claimed to be "*The* state pathologist for the Department of Public Safety Medical Examiner's office." Tr. 396. This was facially untrue. Mississippi has no office of "State Pathologist for the Department of Public Safety Medical Examiners office." The Mississippi Code does establish the office State Medical Examiner, to be appointed and supervised by the Commissioner of Public Safety but at the time of the autopsy and Dr. Hayne's testimony, that office was vacant and was thus not held by Dr. Hayne. Miss. Code Ann. § 41-61-55. Moreover, the statute requires that the occupant of that office be a licensed physician who is also "certified in forensic pathology by the American Board of Pathology." *Id. See also* § 41-61-53(h) (distinguishing expressly between "the State" Medical Examiner, who must hold that credential, and "county medical examiners" who need only be licensed physicians appointed by counties to perform autopsies on a case by case basis, and which is the capacity in which Dr. Hayne performed the autopsy in this case). Dr. Hayne does not have this credential and was therefore not only not "the state" anything, he was not even eligible to serve in the only state office for which a forensic pathologist is the appropriate occupant. *Edmonds*, 955 So. 2d at 802 (Diaz, P.J., specially concurring) (expressing "serious concerns over Dr. Hayne's qualifications to provide expert testimony" at all as a consequence of that lack of credential).

Even if the lack of the credential itself does not facially disqualify Dr. Hayne from being recognized as an expert in forensic psychology, for him to have obtained recognition as such in the trial court by making material misrepresentations relevant to his

credentials renders that recognition of expertise invalid and requires a new trial *See, e.g. State v. Ruybal*, 408 A.2d 1284 (Me. 1979), *People v. Cornille*, 448 N.E.2d 857 (Ill. 1983). *See also Pearson v. State*, 428 So.2d 1361, 1353 (Miss. 1983) (use of false evidence or perjured testimony).[50]

Second, even if this perjury did not prevent meeting the threshold qualifications as a forensic pathologist, his own testimony concerning his qualifications established that the methods he employed were not in conformity with the accepted methods of the profession, and his opinions were therefore not "the product of reliable principles and methods." *Janssen Pharmaceutica*, *Inc. v. Bailey*, 878 So.2d 31, 60 (Miss. 2004) (holding that "if a particular expert's methods ignore or conflict with the techniques and practices generally accepted within the field, that expert's opinion should not be considered valid or competent for admission in court.").

Dr. Hayne testified in this matter that he does 1500 to 1600 autopsies annually. Tr. 418. The National Association of Medical Examiners (NAME) is perhaps the largest professional association in the profession

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[50] "To be sure, where it may be established that a conviction has been obtained through the use of false evidence or perjured testimony, the accused's rights secured by the due process clause of the Fourteenth Amendment of the Constitution of the United States are implicated. *Mooney v. Holohan*, 294 U.S. 103, (1935). And this is so without regard to whether the prosecution has wilfully procured the perjured testimony. Where such false evidence has in fact contributed to the conviction, the accused is entitled to relief therefrom. *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150, (1972)." 428 So. 2d at 1353. (parallel citations omitted).

of forensic pathology, sets limits on the number of autopsies a forensic pathologist can conduct in a year and still meet the quality assurance standards of the profession. After 250 autopsies a year, a pathologist is deemed under those standards to be deficient, and after 325 is subject to sanction. NAME Inspection & Accreditation Policies and Procedure Manual, Sept. 2003 at 2.[51] Dr. Hayne, by his own admission, was performing between four and over six times the number of autopsies the standards of the profession dictate at the time he performed the autopsy on Mr. Britt. It is clear that his methods "ignore or conflict with the techniques and practices generally accepted within the field" of forensic pathology and the conviction based on them should not be allowed to stand.

XI. THE TRIAL COURT ERRED IN DENYING DEFENDANTS REQUESTED CULPABILITY PHASE JURY INSTRUCTIONS D-9,10,18, 30, AND 34 AND IN GRANTING THE STATE'S CULPABILITY PHASE INSTRUCTIONS S-1, S-2A, AND S-3 IN THEIR ABSENCE

In addition to the failure to grant Defendants Instructions D-9, R.1132 and D-10, R. 1133 as proper cautionary instructions concerning informant

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[51] These are not arbitrary numbers but are directly correlated to competent professional practice. Vincent DiMaio, the author of *Forensic Pathology*, the profession's guiding textbook, explained to the Wall Street Journal that "[a]fter 250 [forensic] autopsies, you start making small mistakes. At 300, you're going to get mental and physical strains on your body. Over 350, and you're talking about major fatigue and major mistakes." Radley Balko, *CSI: Mississippi*, WALL ST. J., Oct. 6, 2007, at A20.

testimony, discussed in Argument V, *supra*, the trial court erred in granting several other instructions, as well. Because the denial of these instructions affected his ability to be fairly tried in a matter where the death penalty was a possible punishment, these denials also violated the Eighth and Fourteenth Amendments to the U.S. Constitution.

The trial court's most prejudicial error came in failing to instruct the jury on the lesser offense of non-capital murder. *Fairchild v. State*, 459 So.2d 793 (Miss. 1984). D-30, R. 1148. Tr. 604. Failure to give this instruction amounted to granting a peremptory instruction to the state on the defendant's having committed armed robbery. *See Jenkins v. State*, 607 So. 2d 1171, 1179 (Miss. 1992) (finding that improper accomplice instruction likely served as peremptory instruction on guilt). The trial court based its denial solely on the conclusory statement that "there's not one bit of evidence that would support the giving of this instruction." Tr. 604. This was simply wrong. The testimony of the co-conspirators in the earlier robbery attempt concerning Mr. Pitchford's decision to get someone else to help him do it, Tr. 454, combined with Mr. Pitchford's statements to Inv. Jennings that he intended to rob, but withdrew from the store without attempting to take anything by force – and thereby the robbery – when his codefendant started shooting, Tr. 575, could make him guilty as an accomplice to simple felony murder – killing in the course of a non-capitalizing other felony – conspiracy. Miss. Code Ann. § 97-3-19(c). The only item associated with the store found in his possession was the 38 pistol, but there is also testimony from Officer Conley that Mr. Pitchford said he acquired that pistol from another

source before the robbery occurred. Tr. 502. Hence, there was evidence to support the giving of the simple murder instruction. In determining whether or not to grant an instruction, the trial court may not weigh the evidence or make credibility determinations concerning it. If any evidence exists which supports giving an instruction, it must be given. *Ruffin v. State*, 444 So.2d 839, 840 (Miss.l984).

