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 II OF IV

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IN THE SUPREME COURT OF MISSISSIPPI

TERRY PITCHFORD,

Appellant

v.

STATE OF MISSISSIPPI,

Appellee

No. 2006-DP-00441-SCT

Filed: Aug. 10, 2009

BRIEF OF APPELLEE

STATEMENT OF THE CASE

This case arises from the homicide that occurred on November 7, 2004. On that date, the appellant, Terry Pitchford along with Eric Bullins robbed the Crossroad Grocery store in Grenada County, Mississippi and shot and killed the owner of the store, Mr. Reuben Britt during the commission of that robbery. On January 11, 2005, Pitchford was indicted separately for the capital murder of Mr. Britt pursuant to Miss. Code Ann. 97-3-19(2)(e). C.P. 10. Pitchford was charged with murdering the victim while engaged in the commission of an armed robbery. *Id.*

After jury selection in Grenada County, the trial commenced on February 7, 2006, and continued until its conclusion on February 8, 2006. Pitchford was found guilty of the single count of capital murder. A

sentencing hearing was then conducted, after which, on February 9, 2006, the jury returned the following:

> We, the jury, unanimously find from the evidence beyond a reasonable doubt that the following facts existed at the time of the commission of capital murder charged in the indictment:
>
> that the defendant actually killed Reuben Britt.
>
> that the defendant attempted to kill Reuben Britt.
>
> that the defendant intended the killing of Reuben Britt take place
>
> AND that the defendant contemplated that lethal force would be employed.
>
> We, the jury unanimously find the aggravating circumstance of:
>
> The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> The capital offense was committed for pecuniary gain during the course of a robbery.
>
> exists beyond a reasonable doubt and is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance, and we further find unanimously that the defendant should suffer death.
>
> William Fred Johnston
> FOREMAN OF THE JURY

C.P. 1234-35.

On February 17, 2006, Pitchford filed a post-trial "Motion For a New Trial." Supp. R. 1249-1252. And on February 24, 2006, filed an "Amended Motion For a New Trial." Supp. R. 1261-1263. On March 1, 2006, the court denied the Appellant's motion. R. 1264-65. The appellant, Terry Pitchford appeals, *in forma pauperis*, represented by his trial attorneys, and raises the following assignments of error for consideration by this Court:

I. THE JURY SELECTIONPROCESS WAS CONSTITUTIONALLY INFIRM AND REQUIRES REVERSAL OF MR. PITCHFORD'S CONVICTION AND SENTENCE OF DEATH.

   A. *The State Discriminated On The Basis Of Race In Its Peremptory Strikes In Violation of Batson v. Kentucky*

   B. *The Trial Court Otherwise Deprived Defendant Of A Jury Comprised As Required By The Sixth And Fourteenth Amendments*

   C. *The Trial Court Erred In Precluding The Defense From Questioning Prospective Jurors Concerning Their Ability To Consider Mitigation Evidence.*

II. THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A FULL, COMPLETE AND ADEQUATELY DEVELOPED DEFENSE AND TO HAVE HIS COUNSEL RENDER

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

VIII. 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. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY FROM DR. STEVEN HAYNE

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

XII. THE TRIAL COURT ERRONEOUSLY LIMITED THE MITIGATION EVIDENCE AND ARGUMENTS THEREON THAT DEFENDANT WAS PERMITTED TO

PRESENT DURING THE PENALTY PHASE PROCEEDINGS

XIII. THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO PRESENT IMPROPER MATTERS TO THE JURY DURING THE PENALTY PHASE PROCEEDINGS

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

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

XVI. WHETHER THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY OR STATUTORILY DISPROPORTIONATE

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

As the following analysis demonstrates, each of the issues raised on appeal is procedurally barred and

without legal merit. Accordingly, Pitchford's conviction and sentence should be affirmed.

STATEMENT OF FACTS

On November 7, 2004, at between just about 7:22 and 7:30 a.m., Walter Davis and his son walked into the Crossroads Grocery store in Grenada County, Mississippi, at the intersection of Scenic Loop 333 and Highway 7 North. Tr. 357, 366. After walking around the store a little, calling out to Mr. Britt, Walker discovered Mr. Britt's body on the floor and called 911 to report it. Tr. 366-67. 911 received the call at 7:34 a.m. Tr. 356.

Deputy Adam Eubanks of the Grenada County Sheriffs Department was dispatched to the location and arrived there at 7:42 a.m., followed shortly thereafter by Deputy Carver Conley. Tr. 357. The deputies observed shell casings on the floor and that Mr. Britt's body was very bloody. Tr. 357, 360.

Also dispatched to the scene was Grenada County Sheriffs Department Investigator Greg Conley. Tr. 484. Investigator Conley observed that Mr. Britt appeared to have been shot with two different types of weapons, as some of the wounds made by pellets. Tr. 492. Investigator Conley then began to gather information in the hopes of identifying any suspects in the crime. Tr. 492. After receiving information from three individuals, Henry Ross, Paul Hubbard and Quincy Bullin, that Terry Pitchford had been part of a previous attempt to rob the Crossroads Grocery store as well as information that the car involved was a clean, gray, Mercury or Crown Victoria with dark windows and was in the possession of Pitchford. Investigator Conley proceeded to the home of Terry

Pitchford, located on Scenic Loop 333, that he shared with his mother, Ms. Shirley Jackson. Tr. 95-6, 493.

At the home Investigator Conley found a car that fit the description given as the one involved in the homicide at the Crossroads Grocery; he asked for and received verbal consent from both Terry Pitchford and Shirley Jackson to search their car as well as written consent from Shirley Jackson. Tr. 97-8. A search of the vehicle produced a .38 caliber revolver. Tr. 494; State's Exhibit 32. At trial, the revolver was identified by Marvin Fullwood as the weapon he had given to Mr. Britt in the past and had seen it at the Crossroad Grocery the day before the murder took place there. Tr. 469-70.

Pitchford was transported to the Grenada County Sheriffs Office and consented to a series of interviews with Investigator Conley and Investigator Robert Jennings of local district attorney's office on November 7 and 8, 2004. Tr. 501-10, 570-73. Ultimately, Pitchford described his role in the murder of Mr. Britt. Pitchford confessed that he and Eric Bullin had gone to the store with the intention of robbing it. That Eric Bullin was armed with a .22 caliber pistol. That Bullin screamed the victim had a gun and that three shots were fired. That Pitchford himself was then armed and that he had fired shots into the floor. Tr. 572. Pitchford also confessed to having attempted to rob the same store a week and half prior to the murder on November 7. Tr. 572.

During his incarceration leading up to the trial, Pitchford also confessed his role in the murder to two fellow inmates at the Grenada County Jail. Dantron Mitchell testified Pitchford had told him at first that

he and Eric Bullins had committed the robbery and murder at the Crossroads Grocery but had then changed that story to claim that he had robbed and killed Mr. Britt by himself. Tr. 564. James Hatchcock testified Pitchford had told him he wanted to make some quick money; Pitchford claimed he and Bullin entered the store and demanded money at gunpoint; Pitchford and Bullin informed Mr. Britt they knew he had a gun; Pitchford and Bullin then took the money from the cash register and Mr. Britt's .38 revolver; Pitchford and Bullin then shot Mr. Britt eight or nine times; they took the cash register and Pitchford's blood stained jacket to dispose of; Pitchford informed him that Mr. Britt had begged to not be hurt; Pitchford also confessed to the earlier attempt to rob the same store, "That is when Terry said that's when - - he said wheels started rolling in my head." Tr. 429-31.

SUMMARY OF THE ARGUMENT

Pitchford's argument that the reasons for the prosecution's peremptory strikes were pretextural is barred for lack of rebuttal to the proffered reasons. Likewise, no objection was offered to any veniremen struck for cause making any argument against the strikes barred. The veniremen were properly voir dired as to issues that would be presented in the penalty phase.

The trial court did not abuse its discretion in the denial of a continuance in this case. There was no need to delay the sentencing phase of the trial as counsel informed the trial court that it was not calling an expert witness.

Pitchford's claim of prosecutorial misconduct is procedurally barred as the issue was never brought forth at trial. Alternatively, there was no action on the part of the prosecution that could be considered misconduct.

There were no improper displays of emotion viewed by the jury and what little emotion there was at trial was properly handled by the court at the request of the defense.

Pitchford's confession to fellow prisoners was properly admitted into evidence and the jury was instructed regarding informant testimony.

After prior bad act testimony was given in response to defense questioning on cross-examination, the court properly denied a mistrial, admonished the jury to disregard the testimony and received affirmative responses from the jurors that they would in fact disregard the testimony and do as instructed by the court.

Suppression of the firearm recovered from the vehicle belonging to Pitchford and his mother was correctly overruled by the trial court. Law enforcement officers had valid consent to search the vehicle.

The trial court was correct in its finding that the statements given by Pitchford to law enforcement were the result of a knowing and intelligent waiver and therefore all were admissible at trial.

The prosecution was correctly allowed to discuss the previous attempt to rob the same store the week before under MRE 404 (b) and MRE 403.

Without objection, Dr. Hayne was accepted as an expert in forensic pathology to which he gave testimony as to the wounds and cause of death. Dr. Hayne never offered testimony outside his designated area of expertise.

The jury was properly instructed at both the guilt and sentencing phases of trial.

The defense was not improperly limited in the presentation of mitigation evidence.

The court did not err in allowing the prosecution to present an opening statement at the penalty phase of the trial. Nor was improper victim impact evidence given.

The indictment in this case was sufficient to charge and put Pitchford on notice that he faced the death penalty if convicted.

The sentence was not disproportionate, nor was there cumulative error in this case.

Plainly put, Pitchford planned and carried out the armed robbery in which a man was murdered. Pitchford was apprehended and confessed to his role in the crime. The conviction and sentence are supported by the overwhelming weight of the evidence presented during trial.

LEGAL ANALYSIS

I. NO ERROR OCCURRED IN THE VOIR DIRE OR SEATING OF THE JURY.

A. At trial, four of the State's seven peremptory challenges involved the striking of African American veniremen. Tr. 321-28. Pitchford complained to the court that the strikes were in violation of the precepts *of Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting

the exercise of discriminatory peremptory challenges based solely on race). The State volunteered its race-neutral reasons for each of the strikes complained of, which were accepted by the trial court. Tr. 323-26.

This Court's standard for reviewing *Batson* questions in this situation is well-settled:

> The proper analysis for a violation pursuant to *Batson v. Kentucky*, 476 U.S. 79,106 S.Ct. 1712,90 L.ed.2d 69 (1986) has been set forth by this Court in numerous cases. *See Berry v. State*, 728 So.2d 568 (Miss. 1999); *Randall v. State*, 716 So.2d 584 (Miss.1998); *McFarland v. State*, 707 So.2d 166 (Miss. 1998). The United States Supreme Court in *Henandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed2d 395 (1991) provided *Batson* requires that:
>
> > The defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.
>
> The trial court's decision is accorded great deference on review and this Court will reverse only where the decision is clearly erroneous. *Randall v. State*, 716 So.2d at 5 87; *Collins v. State*, 691 So.2d 918, 926 (Miss.1997). In establishing the necessary prima facie showing

of discrimination a defendant must demonstrate:

> (1) that he is a member of a cognizable racial group; (2) that the prosecutor has exercised peremptory challenges to remove from the venire member's of the defendant's race; (3) and the facts and circumstances raised an inference that the prosecutor used his peremptory challenges for the purpose of striking minorities.

Walker, 740 So.2d at 879.

> Although the trial court did not explicitly rule whether [the appellant] established a *Batson* prima facie case, the trial court required the State to provide race-neutral reasons for its challenges and because the State provided explanations for its challenges, the issue of whether [the appellant] established a prima facie case and whether the State should be required to give race-neutral reasons for its challenges is moot. *Mack*, 650 So.2d at 1297 (citing *Hernandez*, 500 U.S. 352-54, 111 S.Ct 1859, 114 L.Ed.2d 395).

Snow v. State, 800 So.2d 472, 478 (Miss.2001)(affirming trial court's ruling that reasons were race-neutral, where the State used eight peremptory challenges, all to strike black members of the venire).

Therefore,

> ... the "next step is to determine whether the prosecution met its burden of showing sufficient race-neutral explanations for its

> strikes." *Woodward*, 726 So.2d at 529-30. "A peremptory challenge does not have to be supported by the same degree of justification required for a challenge for cause." *Stewart v. State*, 662 So.2d at 558. It is not necessary to meet the same standard of examination as a challenge for cause for a peremptory challenge. *Id.*

Steven v. State, 806 So.2d 1031, 1046(Miss.2001).