In combination with Instructions 2, 3, and 4 (State's proposed instructions S-1, S-2A, and S-3 granted over the objection of the defendant, Tr. 591-93), R. 1118-19, which instruct the jury on the elements of capital murder and armed robbery and in accomplice liability but improperly fail to give any guidance to the jury on what to do if it fails to find any of the requisite elements beyond a reasonable doubt, the denial of the lesser included non-capital murder instruction rendered the jury instructions at the culpability phase fatally flawed and requires reversal, *Lester v. State*, 744 So. 2d 757, 759-60 (Miss. 1999).

It was also error when, after initially granting it, the trial court refused the proposed defense c instruction D-18, R. 1131 in favor of a hastily drafted instruction S-5, given as Instruction 6, R. 1122. Tr. 597-99, 613 which included the accomplices and informants in the same instruction. D-18 was a cautionary instruction dealing only with the co- participant/accomplice testimony from Quincy Bullins and DeMarcus Westmoreland, who were testifying about a different crime than the one being considered by the jury (error in and of itself, see Arg. IX, *supra*) solely for the purpose of establishing motive or planning, and not with the informant testimony from James Hathcock and Dantron Mitchell, who were testifying to

purported admissions by defendant to them about the crime that the jury was considering (also independent error, see Arg. V, *supra*). Denying the separate instruction had the effect of confusing the jury regarding the evidence and permitting it to confound two very different kinds of evidence into one, and requires reversal. *See, e.g.*, *Brazile v. State*, 514 So.2d 325, 326 (Miss. 1987) (reversing conviction "because of the inaccurate and confusing nature of' an aiding and abetting instruction).

Finally, it was error to deny defendant's requested instruction D-34, R 1151. *Sandstrom v. Montana*, 442 US 510 (1979) requires that where the state is relying on inferences and presumptions arising out of even non-circumstantial evidence, the Fourteenth Amendment requires that the jury not be permitted to make more than one leap from what is proven beyond a reasonable doubt to what is inferred. In the instant matter the State was relying on inference for a key element of defendant's guilt of capital murder-that his ownership of the gun that fired the fatal shot made him at least an accomplice, if not the actual perpetrator, of the death in the course of an armed robbery which he had planned. Tr. 649. It sought and obtained its accomplice instruction, at least in part on the basis of this inference. Instruction 4 (S-3), R. 1120.[52]

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[52] The lack of this instruction at the guilt phase also infected the penalty phase, where the State spring boarded off of the guilt finding obtained with it to argue that the defendant met the statutory *mens rea* factors for imposition of a death penalty, as well. Tr. 772-74.

XII. THE TRIAL COURT ERRONEOUSLY LIMITED THE MITIGATION EVIDENCE AND ARGUMENTS THEREON THAT DEFENDANT WAS PERMITTED TO PRESENT DURING THE PENALTY PHASE PROCEEDINGS

At the penalty phase of a capital trial, it has long been established that the Eighth Amendment to the United States Constitution gives a very broad scope to a criminal defendant facing the death penalty in presenting evidence in mitigation of punishment. A sentencing jury must be permitted to "consider[] . . . [any] evidence [that] the sentencer could reasonably find . . . warrants a sentence less than death." *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990).

Further, in a recent decision, the United States Supreme Court has reiterated that it "speak[s] in the most expansive terms" when it describes the scope of evidence a capital defendant may introduce in mitigation. *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (holding that mitigating evidence is relevant even if it has no nexus with the crime committed and reiterating that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances"). It expressly sets the threshold for relevance for admissible evidence in a defendant's mitigation case at a very low level and holds specifically "a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death." *Tennard*, at 285. *See also Boyde v. California*, 494 U.S. 370, 377-378 (1990) (citing *Lockett v. Ohio*, 438 U.S. 586, (1978)); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Payne v. Tennessee*, 501 U.S. 808, 822, (1991).

The trial court erroneously prevented the Defendant from adducing mitigation evidence allowed by the Constitution and the jury was thus unable to make a decision regarding sentence in conformity with the Eighth Amendment. The sentence in this matter must be vacated as a result. *Tennard*, 542 U.S. 274.

Citing *Wilcher v. State*, 697 So. 2d 1087 (Miss. 1997), the State objected to the Defendant seeking information from Dominique Hogan, the mother of Terry's two year old son, about the effect Terry's death would have on the child. The trial court sustained the objection and pursuant to that ruling, the Defendant did not seek to inquire about the impact Terry's death would have on any other family member witness, either. Tr. 687-88.[53] This was constitutional error under the broad scope of *Tennard* and requires vacating the death sentence here.

Notwithstanding some language in *Wilcher*, apparently foreclosing testimony from family members about their own feelings and how they relate to the defendant, this Court has, consistently with the trend in the Supreme Court that has culminated in *Tennard*, subsequently recognized that denying the

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[53] *Sua sponte*, though it was not argued by either counsel, the trial court also sustained the objection on the grounds that the witnesses response would be "speculative." Tr. 688. Clearly, if otherwise admissible, the lay opinion of a mother about the possible effects of absence of the father on a two year old - especially in light of the fact that the father had been incarcerated since the child's infancy and the mother had been observing the effect the highly restricted access had had, is within the scope of admissible lay opinion under Miss. R. Evid. 701. *See McGowen v. State*, 859 So.2d 320, 344-45 (Miss. 2003).

right to offer such testimony is, in fact, erroneous. *Simmons v. State* 805 So. 2d 452, 498 (Miss. 2001).