Indeed, the standard for reviewing such questions is highly deferential:

> This Court accords great deference to the trial court in determining whether the offered explanation under the unique circumstances of the case is truly a race-neutral reason. *Stewart*, 662 So.2d at 558. This Court will not reverse a trial judge's factual finding on this issue "unless they appear clearly erroneous or against the overwhelming weight of the evidence." *Id.* (quoting *Lockett v. State*, 517 So.2d 1346, 1350 (Miss.1987)). One of the reasons for this is because the demeanor of the attorney using the strike is often the best evidence on the issue of race-neutrality. *Id.* at 559 (citing *Hernandez v. New York*, 500 U.S. 352, 365, 111 S.Ct. 1859, 114L.Ed.2d 395 (1991)).

Finley v. State, 725 So.2d 226, 240 (Miss.1998).

As stated previously, Pitchford raises objections to the State's peremptory challenges of four potential jurors (30, 31, 43 and 48) for consideration under this standard of review. With regard to potential jurors 30, 31, 43 and 48, the defense did not attempt to refute

the reasons offered by the State regarding their strikes. Accordingly, this issue is procedurally barred as to those veniremen. *See Manning v. State*, 735 So.2d 323, 339 (Miss. 1999) ("'It is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver.'")(citing *Mack v. State*, 650 So.2d1289, 1297 (Miss.1994)); *Manning v. State*, 726 So.2d 1152, 1182 (Miss. 1998) ("First, Manning is procedurally barred from asserting this claim . . . for failure to rebut the prosecutor's reason for the strike as pretexual."); *Woodward v. State*, *726* So.2d 524, 533 (Miss.1997) ("In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point.) (citations omitted).

Alternatively, and without waiving any applicable bar, the following analysis clearly demonstrates that the State's use of its peremptory challenges was correct and proper with regard to the remaining prospective jurors.

As to Juror Number 30:

> MR. EVANS: Yes Sir. S-2 is a 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 she obviously has mental problems.

Tr. 324-25.

As to Juror Number 31:

> 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.

Tr.325. See S-R. 799-802.

As to Juror Number 43:

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.

As to Juror Number 48:

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.

Tr. 325-26.

Pitchford offered no attempt to rebut any of the reasons given by the State with regard to the potential jurors 30, 31, 43 and 48. Therefore, the State submits that:

> ... the record clearly indicates that [defense] counsel offered no rebuttal to the State's explanations for its peremptory strikes. In *Bush v. State*, 585 So.2d 1262 (Miss. 1991), we stated that if a racially neutral procedurally is offered the defendant can rebut the explanation. *Id.* at 1268. If the defendant makes no rebuttal, the trial judge must base his decision only on the explanations given by the State. *Id.* On appellate review this decision is given great deference, and we will reverse only when such decisions are clearly erroneous. *Lockett v. State*, 517 So.2d 1346,1349-50 (Miss. 1987). Therefore, we review the trial court's ruling on the strikes under a harmless error analysis.

Gary v. State, 760 So.2d 743, 748 (Miss.2000). Pitchford has failed to demonstrate any error here, harmless or otherwise.

Alternatively, the reasons given for exercising the strikes against the disputed jurors are all within the realm of explanations approved by this Court. Pitchford does not demonstrate any evidence of discriminatory intent on the part of the State. Therefore, the trial court correctly accepted the reasons given by the State. Based on the foregoing, the State submits that Pitchford's argument is procedurally barred as well as without substantive merit. This is particularly true, given that: (1) this Court's deferential standard of review on this issue, and (2) the fact that the trial court's ruling were supported by the precedent of this Court. "The trial judge witnessed the challenges in court and could observe the demeanor of all involved as well as all other relevant circumstances in this case.... [T]he trial court's findings are not clearly erroneous or against the overwhelming weight of the evidence. Therefore this contention is without merit." *Stevens v. State*, 806 So.2d 1031,1048 (Miss.2001).

Additionally, Pitchford takes issue that some of the information relied upon by the prosecution for the strikes was supplied by a third party, mainly law enforcement. Such reliance on this type of information is acceptable. In *Lockett v. State*, 517 So.2d 1346 (Miss. 1987), this Court held;

> The Supreme Court in *Batson* declined to express any views on the techniques used by lawyers seeking to obtain information about the community in which the case is to be tried, or more particularly about the age, education, employment, and economic status of prospective jurors. *Batson*, 476 U.S. at 89, n. 12, 106 S.Ct. at 1718, n. 12, 90 L.Ed.2d at 82, n. 12.

> We decline to set any limits on the prosecutor's use of any legitimate informational source heretofore or hereafter available as to jurors. Furthermore, the prosecutor does not have to question a juror in open court about such information before using it as a racially neutral ground to make a peremptory strike, as long as the source of the information and the practice itself are not racially discriminatory.
>
> 517 So.2d at 1353.

See Collins v. State, 691 So.2d 918 (Miss. 1997) (prosecutor represented that he had been informed by law enforcement that juror had been accused of taking dope from the crime scene was race neutral.); *United States v. Cobb*, 975 F. 2d 152, 154, n.3 (5th Cir. 1992) (Basis for prosecutor's race-neutral strikes do not have to be supported by evidence in the record.). There was no error in accepting this type of information.

B. Pitchford next makes a general claim, and a specific claim as to four members of the venire, that it was tainted based on the exclusion of minority veniremen pursuant to *Witherspoon v. Illinois*, 391 U.S. 510 (1968). After questioning of the veniremen had ended a total of fifty-one people were struck for cause without objection from either the defense or the prosecution. Tr. 307-14, 320-21. Before the matter of peremptory challenges was taken up, Pitchford moved the trial court to disallow the State to seek the death penalty and restore to the venire those individuals that had been stricken solely based on their viewpoint on consideration of the death penalty. Tr. 315-16. Pitchford conceded during that presentation to the court that no objections to the strikes had been made

and at least acknowledged that the prevailing law of the United States and of Mississippi was properly followed. Tr. 315, 316.

As there was no contemporaneous objection to the cause strikes of any of the veniremen by anyone for any reason the issue is procedurally barred from consideration on appeal. *Manning v. State*, 735 So.2d323,337 (Miss.1999), quoting *Wells v. State*, 698 So.2d 497, 514 (Miss. 1997) ("Any claim is waived for failure to raise a contemporaneous objection.").

Alternatively, without waiving the applicable bars, the issues presented by Pitchford are without merit.

First, with the exception of the four individually voir dired veniremen and two others, there is no indication in the record as to why any of the individuals were subjected to strikes for cause, that the sole reason for the strikes is based on death penalty views is mere conjecture and speculation and therefore not properly before the Court for consideration.[1] *Briggs v. State*, 741 So.2d 986, 991 (Miss. App. 1999).

Secondly, as Pitchford's claim that the fair cross section requirement has been violated this Court has adopted the test from *Duren v. Missouri*, 439 U.S. 357 (1979):

> ¶7. [...] The test from *Duren* requires a defendant to show: (1) that the group alleged to

---

[1] 'Reference is made to veniremen 39 and 40, that they could not consider the death penalty. Tr. 309. While it is easy to assume the venirmen that were individually voir dired on their death penalty views were excluded based on *Witherspoon*, there is no support in the record that this was the sole reason for the strikes.

> be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Id.* at 364, 99 S.Ct. 664.The *Duren* test has also been adopted by this Court. *See Kolberg v. State*, 829 So.2d 29, 86 (Miss.2002); *Lanier v. State*, 533 So.2d 473, 477 (Miss. 1988).

Yarbrough v. State, 911 So.2d 951, 955 (Miss.2005).

The Court further held:

> ¶ 12. The fair cross-section requirement is not violated merely because the all-white jury in Yarbrough's case was not representative of the black community in Neshoba County, because as we noted in *Gathings*, a defendant is "not entitled to a given percentage of jury members of his own race." *Id.* at 272. To prevail on his challenge of the venire, he must prove a prima facie violation of the Sixth Amendment's fair cross-section requirement.
>
> ¶ 13. We find that Yarbrough has not met his burden. He has failed to prove that the black population of Neshoba County was not fairly or reasonably represented in the venire. Furthermore, he has offered no evidence, only mere assertions, that black citizens of Neshoba County are being systematically excluded from the jury selection process. Therefore, the trial judge did not err in denying Yarbrough's

> motion for a dismissal of the indictment or his alternative motion for a continuance.

Yarbrough at 956.

Without proof or argument beyond the bare declaration that he had made a prima facie case that a violation occurred, Pitchford declares his conviction must be reversed. As in *Yarbrough*, the appellant offers no evidence, only mere assertions of racial discrimination and the issue is without merit.

Additionally, the fact that any potential juror is stricken based on *Witherspoon* factors is not a violation of the fair cross section requirement as explicitly held by the United States Supreme Court and followed by this Court in *Wilcher v. State*, 863 So.2d 719 (Miss.2003):

> ¶ 185. Further, the U.S. Supreme Court has stated:
>
> > The Court's reasoning in *McCree* requires rejection of petitioner's claim that "death qualification" violated his right to a jury selected from a representative cross section of the community. It was explained in *McCree* that the fair cross section requirement applies only to venires, not to petit juries. *Id.*, at 173, 106 S.Ct., at 1765. Accordingly, petit juries do not have to "reflect the composition of the community at large." *Ibid.* More importantly, it was pointed out that, even if this requirement were applied to petit juries, no fair cross section violation would be established when

> "*Witherspoon*-excludables" were dismissed from a petit jury, because they do not constitute a distinctive group for fair cross section purposes. *Id.*, at 174, 106 S.Ct., at 1765.
>
> *Buchanan v. Kentucky*, 483 U.S. 402, 415, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987) (citing *Lockhart v. McCree*, 476 U.S. 162,173-74, 106 S.Ct. 175 8, 90 L.Ed.2d 137 (1986)).

Wilcher at 767-68.

As to the four individuals pointed to by Pitchford as having been improperly stricken for cause, the State would again assert that no objection to the strikes were lodged at anytime regarding these veniremen, but rather Pitchford assented to each one being removed. Tr. 307-09. The lack of an objection bars the argument on appeal. *Manning*, 735 So.2d323,337.

Alternatively, without waiving the procedural bar, the strikes as to the individual veniremen were all properly made. Each venireperson (3, 5, 15, 49[2]) that was individually voir dired on the issue of their viewpoint on the death penalty unequivocally stated that they would not consider imposing it under any circumstances. Tr. 300-03, 305-06. A strike for cause is proper if a potential juror's viewpoint on the death penalty "[w]ould prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Grayson v. State*, 806

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[2] Pitchford identifies #45 Dora Wesley as one of the venirepersons individually voir dired. She was not. However, the State includes venireperson #49 Mamie Swims in consideration of this argument.

So.2d 241, 254 (Miss.2001); quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980).

C. In the third part of Pitchford's argument regarding the voir dire portion of the trial, he contends the trial court erred in sustaining an objection to a question regarding mitigation factors. Tr. 285-87. There was no error in the trial court's ruling as it held that, "[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." Tr. 286.

The argument Pitchford presents here on appeal has little if any resemblance to the issue that was before the trial court. As to the assertion made by Pitchford that he was somehow precluded from properly voir diring the jury panel as to mitigation issues, the following exchange occurred:

> 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. CARTERAND 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.)

Tr. 282-87. (Emphasis added).

After a short recess the defense voir dire continued.

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.

Tr. 287-88.

Rather than being precluded from asking any questions of the jury regarding mitigation issues, the record shows the prosecution objected to the defense line of questioning and after the defense made clear to the court the intention and scope of the questions it wished to ask, it was allowed to proceed unfettered. There was no error by the trial court as the defense was allowed to do exactly what it asked to do and properly questioned the veniremen. *Foster v. State*, 639 so.2d 1263, 1276 (Miss.1994). This issue is without merit and due to be dismissed.

II. THERE WAS NO ABUSE OF DISCRETION IN THE TRIAL COURT'S DENIAL OF PITCHFORD'S MOTION FOR A CONTINUANCE NOR WAS A CONTINUANCE SOUGHT PRIOR TO THE SENTENCING PHASE BY THE DEFENSE.

Pitchford makes a generally vague claim that the trial court rendered the defense ineffective by the denial of his motion for a continuance of the trial. Pitchford also asserts the trial court abused its discretion in the denial of the requested continuance.

As to Pitchford's claim of ineffectiveness on the part of trial counsel, this Court has held, "that "[i]t is totally unrealistic to expect that the lawyer charged with ineffectiveness will raise and preserve the issue in the trial court. Even if he raised the issue, it is absurd to fantasize that this lawyer might effectively or ethically litigate the issue of his own ineffectiveness."" *Lynch v. State*, 951 So.2d 549, 551-52 (Miss.2007), quoting, *Read v. State*, 430 So.2d 832,838 (Miss. 1983). Pitchford was represented at trial by three attorneys; Ray Baum, Ray Carter and Alison Steiner. Two of the attorneys, Carter and Steiner, continue to represent Pitchford here on direct appeal. It appears the more proper course of action regarding issues of ineffective assistance would more properly be brought forward in any subsequent post-conviction proceeding. *See Dunn v. State*, 693 So.2d 1333, 1339-40 (Miss. 1997).