In the instant case, the defendant, already reduced by the failure of the trial court to permit time to complete the mitigation investigation, and to accommodate the conflicting schedule of the mental health professional who could "knit up" the mitigation case, to a mitigation case dependent solely on the testimony of a few teachers and close family members, was restricted by the court from offering significant evidence in support of mitigating his sentence, evidence that "the sentencer could reasonably find [] warrants a sentence less than death." *Tennard*, 542 U.S. at 284 (citing *McKoy*, 494 U.S. at 441). This was error that requires that the death sentence imposed on Mr. Pitchford be vacated.

Although the trial court agreed that information about Mr. Pitchford's present relationship with his child was relevant mitigation, it thwarted the defendant's attempt to illustrate that for the jury by way of videotape. Tr. 97-91. Such evidence is legally well within appropriate mitigation, and the means of presenting it is also reasonable. *See, e.g. State v. Fautenberry*, 650 N.E.2d 878, 885 (Ohio, 1995) (noting that trial court had permitted actual videotaped testimony from family member mitigation witnesses), *Collier v. Johnson*, 2001 WL 498095 (N.D.Tex., No. CIV. A. 798CV008R, May 9, 2001) (acknowledging that video footage of defendant with his children that appointed attorney assisting a defendant representing himself *pro se* wanted to introduce could have been powerful mitigation evidence).

Under both federal constitutional law and Mississippi law, it has long been established that in a death penalty case "the jury must have before it as much information as possible when it makes its sentencing decision." *Mackbee v. State*, 575 So.2d 16, 39 (Miss.1990). Hence, the right of a defendant to put on any relevant evidence that he wishes to argue to the jury mitigates his sentence is virtually unlimited. *Jackson v. State*, 684 So.2d 1213, 123 8 (Miss.1996), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982) *See also Jordan v. State*, 912 So.2d 800, 820 (Miss. 2005) (citing *Jackson.* 684 So.2d at 1238 and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)and stating that they "stand for the proposition that a defendant is entitled to present almost unlimited mitigating evidence.").

Letting a jury observe the object of their sentencing deliberations and his children can be powerful mitigation evidence, and is generally admissible under the broad scope of non-statutory mitigation evidence the Court must permit under *Jackson*, 684 So. 2d at 1238, *Eddings*, 455 U.S. 104 and their progeny. It was reversible error for the trial court to prevent this evidence from being obtained.

Finally, the trial court erred when it refused to permit Defendant to contextualize the mitigation information about how he reacted to his father's illness and death with information about how the family unit as a whole reacted to it by eliciting his brother's feelings at the time, and his mother's testimony about the nature of the illness or the effect it had on the mother in the context of her ability to parent her sons. Tr. 696, 714-16. The family environment in which the client was reared is of great significance to establishing mitigation, and can

include both positive and negative aspects of that environment. *See*, *Wiggins v. Smith*, 539 U.S. at 520-26 (noting importance of family and childhood life in mitigation investigation). There need not be a "nexus" to the crime itself. *Tennard*, 542 U.S. at 280; *See also Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (post-offense adjustment to prison life). By limiting the defendant from discussing the impact of his father's death on his family of origin in general the trial court improperly limited the defendant's ability to paint the picture of that environment, as it contributed to his reaction to his father's death.

XIII. THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO PRESENT IMPROPER MATTERS TO THE JURY DURING THE PENALTY PHASE PROCEEDINGS

In addition to the misconduct and improper evidence dealt with elsewhere, the trial court made three additional reversible errors in what it permitted the jury to hear about at the penalty phase. First, it permitted victim impact testimony that went beyond the limited scope permitted by *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("[i]n the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief"). In particular, members of the victim's family were permitted to give evidence about the decedent beyond that which was "*relevant to the crime charged*" *Randall v. State*, 806 So.2d 185, 225 (Miss. 2001) (emphasis in original). Defendant preserved this objection by way of pretrial motion. R. 60-64; Tr. 57.

Second, in the course of presenting its victim impact evidence, it employed hearsay evidence that violated the defendant's Sixth Amendment right to confrontation of witnesses. *Crawford v. Washington*, 541 U.S. 36 (2004). Over defendant's objection, the trial court permitted the decedent's widow not only to tell about her loss at her husband's death, but to read a letter from her niece, who did not testify, regarding him. Tr. 658-62.

Third, it effectively and inappropriately, and over the defendant's objection gave the State what amounted to an closing argument to the jury at the conclusion of its case in chief at the penalty phase. Tr. 667-70. The State elected not to give an opening statement at the commencement of its penalty case. This operated as a waiver of its right to do so that it did not have any right to have the trial court correct merely because the Defendant elected to make one prior to the commencement of his mitigation evidence. *See McFadden v. Mississippi State Bd. of Medical Licensure*, 735 So.2d 145 (Miss. 1999).

Given the other impediments the defense was under at this point, including the absence of the only witness who could function as an "explainer' of the significance of the family and social information the jury would be hearing, to have to do its own opening only after the State's de facto closing was an abuse of discretion that prejudiced the defendant and denied him his right to present the mitigation case he was entitled to present. *Tennard* 542 U.S. at 284.

XIV. SENTENCING PHASE INSTRUCTION 1 IS DEFICIENT BECAUSE OF THE REFUSAL OF DEFENDANTS REQUESTED SENTENCING PHASE INSTRUCTIONS DS-7, 8, 13, 15, AND MITIGATING FACTOR (H) FROM DS-17 AND BECAUSE OF THE IMPROPER PLACEMENT OF THE VERDICT OPTIONS ON THE PAGE.

Sentencing Instruction 1 directs the jury that if it finds one or more of the aggravating circumstances on which it has been instructed exists beyond a reasonable doubt "then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances" and goes on to instruct the jury that it "may" impose a death sentence if it finds that the mitigators do not outweigh the aggravators. R. 1206. The instruction does not expressly inform the jury that it may give a life sentence *even if it* finds that the mitigating circumstances do not outweigh the aggravators. The defendant therefore requested an instruction doing so DS-7, R. 1225. The trial court denied DS-7 on the basis of the State's argument that *Manning v. State*, 765 So.2d 516 (Miss. 2000) and its progeny did not require it. This was error in light of the United States Supreme Court's intervening decision in *Kansas v. Marsh*, 548 U.S. 163, 176 n.3 (2006).