As to Pitchford's claim the trial court erred in failing to grant the requested continuance, the standard for review for a denial of a motion for continuance is abuse of discretion by the trial court. *Smiley v. State*, 815 So.2d 1140, 1143-44 (Miss.2002). This Court will not reverse the trial court unless the ruling resulted in manifest injustice. *Simmons v. State*, 805 So.2d 452, 484 (Miss.2001). As discussed below, the trial court did not abuse its discretion nor did the denial result in a manifest injustice to Pitchford at trial.

The motions for continuance filed by Pitchford as well as the argument to the trial court in support clearly show the request was made strictly regarding mitigation issues. R. 875, 1065; Tr. 32-50. This is shown most obviously by Pitchford's offer to proceed with the trial on the scheduled date if the State were to remove the death penalty from consideration. R. 875, 1065. Specifically, the main issues argued by Pitchford as a need for the continuance were the need to have an independent expert to refute the findings of the experts from the State Hospital at Whitfield and to interview a number of relatives of Pitchford in California that knew little of Pitchford and of whom Pitchford knew little. Tr. 38.

After reviewing the motions and hearing argument on the issue the trial court held:

> THE COURT: This Court is of the opinion that Mr. Pitchford has had plenty of time to investigate mitigating factors. And, in fact, counsel has just stated that there has been a good deal of investigation on mitigating factors, because that is where the real hope for real defense is. More or less, it's a hope to save his life, but it's -- while close to a concession that there is not much chance of him being found innocent and that it's a strong likelihood of him being found guilty, therefore, it is just trying to save his life. So apparently, a good bit of information as to mitigation has already been collected. And, you know, the defendant grew up in Grenada County. He has lived here all of his life except maybe being in Jackson for a little -- you know, a few weeks or something like that. So everybody that would have any

knowledge at all about him is right here, probably within five miles of this courthouse. And so I'm of the opinion that -- you know, there's ample time and opportunity has already been given for mitigation. This case has, you know -- defense counsel has been in it since March, and Mr. Baum in it since November of'04. You know, whether he has got some half brothers or sisters in California that don't know him or anything about him, I don't see that that has any bearing on mitigation or anything else. And if his family and he were not forthcoming with this information previously, it seems to me it is almost like an attempt to withhold this information for the specific purpose of then trying to get a continuance. He has got no one but himself to blame if this information has not been provided to defense counsel earlier. As to the neurological problems or whether he can understand his rights, again, this Court has historically relied on the Mississippi State Hospital. I find all the people that I have ever dealt with there to be top rate in every fashion. There has been a couple of times where, in fact, I sent somebody to be evaluated and they came back and said they were McNaughton insane. And I thought I can't believe they would have come back with that report because in appearances before me it did not appear that they would have. But nevertheless, I rely on their expertise and have always deferred to their judgment, because they are experts in that field and I'm not. And I'm relying on their expertise again in this case. They have written

a very, very thorough analysis and I'm going to their report and a letter that they sent to me that's dated -- well, the letter is dated January 26, 2006, and a letter dated January 11 -- an evaluation dated January 11, 2006, both to be placed in the record here. They have done all evaluations that were necessary. They have come up with nothing that would in any way indicate that Mr. Pitchford has any neurological problems, any psychological problems, any low I.Q., anything that would justify another person coming in and evaluating Mr. Pitchford. Now, I guess, you know, in fact, having tried a malpractice case earlier in the week, I know that there is, I guess, hired guns that somebody can hire and get the result they want from that doctor if they, you know, talk to enough people and try --

MR. CARTER: We are not looking for that, Your Honor.

THE COURT: Excuse me.

MR. CARTER: We are not looking for just a hired gun to say what we want them to say.

THE COURT: Well, it does appear that you got a report from qualified experts and don't like their report and are trying to find something else. But if I in any way was meaning to cast any --

MR. CARTER: I understand.

THE COURT: -- you know, dispersion on your character, Mr. Carter, I was not meaning to do that.

> MR. CARTER: I understand, Your Honor. I really do.
>
> THE COURT: I just feel like that the thoroughness of the state hospital's evaluation is such that I don't see that there would be anybody else that would be necessary to evaluate Mr. Pitchford. And again, also of the opinion there wasn't anything stopping the defense from having had somebody else evaluate him even before the state hospital did. So for these reasons I just do not see that there is any grounds for continuance in this matter. And I'll note for the record that Mr. Carter has filed 30-something pretrial motions. I mean -- you know, I think you don't give your credit you do not give yourself the credit that you deserve, Mr. Carter, in your preparations. Because I think -- and I've tried a number of capital cases in the 13 years that I have been around. I don't see that any I have ever had come before me have been anymore thoroughly prepared than it looks like this case is. As I say, 30-something pretrial motions and all kinds of things. So you know, I just don't see any reason at all why this case should be continued. And I've got the utmost confidence in your ability, Mr. Carter. And I see no reason to do anything but proceed with trial.

Tr. 50-55.

The record shows that Pitchford did in fact retain the services of another psychological expert, Dr. Rahn K. Bailey. The record also clearly shows that Pitchford notified the trial court that although his expert was

available to testify that he would not be called to do so. Supp. Tr. 60-61. Also, available to testify were the experts from Whitfield who were not called to testify either. Tr. 722. As Pitchford had retained an expert prior to the proceedings and he was available to testify but not called, there can be no manifest injustice in the trial court's denial of the motion for continuance in this regard. *Simmons*, 805 So.2d 452, 484.

As to the family members in California, there was no further showing by Pitchford if they had been made available to testify. The main concern or focus of contacting this family was Pitchford's concern there was possibly some "genetic defects" or neurological problems that could be investigated or discovered. Tr. 39, 44. As pointed out by the trial court the State Hospital had made the determination that there was no evidence of neuropsychological and neurological problems found in Pitchford's evaluation. Tr. 44-45.

The trial court reviewed the motion and listened intently to Pitchford's argument and gave a well reasoned explanation of the denial of the motion for continuance. There was no abuse of discretion by the court nor did manifest injustice result from the denial requiring this issue be dismissed as lacking merit. *Simmons* at 484.

B. Pitchford next spuriously claims the trial court erred in not granting a delay in the sentencing phase so that a defense psychologist could be present to testify. Pitchford completely ignores the hearing conducted on November 12, 2007, that was instigated at his insistence on a motion to supplement the trial record. Supp. Tr. 1-63. After trial, on Pitchford's motion to supplement the record, a hearing was held

and presided over by the Honorable Marcus Gordon, appointed by this Court to rule on the matter. (Supreme Court Order No. AP-1793) After hearing testimony from ah concerned parties the judge ruled that on the final morning of trial, defense attorney Carter informed the trial court that his expert witness, Dr. Rahn K. Bailey was available, but that Carter would not be calling him to testify. Supp. Tr. 61.

As no continuance was requested and Pitchford informed the trial court that he would not call Dr. Bailey, despite his being available to testify there can be no merit to claim that the court erred on this issue. The trial court can not be held to err on an issue not presented to it for a decision. *Branch v. State*, 822 So.2d 36, 39 (Miss.2004).

III. THERE WAS NO PROSECUTORIAL MISCONDUCT DURING THE TRIAL.

Pitchford alleges instances of misconduct by the prosecution that occurred during both the guilt and penalty phases of the trial. Pitchford never raised any objection at trial or in his motion for a new trial that the prosecution had engaged in misconduct and these claims are therefore barred on direct appeal. *Jackson v. State*, 684 So.2d 1213, 1226 (Miss. 1996); *Chase v. State*, 645 So.2d 829, 854 (Miss.1994); *Hansen v. State*, 529 So.2d 114, 139-40 (Miss.1991).

Alternatively, and without waiving the applicable bar, the State addresses the merits of Pitchford's claims regarding allegations of prosecutorial misconduct. The standard of review for prosecutorial misconduct is: "Where prosecutorial misconduct endangers the fairness of a trial and the impartial

administration of justice, reversal must follow." *Goodin v. State*, 787 So.2d 639, 653 ¶ 41 (Miss.2001).

During the guilt phase of the trial, Pitchford alleges the prosecution's most flagrant misconduct occurred when they twice improperly argued facts not in evidence to the jury. Pitchford first makes the bare allegation that the prosecutor informed the jury that Quincy Bullard had voluntarily turned himself into law enforcement the day of the murder and admitted his guilt in a previous attempt to rob the store. Pitchford's allegation is inaccurate as the prosecution never made such a statement. The prosecutor actually argued, "One thing you've got to think about - Greg Conley told you Quinton, the one that was going to the store with the 22 that this defendant gave him to rob the store, he went to the sheriffs department the same morning of the murder and he admitted it." Tr. 648. Pitchford does not describe what harm or prejudice he suffered based on this assertion. Even if the statement had been as described by Pitchford there is no showing that such a statement endangered the fairness of the trial or that the administration of justice was in any way afflicted. *Goodin* at 653.

The second alleged improper argument complained of by Pitchford is contained in the prosecutor's statement:

> And when Robert Jennings pinned him down, in two different statements he admitted that him and Eric went in the store. They both robbed Mr. Britt, and they killed him. They both shot him. It doesn't matter which one shot which gun. That hasn't got anything to do with this case. I think 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.

As the jury had been properly instructed as to accomplice liability the prosecutor presented them with an accurate statement for their deliberations. Tr. 619, R. 1122. Pitchford only takes issue with the prosecutions statement that Pitchford probably had the gun, claiming such an assertion was without an evidentiary basis and was not based on the evidence and amounted to vouching for the testimony of the jailhouse informants. The record shows that the statement by the prosecution was a clear inference based on the evidence presented at trial. That Pitchford had possession of this pistol, at the scene of the crime that he had confessed to committing, was a reasonable inference for the prosecution to bring out. But, again, Pitchford fails to show that such a statement endangered the fairness of the trial or that the administration of justice was in any way tainted. *Id.*

Pitchford next argues that the prosecution's statement that the gun found in Pitchford's car was in fact the victim's gun was not supported by the evidence. Pitchford ignores the testimony of Marvin Fullwood in his attempt to discredit the prosecution. Mr. Fullwood positively identified the .38 caliber pistol, State's Exhibit 32 as a firearm that he had personally given to the victim and had also supplied him with the ammunition that it contained. Tr. 468-70. The argument of the prosecutor was entirely consistent with the evidence presented therefore

there could be no prosecutorial misconduct associated with this complaint. *Id.*

Pitchford also claims misconduct by the prosecution in stating that, "And he is about as close to a habitual liar as anybody I have ever seen." Tr. 649. This statement by the prosecution was in response to the defense argument regarding prosecution witnesses, telling the jury that Quincy Bullins and Demarcus Westmoreland had lied in their testimony, and the prosecutor pointed out the numerous falsehoods Pitchford had concocted, even to lying about his own mother's name to law enforcement. Tr. 649. To counter the argument of the defense is proper in closing and is what was utilyzed here by the prosecution. Regarding accusations of improper closing argument by the prosecution, this Court has held that, "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remark, but must also take into account defense counsel's opening salvo." *Simmons*, 805 So.2d at 490. The State can properly rebut the defense's arguments when the defense invites such a response. *Rubenstein* at 188, quoting *Davis v. State*, 660 So.2d 1228, 1255 (Miss.1995).

During his closing argument Pitchford had attacked the prosecution witnesses extensively as liars and offering testimony that could not be trusted or relied upon. Tr. 637-38, 639, 641, 642, 644. The defense attack on the honesty of the prosecution witnesses invited the response tendered by the prosecution and was not error. *Id.*

Additionally, as stated before, at no time did Pitchford object to the argument presented by the

prosecution and complained of here on appeal making the issue barred from consideration. As to the requirement that an objection is required to preserve an argument regarding closing argument this Court has held:

> ¶ 148. In *Williams v. State*, 512 So.2d 666 (Miss.1987), defense counsel did not object to prosecutor's closing argument, and this Court held that "(t]he failure of an objection is fatal." *Id.* at 672 (citing *Johnson v. State*, 477 So.2d 196 (Miss. 1985)). This Court has held that "[i]f no contemporaneous objection is made, the error, if any, is waived." *Walker*, 671 So.2d at 597 (citing *Foster*, 639 So.2d at 1270). The contemporaneous objection rule is in place to enable the trial court to correct an error with proper instructions to the jury whenever possible. *Gray v. State*, 487 So.2d 1304, 1312 (Miss.1986) (citing *Baker v. State*, 327 So.2d 288, 292-93 (Miss. 1976)). To preserve an issue for appeal, a contemporaneous objection must be made. *Ratliff v. State*, 313 So.2d 386 (Miss.1975). *See also Box v. State*, 610 So.2d 1148 (Miss.1992) (defendant failed to contemporaneously object to the prosecutor's remarks during closing argument, and a motion for mistrial, made after jury verdict of guilty, was deemed too late); *Monk v. State*, 532 So.2d 592, 600 (Miss. 1988) (contemporaneous objection during closing argument must be made, otherwise it is waived); *Gray*, 487 So.2d at 1312 (contemporaneous objection during prosecution's closing argument must be made or it is deemed waived); *Coleman v. State*, 378