This court has not required the giving of the mercy instruction that the Supreme Court found to be crucial to the constitutionality of the Kansas sentencing scheme. *Chamberlin v. State*, 989 So.2d 320, 342 (Miss. 2008). That conclusion makes the clarification that the mere finding of less weighty mitigation does not require a death sentence all the more important. DS-7 does not "nullify" the weighing

process at all, which is the problem *Manning* and *Chamberlin* identify as the reason for not permitting a mercy instruction, it simply clarifies what legal options are available to it once it has done the weighing. The sentencing statute itself specifically permits the jurors to make the finding DS-7 instructs them about, Miss. Code Ann. 99-19-101(2)(d), as do the United States and Mississippi Constitutions. *Graham v. Collins*, 506 U.S. 461, 468 (*relying on Woodson v. North Carolina*, 428 U.S.280, 304-05 (1976)); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978). *Pruett v. Thigpen*, 665 F.Supp. 1254, 1277-78 (N.D. Miss. 1986); *Manning v. State*, 726 So. 2d 1152 (Miss. 1998). It was therefore error for the Court to give Sentencing Instruction 1 without also giving DS-7.

This error was compounded when the trial court also declined to include in its listing of non-statutory mitigating circumstances the jury could consider the mitigating circumstance that "Mr. Pitchford had mental health problems as a child that were never treated" as requested in D-17(h), R. 1215, refused as unsupported by evidence at Tr. 731-33. Mississippi permits the proof of mental health infirmities through the use of lay testimony concerning them. *Groseclose v. State*, 440 So.2d 297, 301 (Miss. 1983). In the case *sub Judice*, the defendant's mother, brother and sister all testified to significant emotional and behavioral changes in Terry Pitchford at age 10 immediately following his father's death from cancer. His mother also testified to the lack of counseling or other treatment for these things. Tr. 696-97, 708-09, 717-18. This is clearly sufficient evidence to warrant the instruction sought. The trial court however, improperly weighed that testimony, rejecting it in

favor of its own conclusion that this testimony was "not an indication that he had mental health problems. It may have been an indication that she spared the rod and spoiled the child." Tr. 731-32. While that is one conclusion that the *jury* might have been free to draw from the testimony, it was not one the judge was permitted to predetermine and deny the instruction that asked the jury to consider the evidence and make up its own mind as to the mitigating import – or lack of it – of this testimony. *Ruffin v. State*, 444 So.2d 839, 840 (Miss. 1984).

The trial court also erroneously declined to give Defendant's proposed sentencing instruction, D-13 which cautioned the jury that the aggravating factors on which it was being instructed in Sentencing Instruction 1 were the only aggravating factors they could consider. R. 1220; refused as cumulative at Tr. 753. Although Sentencing Instruction 1 did advise the jury of only two aggravating factors it could consider, that was insufficient under the United States Constitution to protect the Defendant from having the jury improperly consider other things as aggravating. *See U.S. v. Booker*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004), *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover it magnified the prejudice to the defendant of the State's improper argument inviting it to find the brutality of the crime as a basis for imposing the death penalty even though the State had not sought, and the facts did not justify their finding the crime was aggravated because it was so heinous, atrocious and cruel. Tr. 804. *See* Arg. Ill, *supra*

It was also error for the trial court to refuse Defendant's proposed sentencing instruction DS-15, R. 1218, refused as cumulative at Tr. 754. Instruction 1 recites several time that the two sentences being considered by the jury are "death" and "life in prison without parole." R. 1205-8, 1213. However, nowhere does that or any other instruction expressly describe what, under the statutory sentencing scheme, the term "without parole" means in terms of other kinds of available release. Without the additional information doing so provided by DS-15, Sentencing Instruction 1 is incomplete and improper, since it leaves the jury free to speculate on whether "without parole" truly does preclude future release. Leaving such opportunity for speculation, when it is possible to be definitive, is reversible error if a proper, more specific instruction is furnished to it. *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006). It is not sufficient that counsel may argue that "without parole" really means what it says. "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the *law*." *Boyde v. California*, 494 U.S. 370, 384 (1990).

Similarly, the trial court refused an instruction informing the jury that the black letter law of the statute required that a sentence of life in prison without parole be imposed in the event that the jury could not agree upon sentence. Miss Code Ann. §99-19-103. DS-8 R. 1224 denied, even with redaction to

statutory language alone, at Tr. 750-51. The jury was instructed that one possible verdict it could return was "We the jury are unable to agree unanimously on punishment." Almost all jurors know that ordinarily, a hung jury means that another trial, before another jury, will be required. In the unique world of capital sentencing procedures, that is not the case. In *Simmons*, the Court relied on similar misapprehensions that were likely in jurors' minds about what a "life" sentence actually meant in terms of eligibility for future release to require that jurors be instructed on that if their sentence would meet the requisites of the Eighth Amendment. 512 U.S. at 169. So, too, here, because out statute particularly requires this counter-intuitive outcome, the jury must be apprised of it if any sentence they render is to pass Eighth Amendment muster.

Finally, Sentencing Instruction 1 placed the instructions about the form of a post-weighing verdict of life imprisonment without parole, or that the jury was unable to unanimously agree on punishment on a separate page from the instructions and form of the verdict for returning a death sentence. R. 1207, 1213. This was condemned *in Jenkins v. State*, 607 So. 2d, 1171, 1180 (Miss. 1992); *Stewart v. State*, 662 So. 2d 552, 564 (Miss. 1995); *Bell v. State*, 725 So. 2d 836, 858 (Miss. 1998). Defendant objected to this instruction for this reason but the trial court declined to have the instruction redone to avoid the problem. Tr. 757-60. Although the actual Verdict Form, R. 1234-35, put all three possible verdicts on the same page of the form, that does not undo the confusion and possible suggestibility to the jury that death is the preferred verdict that the layout of the instructions

they were following gives. Indeed, when the jury first attempted to return its verdict in this matter, the trial court found that the form had not been filled out properly and sent the jury back telling it to "read the instruction again real carefully" and fill in another part of the verdict form. Since it only took them five minutes to do this, it seems evident that it was the second page that had been left blank, since the writing on the first pages about aggravating factors and mens rea was lengthy. Tr. 811-12

In light of these instructional errors the sentence of death imposed on Mr. Pitchford must be reversed and remanded for a new sentencing proceeding before a properly instructed jury. *See Rubenstein*, 941 So.2d at 791.

XV. THE DEATH SENTENCE IN THIS CASE MUST BE VACATED BECAUSE IT WAS IMPOSED, AS A MATTER OF LAW, IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES

Execution will violate Baze v. Rees

Terry Pitchford has been sentenced to death by lethal injection. This Court has held that challenges to this method of execution can, and must, be brought on direct appeal. *See, e.g.*, *Jordan v. State*, 918 So.2d 636, 661 (Miss. 2005). Hence, this is a timely request for relief

The Eighth Amendment prohibits the infliction of cruel and unusual punishments. U.S. Const, amend. VIII. The Supreme Court's Eighth Amendment jurisprudence establishes that punishments that are "incompatible with 'the evolving standards of decency that mark the progress of a maturing society'" violate the Eighth Amendment's proscription against cruel

and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). The Court has also established that the Eighth Amendment prohibits punishment that "involves the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976), "involve torture or a lingering death," *In re Kemmler*, 136 U.S. 437, 447 (1890), or that do not accord with "the dignity of man, which is the basic concept underlying the Eighth Amendment." *Gregg*, 428 U.S. at 173.

Affirming Mr. Pitchford's death sentence would violates the Eighth Amendment because Mississippi's method of inflicting death by lethal injection—the only authorized method of execution under Mississippi law— has not yet been determined to pass muster under the Eighth Amendment standards promulgated by the United States Supreme Court in *Baze*, *et al. v. Rees*, 553 U.S. __, 128 S.Ct. 1520 (2008).

In *Baze*, the plurality opinion authored by the Chief Justice and joined by Justices Kennedy and Alito held that a method of execution that presented a "substantial risk of serious harm" would violate the Eighth Amendment's prohibition against cruel and unusual punishment. 238 S.Ct. at 1531. The plurality opinion explained that conditions of execution that were "sure or very likely" to cause serious illness and needless suffering, and give rise to "sufficiently imminent dangers" of serious harm would meet this standard. *Id.*

The Court in *Baze* went on to look at the fully developed factual record about the practice of lethal injection in the state of Kentucky, and concluded that

as it was performed in Kentucky, lethal injection met the requisite standard. In doing so, it relied on specific fact findings that had been made after a full hearing in the lower courts that established both significant safeguards against unnecessary suffering in the doses of drugs administered and well trained personnel who carry out the process. *Id.* at 1533-34. Based on information on file in the United States District Court for the Northern District of Mississippi, it appears that the lethal injection procedure employed in Mississippi may not meet these factual criteria for acceptance. See *Walker*, *et al. v. Epps*, *et al.*, No. 4:07-cv-00176 (N.D. Miss, Affidavit of Mark Heath, M.D., filed October 23, 2007).

In the wake of *Baze*, it is necessary that each jurisdiction's lethal injection process undergo a similar careful factual examination before that process as employed in that jurisdiction can be deemed to meet the Eighth Amendment standards promulgated by the Court. This requires at the very least that, upon timely raising the issue, a hearing be conducted doing so before a determination is made. *See, e.g. Cooey v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Opinion and Order setting hearing on post-5aze challenge to state lethal injection protocols and practice, filed 08/26/2008). Because that has not yet occurred in Mr. Pitchford's case, this Court should either reverse the death penalty altogether or remand this matter for full hearing on the lethal injection issue in the trial court before proceeding with the appeal.

Failure to include aggravating circumstances in indictment

The indictment in this case failed to charge all elements necessary to impose the death penalty under Mississippi law. R. 10. R.E. Tab 3. The indictment did not include a valid statutory aggravating factor nor a mens rea element of Miss. Code § 99-19-101(5) and (7) respectively. This claim is not subject to a procedural bar. *Byrom v. State*, 863 So. 2d 836, 865 (Miss. 2003) ("substantive challenges to the sufficiency of the indictment are not waivable and may be raised for the first time on appeal"). This Court's prior jurisprudence permitting finding such indictments valid is wrongly decided and that error should be corrected here. *Williams v. State*, 445 So. 2d 798, 804 (Miss. 1984).

Under the Due Process Clause of the Fifth Amendment, and the notice and jury trial guarantees of the Sixth Amendment, and the corresponding provision of our state constitution, any fact (other than a prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-82 (2000). "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." *Ring*, 536 U.S. 584, 122 S.Ct. at 2443.

Under the Mississippi statutory scheme, without a sentencing hearing before a jury as mandated in Miss.

Code § 99-19-101, and a finding of the jury of requisite men rea factors and aggravating circumstances beyond a reasonable doubt, the maximum penalty for capital murder is life imprisonment. *See Pham v. State*, 716 So. 2d 1100, 1103-04 (Miss. 1998); *Berry v. State*, 703 So. 2d 269, 284-85 (Miss. 1997); *White v. State*, 532 So. 2d 1207, 1219-20 (Miss. 1988); *Gray v. State*, 351 So. 2d 1342, 1349 (Miss. 1977). *See also Ring*, 122 S.Ct. at 2437 ("Based solely on the jury's verdict finding Ring guilty of first-degree murder, the maximum punishment he could have received was life imprisonment"). This implicates the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, and the corresponding provisions of our state constitution. *Apprendi* at 476; Ring, 536 U.S. 584. Holdings by this Court to the contrary are clearly erroneous in light of the Supreme Court of the United States decision in *Kansas v. Marsh*, 126 S.Ct. 2516 (2006).