> So.2d 640, 649 (Miss. 1979) (defendant failed to object to a statement by the district attorney in closing argument and a motion for mistrial after the jury had retired was deemed too late).
>
> ¶ 149. "[I]t is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court.' " *Evans*, 725 So.2d at 670 (quoting *Johnson v. State*, 477 So.2d 196, 209-10 (Miss.1985)). This Court on numerous occasions has refused to consider the issue of prosecutorial misconduct where the defendant did not raise it at trial, and we so refuse to do so today. *See, e.g.*, *Dufour v. State*, 483 So.2d 307, 311 (Miss. 1985); *Billiot v. State*, 478 So.2d 1043, 1045 (Miss.1985); *In re Hill*, 460 So.2d 792, 799 (Miss.1984); *Smith v. State*, 434 So.2d 212, 216 (Miss.1983); *Read v. State*, 430 So.2d 832, 836 (Miss. 1983).

Walker v. State, 913 So.2d 198 (Miss.2005).

Pitchford did lodge an objection during closing argument to the statement by the prosecution that, based on the fact that two other individuals walked into the store minutes after the murder occurred, "We would of had two more dead people - - ". The trial court properly ruled there was a reasonable inference from the evidence to justify the statement and overruled the objection. *Rubenstein v. State*, 941 So.2d 735, 779 (Miss.2006).

During the penalty phase of the trial, Pitchford contends the prosecution committed misconduct in improperly questioning Dominique Hogan, the

mother of his young child. The prosecutor asked, "Isn't it a fact that y'all were doing a lot of fighting?" Tr. 688-89. Ms. Hogan answered in the negative. There was no objection from the defense. The prosecutor then asked, "Were y'all going with other people at the time?", to which Pitchford did lodge an objection, that there needed to be some type of proof provided for this question to be asked. Tr. 689. The trial court agreed and required the prosecutor to provide a reasonable basis for asking the question which it did with reference to psychological reports of the defendant. Tr. 690. At the conclusion of the wrangling over the question, Ms. Hogan responded to the question in the negative and her testimony then moved on. Tr. 689-92. The trial court correctly agreed with the defense and required the prosecution to show a reasonable basis for the question and it did so. *Walker v. State*, 740 So.2d 873,886 (Miss. 1999). There was no endangerment of the trial's fairness as this allegation of misconduct is without merit and due to be dismissed. *Goodin* at 653.

Pitchford also takes issue with the prosecution's cross-examination of Pitchford's sister claiming one particular question was improper.

> 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.

Tr. 711.

Pitchford argues now on appeal that the question was improperly inflammatory. The objection at trial was general with no specific reason given. As only a

general objection was made at trial it is improper to now attempt to argue a position that was not presented to the trial court to rule upon and is therefore barred from consideration. *Goodin v. State*, 856 So.2d 267, 284 (Miss.2003).

Alternatively, without waiving that procedural bar, the argument presented now is without merit in that it does not even comport with the argument given now.

Pitchford attempts to argue that the prosecution presented and argued the aggravating factor of the crime being heinous, atrocious and cruel. There is no support in the record for such a claim and it was not argued by the prosecution. Additionally, again, there was no objection to any such argument or behavior by the prosecution and this issue is procedurally barred. *Jackson*, 684 So.2d 1213, 1226. All of the issues argued by Pitchford under this heading are procedurally barred and without merit and all are due to be dismissed.

Finally, Pitchford goes on to rant and smear the trial court judge for failing to curb the improper actions of the prosecution accusing him of bias against the defendant and ignoring his rights. As discussed immediately *supra* the record bears out that at no time did the prosecutor commit acts of misconduct. That Pitchford resorts to attempting to defile the integrity of the trial judge with nothing but innuendo and unsupported accusations is contemptuous.

The issue itself is procedurally barred as Pitchford could have brought forth this issue at trial or in any of his motions for new trial but, failed to do so. Failure to raise an issue at trial results is a procedural bar on

appeal as the trial court will not be held in error on an issue not placed before it. *Scott v. State*, 878 So.2d 933, 963 (Miss.2004).

Not a single issue raised by Pitchford under this heading rises to the level of prosecutorial misconduct or trial court error and all are due to be dismissed and barred and without merit.

IV. THERE WERE NO IMPROPER DISPLAYS OF EMOTION IN THE COURTROOM.

Pitchford contends that the trial court erred in not adequately handling improper displays of emotion from the victim's family and/or friends. As the record shows, there were never any improper displays of emotion in the courtroom during the trial leaving Pitchford's argument meritless.

Prior to trial the defense filed a motion that the court not allow the victim's family or friends to sit directly before or display emotion to the jury. R. 170-72. The trial court

informed counsel *inter alia* that if anyone became unruly or disruptive that they would be removed from the courtroom. Tr. 70-71.

At trial, following the direct testimony of James Hathcock, and before beginning cross-examination, defense counsel approached the bench and the following discussion took place:

> MR. CARTER: I filed a motion or pretrial motion about outburst and sobbing and that kind of thing and emotion in the courtroom in front of the jury. And most the jury has noticed that. We thought it would hurt the defendant. I just want the record to reflect that during Mr.

Hathcock's testimony that family members are in the back of the courtroom crying out loud, loud enough for everybody in the courtroom to hear.

THE COURT: 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.

MR. CARTER: I have not asked that anybody be ordered to leave. All I'm asking, which is the same thing I asked for in the motion, is that, I guess, that we control it to the extent that we can. I understand that we can't avoid it. And nobody is asking that it be avoided, but just that we control it to the extent that it can be.

MR. EVANS: Your Honor, I think the Court has already made it pretty clear. I would like to say there have been no outbursts in here. And there have only been some minor sniffling. From what I have heard, which is hard for even anybody even other than the jury to keep from doing.