In *Marsh* the Kansas Supreme Court had found its capital sentencing scheme unconstitutional and the State sought certiorari. The Supreme Court reversed the state court finding of an 8th Amendment violation, however, on the way to reaching its conclusion the Court compared the Kansas scheme to the Arizona scheme and found them essentially the same. Mississippi's scheme is indistinguishable from *Kansas.* Thus the position that *Ring v. Arizona* has no application to Mississippi's scheme, is incorrect.

The State cannot avoid these constitutional requirements by classifying any factor which operates as an element of a crime as a mere "sentencing factor." The "look" of the statute – that is, the construction of the statute or, perhaps, the legislative denomination

of the statute – is not at all dispositive of the question as to whether the item at issue is an element of the offense or a sentencing factor. See *Jones v. United States*, 526 U.S. 227, 232-33 (1999); see also *Ring*, 122 S.Ct. 2428, 2439-40 (noting the dispositive question from *Apprendi* was "one not of form, but of effect"); *Apprendi*, 530 U.S. at 476 (New Jersey's placement of word "enhancer" within the criminal code's sentencing provision did not render the "enhancer" a non-essential element of the offense). Any fact which elevates punishment above the maximum is considered an "element of an aggravated offense." *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 2414 (2002). *See also Blakely v. Washington*, 542 U.S. 296, 24 S.Ct. at 2536 (2004)(Holding that *Apprendi* reflects two longstanding tenets of common-law criminal jurisprudence: the right to a jury trial and "that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason'").

Mississippi requires that "each and every material fact and essential ingredient of the offense must be with precision and certainty set forth." *Burchfield v. State*, 277 So. 2d 623, 625 (Miss. 1973). An indictment which fails to allege the essential elements of an offense would be so defective as to deprive this Court of jurisdiction in violation of due process of law. *Alexander v. McCotter*, *115* F.2d 595, 599 (5th Cir. 1985).

Moreover, in *Rose v. Mitchell*, 443 U.S. 545, 557 n. 7 (1979), the United States Supreme held that if a state elects to prosecute by indictment, that process must comport with the Fourteenth Amendment and that

the arbitrary denial of a state right (not even a constitutional right) violates the Fourteenth Amendment and due process. *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Stewart v. State*, 662 So. 2d 552, 557 (Miss. 1995) (citing *Hicks* and holding that "the arbitrary denial. . . rises to a violation of the due process clause of the Fourteenth Amendment.")

Dual use of robbery as capitalizer and aggravator

This use, objected to by way of pretrial motion in the instant matter, R. 101-08, 136-40 Tr.62, 65-66 violates the longstanding constitutional precept that a death penalty can be imposed constitutionally only if "the sentencing body's discretion [is] suitably directed and limited" so as to avoid arbitrary and capricious executions. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976). See also *Pulley v. Harris*, 465 U.S. 37 (1984) (states must narrow sentencer's consideration of the death penalty to a smaller, more culpable class of death-eligible defendants).

Where state law does not narrow the class of death eligible offenders sufficiently in its definition of capital murder, then an aggravator found at sentencing must be an effective, operative narrower, further restricting the class of offenders beyond those convicted of capital murder. See *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *Poland v. Arizona*, 476 U.S. 147, 156 (1986); *Zant v. Stephens*, 462 U.S. 862, 878 (1983); United *States v. McVeigh*, 944 F.Supp. 1478, 1489-90 (D.Colo. 1996) (striking duplicative aggravators as they only serve to skew the weighing process in favor of death). See also *Roper v. Simmons*, 543 U.S. 551, ____ 125 S.Ct. 1183, 1194 (2005) (states

must give narrow and precise definition to the aggravating factors that can result in a capital sentence).

This Court has, Defendant understands, heretofore ruled that there is no constitutional violation, despite the failure of the dual use to narrow the sentencer's consideration of the death penalty, *Thorson v. State*, 895 So. 2d 85 (Miss. 2004), *Ross v. State*, 954 So.2d 968 (Miss. 2007). However, for the reasons stated in the foregoing section, Defendant respectfully urges this Court to revisit this view and find that the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution do, in fact require that this Court revisit those holdings, and that hold the aggravators to a capital crime be distinct from the factor that capitalizes the crime in the first place, just as it has affirmed that aggravators of each other cannot be used together in a single case. *Ladner v. State*, 584 So. 2d 743 (Miss. 1991).

Enmund* And *Tison

Enmund v. Florida, 458 U.S. 782, 798 (1982) and *Tison v. Arizona*, 107 S.Ct. 1676 (1987) require expressly that to be sentenced to death, a person convicted of capital murder must have actually killed, attempted to kill or intended to kill. *White v. State*, 532 So.2d 1207 (Miss.1988). When the jury returned its verdict in this matter, it relied in part upon the provision of our statute that permits imposition of the death penalty on a felony murder even if the only *mens rea* established is that Mr. Pitchford "contemplated that lethal force would be employed" in the undergirding felony. R. 1234. Even if this language is sufficient in some circumstances to meet

the requisites of *Enmund* and *Tison*, it does not do so here.

The only evidence that the defendant personally killed, attempted to kill, or intended to kill Mr. Britt on November 7, 2004 is the testimony regarding prior bad acts that was, , improperly admitted, or from informant witnesses, whose testimony was for the reasons stated in also inadmissible. The remaining evidence - Mr. Pitchford's own accounts (also assumed admitted only *per arguendo*, see Arg. VIII) of the events in the only statement in which he admits involvement, supported by the evidence that connects him only to a weapon that fired non-fatally and contained ammunition affirmatively intended to be non-fatal when fired – establishes, at most, that he was armed and was aware that his companion was armed with a .22 for the purpose of the robbery but that the companion's discharge of the .22 was a surprise to him, and the result of panic. Tr. 503-514, 570-77.

This Court has held expressly held that this is not a sufficient showing to permit the imposition of the death penalty for felony murder:

> The mere possession of a gun when there is no evidence that there was a plan to kill, although sufficient under the felony-murder statute, does not establish that there was a "substantial probability that fatal force will be employed."

Randall v. State, 806 So.2d 185 (Miss. 2001) (quoting *White*). Although Mr. Britt was, tragically, killed in the course of the robbery in which there is evidence that Mr. Pitchford was a willing participant, in the absence of the inadmissible prior bad act and

informant evidence there is no showing beyond a reasonable doubt that Mr. Pitchford did more than possess a weapon and fire non-fatal shots, and know his companion possessed a lethal weapon. The death sentence therefore was imposed in violation of *Enmund and Tison* and must be set aside.

XVI. WHETHER THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY OR STATUTORILY DISPROPORTIONATE.

This Court has repeatedly emphasized that the mandatory appellate review of death sentences must be qualitatively different from the scrutiny used in other type cases. *Irving v. State*, 361 So.2d 1360, 1363 (Miss. 1978). This review goes beyond simply evaluating the defendant's assignments of error. Miss. Code § 99-19-105(3)(c) and (5) require this Court to review the record in the instant case and to compare it with the death sentences imposed in the other capital punishment cases decided by the Court since *Jackson v. State*, 337 So.2d 1242 (Miss. 1976).

For a sentence of death to be affirmed, the Court must conclude "after a review of the cases coming before this Court, and comparing them to the present case, [that] the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other." *Nixon v. State*, 533 So.2d 1078, 1102 (Miss. 1987) (proportionality review takes into consideration both the crime and the defendant). This type of review provides a measure of confidence that "the penalty is neither wanton, freakish, excessive, nor disproportionate." *Gray v. State*, 472 So.2d 409, 423 (Miss. 1985), and that it is limited as the Eighth Amendment requires to those

offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551 (2005).

The murder of which the defendant was convicted in this case was, however unwarranted for the victim and tragic for his family, simply not within that "narrow category of the most serious crimes" that the Eighth Amendment contemplates punishing with the ultimate penalty. Nor is the defendant, even if the verdict of guilt is not subject to reversal, someone whose "extreme culpability" makes him "the most deserving of execution." *Id.*

Instead, even under the evidence that supports the conviction, the admissible proof shows that Mr. Pitchford was a willing participant in a robbery, but that his co-defendant initiated the fatal conduct in an act of panic when he saw the decedent with a gun and Mr. Pitchford only inflicted separate, non-lethal injuries. Tr. 509-514. This co-defendant has received plea bargain to manslaughter and some drug charges and is serving a total sentence of 40 years, with the possibility of parole and other early release.[54] Hence,

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[54] In reaching this plea, the factual basis for Mr. Bullins' having committed manslaughter would seem to indicate that in his case, at least, they credited Mr. Pitchford's statement that Bullins did not open fire until Bullins saw Mr. Britt with a gun while the two of them were walking towards the counter, and that Pitchford reacted to that by firing his own 38 loaded with rat shot into the floor. Tr. 572. This would be a clear case of manslaughter by imperfect self-defense. Since Bullins did not testify at trial, we can only infer that he corroborated that aspect of Mr. Pitchford's account. For Mr. Pitchford to get the death penalty for a manslaughter by his co-defendant is clearly disproportionate, as well as being improper under *Enmund.*

while Mr. Pitchford's conduct may fall within the technical parameters of § 93-19-2(e), it simply does not rise to the level where the Eighth Amendment permits the imposition of the ultimate penalty on its perpetrator in light of the circumstances as a whole.

XVII. WHETHER THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF EITHER THE VERDICT OF GUILT OR THE SENTENCE OF DEATH

This Court has recently reiterated its longstanding adherence to the cumulative error doctrine, particularly in capital case. *Flowers III*, 947 So. 2d at 940 (Cobb, P. J. concurring) Under this doctrine, even if any one error is not sufficient to require reversal, the cumulative effect of them does mandate such an action. *Walker v. State*, 913 So.2d 198, 216 (Miss. 2005); *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992), *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990) ("if reversal were not mandated by the State's discovery violations, we would reverse this matter based upon the accumulated errors of the prosecution").

As the foregoing litany of errors makes clear, the factual and legal arguments concerning which are incorporated into this assignment of error by reference, this is one of those cases where, even if there are doubts about the harm of any one error in isolation, the cumulative error doctrine requires reversal. *Flowers III*, 947 So. 2d at 940 (Cobb, P.J. concurring), *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990).

CONCLUSION

For the foregoing reasons, as well as such other reasons as may appear to the Court on a full review of the record and its statutorily mandated proportionality review Terry Pitchford respectfully requests this Court reverse the conviction and death sentence.

Respectfully submitted,

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APPENDIX A to Brief of Appellant:

BATSON VIOLATION PEREMPTORY STRIKES

State v. Terry Pitchford

Grenada County Circuit Court

Name	**Strike No.**	**Race/ Sex**	**Age**	**DP attitude**	**Reason Given for Strike**
Lee, Linda Ruth	S-2 Tr. 322	bf	26	b	"She is the one that was 15 minutes late ..." Tr. 324
Lee, Linda Ruth	S-2 Tr. 322	bf	26	b	"She also according to police officer, police captain Carver Conley has mental problems. They have had numerous calls to her house and said she obviously has mental problems" Tr. 324-25

Name	Strike No.	Race/ Sex	Age	DP attitude	Reason Given for Strike
Tillmon, Christopher Lamont	S-3 Tr. 322	bm	27	a	"He has a brother that has been convicted of manslaughter. And considering that this is a murder case, I don't want anyone on the jury that has relatives convicted of similar offenses." Tr. 325
Tidwell, Patricia Anne	S-4 Tr. 322	bf	37	b	" Her brother, David Tidwell, was convicted in this court of sexual battery. And her brother is now charged in a shooting case that is a pending case here in Grenada. " Tr. 325

Name	Strike No.	Race/ Sex	Age	DP attitude	Reason Given for Strike
Tidwell, Patricia Anne	S-4 Tr. 322	bf	37	b	"And also, according to police officers, she is a known drug user." Tr. 325
Ward, Carlos Fitzgerald	S-5 Tr. 322	bm	22	c	"[H]e had no opinion on the death penalty." Tr. 326
Ward, Carlos Fitzgerald	S-5 Tr. 322	bm	22	c	"He has a two year old child .... They both have children about the same age." Tr.326
Ward, Carlos Fitzgerald	S-5 Tr. 322	bm	22	c	"He has never been married.... They both have never been married." Tr. 326
Ward, Carlos Fitzgerald	S-5 Tr. 322	bm	22	c	"He has numerous speeding violations that we are aware of." Tr.326

Name	Strike No.	Race/ Sex	Age	DP attitude	Reason Given for Strike
Ward, Carlos Fitzgerald	S-5 Tr. 322	bm	22	c	"He is approximately the age of the defendant." Tr. 326
Ward, Carlos Fitzgerald	S-5 Tr. 322	bm	22	c	"The reason that I do not want him as a juror is he is too closely related to the defendant" on multiple traits. Tr. 326

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Lee, Linda Ruth	Tr. 239-40; 318 (denying State cause strike for this, finding that juror late because has no car but "is trying real hard to fulfill her civic duty as a juror.")	Several other jurors not present when court first attempted to resume. Tr. 238-39.	By Court, of struck juror Tr. 240,318 None of any other venire member	no	

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Lee, Linda Ruth	Affirmatively absent. Reason not mentioned in State's earlier motion to strike juror for cause. Tr. 318	Information not sought from or about all jurors (not asked on JQ's).	None of any venire member	no	mental illness
Tillmon, Christopher Lamont	JQ R. 800	White venire members with felony	None of the struck juror. None	Homicide conviction	people with criminal relatives

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		convictions in family accepted by State: *Counts, Jeffrey Shann* (Juror 12, R. 1104): uncle convicted of forgery. R. 479-80 *Bernreuter, Henry George*. (tendered by State Tr. 326):	of accepted comparable whites.		

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		son convicted of burglary; stepson convicted of forgery. R. 399-400			
Tidwell, Patricia Anne	JQ R. 788; Tr. 261	White venire members with felony convictions in family accepted by State :	By State, of struck juror on identity only. Tr. 261. None of accepted	no	people with criminal relatives

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		Counts. Jeffrey Shann (Juror 12, R. 1104): uncle convicted of forgery. R. 479-80 *Bernreuter, Henry George* (tendered by State Tr. 326): son convicted of burglary; stepson convicted of	comparable whites		

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		forgery. R. 399-400			
Tidwell, Patricia Anne	none	Information not sought from or about all jurors (not asked on JQ's)	None of any venire member	no	Substance dependency
Ward, Carlos Fitzgerald	JQ R. 814	White venire members with same lack of opinion on death penalty accepted by State:	None of the struck juror. By State, of accepted comparable	Witherspoon Morgan inquiry	philosophy on dp

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		Ward, Laura Candida (Juror 5, R. 1104) R. 818 *Tramel, Nathalie Drake* (Alternate 1, R. 1104) R. 806; Tr. 255	wf Tramel Tr. 255		
Ward, Carlos Fitzgerald	JQ R. 813	White venire members with young children accepted by State:	None of the struck juror. None of accepted comparable whites.	no	parental status

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		Sherman, Michael, (tendered by State Tr. 321) daughter 2 1/2 years old, son 3 months; R. 763; *Wilbourn, Lisa*. (Alternate 2, R. 1104) son 23 month old, R. 837; *Parker, Lisa,* (tendered by			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		State Tr. 321) child 6 year old , R. 701 *Tramel, Nathalie Drake,* (Alternate 1, R. 1104), 4 year old daughter, 5 year old son; R. 808 *Ward, Laura Candida* (Juror 5, R. 1104),			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		daughter 6, R. 817 *Marter, Stephen Abel, Jr.*, (tendered by State Tr. 321) 4 year old son, R. 657; *Curry, Michael*, (tendered by State Tr. 328), 5 year old son, R. 497.			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Ward, Carlos Fitzgerald	JQ R. 813	Unmarried whites accepted by State: *Eskridge,Chad*, never married, R. 527 (Juror 2, R. 1104); *Denham, Kenton L*, divorced, R. 525 (tendered by State Tr. 322); *Counts, Jeffrey Shann*, divorced,	None of the struck juror. None of accepted comparable whites.	no	marital status

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		R.481 (Juror 12, R. 1104); *Brewer, Marv Wylene*. widowed, R.421 (Juror 6, R. 1104			
Ward, Carlos Fitzgerald	none	Information not sought from or about all jurors (expressly excluded from JQ questions	None of any venire member on subject	no	

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		about criminal history)			
Ward, Carlos Fitzgerald	JQ R. 811	White venire members of similar age accepted by State: *Clark, Brantley*, age 22, R. 417, (tendered by State Tr. 321); *Eskridae,Chad*, age 25 R. 527	None of the struck juror. None of accepted comparable whites.	no	age

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		(Juror 2, R. 1104); *Sherman, Michael*, age 27 R. 761 (tendered by State Tr. 321); *Wilbourn, Lisa*, age 28, R, 835 (Alternate 2, R. 1104); *Parker, Lisa*, age 29, R. 699,			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		(tendered by State Tr. 321)			
Ward, Carlos Fitzgerald	none	White venire members accepted by State but sharing more than one of the cited traits: *Eskridae,Chad*, similar age, unmarried, R.	None of either the struck juror or accepted comparable whites except for by State, of accepted Alternate 1, Tramel,on d	no	Multiple traits purportedly shared with Defendant

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		527-29 (Juror 2, R. 1104); *Ward, Laura Candida,* young children, no death penalty opinion (Juror 5, R. 1104) R. 817-18 *Tramel. Nathalie Drake,* young children, no death penalty opinion, R. 805-	p opinion Tr. 255		

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		06; Tr. 255; (Alternate 1, R. 1104) *Parker, Lisa*, similar age, young children, R. 699-701, (tendered by State Tr. 321) ; *Wilbourn, Lisa*, similar age, child same age,			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		(Alternate 2, R. 1104) R. 835-37; *Sherman, Michael,* similar age, child same age R. 761-63; (tendered by State Tr. 321)			