THE COURT: With the cold I have got, I have been sniffling as loud as some of them out there in the courtroom. If you can offer some suggestions on how to control it, I'll certainly be willing to listen.

MR. CARTER: Just so the record will be clear for appeal if it need to be. Sniffling from a cold is not what I'm trying --

> THE COURT: I agree. And I wasn't meaning to suggest that. I am just saying that 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. And if counsel can suggest anything that I hadn't done that could change the situation, I am certainly willing to entertain it.
>
> MR. CARTER: Well, Your Honor, we would just ask that if it becomes any worse than it is that the Court excuse the jury temporarily and just tell the family they should control it to the extent that they can.
>
> THE COURT: We will proceed.

Tr. 432-34.

Clearly, no objection was lodged by Pitchford regarding the crying or sniffling that was taking place. Pitchford merely brought the matter to the attention of the court and asked that it be kept under control. As there was no objection made to the court that any immediate action be taken regarding the "outburst" by Pitchford there can be no error. *Walker v. State*, 671 So.2d 581, 622 (Miss.1995).

Later, during the penalty phase of the trial, counsel approached the bench for the following conversation:

> MR. CARTER: If the Court -- maybe the Court can't hear. Somebody in the back of the courtroom is talking and answering questions. And it is somebody with the victim's family. When I objected and said that question was improper. Somebody in the back said no, it is not. Would the Court please advise --

> THE COURT: I did not hear it, but --
>
> MR. CARTER: I heard it before too.
>
> THE COURT: I am not disputing what you said. I am not in the least bit. I was just saying I did not. But if you said it, I do not question it. I was going to say if, if, if you heard something, I will admonish the members of the audience at this time to refrain from any statements.
>
> MR. CARTER: Yes, sir. Thank you.
>
> (THE BENCH CONFERENCE WAS CONCLUDED.)
>
> THE COURT: I want to make it clear to everybody in the courtroom that they are not to make any comments about anything that is going on. You are a spectator and observer, guest of the Court. And you are not to make any comments. You are not to make any noise at all during this process. You can proceed.

Tr. 711-12.

Rather than an emotional outburst as complained of by Pitchford in this appeal, the defense brought to the attention of the court some improper talking in the audience. The court properly admonished the audience that making comments that could be heard in the courtroom would not be tolerated. Again, there was no objection raised by the defense regarding this action. Pitchford brought the allegement to the trial court and the court acted upon that information. There was no objection for the court to rule upon therefore no error occurred and the issue is barred. *Walker*, 671 So.2d at 622.

The little emotion that was shown in the courtroom did not rise to the level of prejudice that would have been sufficient to dispossess Pitchford of a fair trial and is therefore without merit and should be dismissed. *Id.*

V. THE TRIAL COURT DID NOT ERR IN ALLOWING THE TESTIMONY OF DANTRON MITCHELL AND JAMES HATHCOCK AND PROPERLY INSTRUCTED THE JURY AS TO THEIR TESTIMONY.

Pitchford contends that the trial court erred in allowing Dantron Mitchell and James Hathcock to testify at trial regarding statements made to them by Pitchford, confessing his role in the capital murder of Mr. Britt. Pitchford filed a motion pretrial that asked, in part, that Mitchell and Hathcock not be allowed to testify and pointed out to the trial court that such testimony should be viewed with suspicion. R. 990-92. Likewise, at a pre-trial hearing Pitchford again brought the issue forward for consideration.

> MR. CARTER: Yes, sir. Okay. The next motion is Motion Number 32, Motion to Preclude Unreliable and Untrustworthy Snitch Testimony. And snitch, as used in this sense, is talking about jailhouse persons who have come forward and want to say that Mr. Pitchford has told them various things since they have been in jail and admitted his involvement or guilt. Such as, I believe there's a gentleman named Mr. Hathcock that may be -- I think a Mitchell, Dantron Mitchell. I think the first guy was James Hathcock. And there may be one or two

more. I just want to point out to the Court that this is a capital murder case. And whatever evidence is brought about at trial should be reliable and trustworthy. And as the Court knows, there's a history of people in jail coming forward trying to get time off their sentence in trying to get deal, trying to get out of jail. And there is a great opportunity and inducement to give false testimony. And these, these particular people saw nothing, have no independent evidence of a crime actually occurring and their statements attributed to Mr. Pitchford is not corroborated by any other source. And to allow this kind of evidence in is just unfair, and it violates due process. I'm finished.

MR. EVANS: The main corroboration of their statement is it's consistent with the confession he gave the officers. Plus, these -- there is very much reliability that can be shown in these because they were friends of his and had known him for years before this occurred. These are statements against interest that he voluntarily made to some of his friends in jail. And they told about them. But what is in those statements is consistent with what he has confessed to the officers that he did.

THE COURT: Well, I'm of the opinion this motion is, you know, not well taken. I mean jailhouse snitches or anybody else that a defendant tells that he committed a crime are certainly witnesses that are allowed to come in and testify. That might be excellent issues for cross-examination but it certainly is not

> something where the Court could just preclude ahead of time witnesses testifying in that regard. So that motion is denied.

Tr. 83-84.

Both Hathcock and Mitchell did testify at trial as to what Pitchford had confessed to them about his involvement in the murder. Without objection from the defense, Hathcock testified:

> Q. (By Mr. Hill:) Mr. Hathcock, while you were in the Grenada County Jail in latter part of November or some time in November 2004, did you have an occasion to engage in a conversation with Terry Pitchford?
>
> A. Yes, sir.
>
> Q. What, what brought all of that up? I mean how was it that you happened to see him and get into a conversation with him?
>
> A. Well, see, back in 2004, before they had that killing, there was three lock-downs a day. Right before the last one, before supper, we were all sitting around talking before the t.v. cut off. And me and Terry went back to his cell. He asked me about a Bible verse about, about killing. And I showed it to him at the back of the Bible, and we all just started talking.
>
> Q. What else -- what else did you and Terry talk about?
>
> A. He asked me. He said man, do you think God will ever forgive me. I said well, if you ask for forgiveness God always forgives you.
>
> Q. Do you know what he was talking about being forgiven for?

A. Yes, sir. It was all on the news that morning.

Q. What did Terry tell you? What comment or statement, if any, did Terry Pitchford say to you about what he had done that he was wondering about forgiveness of?

A. He said him and his friend went in there. And he said first, they had a little 22 mag, little automatic. And they pointed it at him. He said man, give us your money. And then he said he gave him the money and the 38. And then he said they were fixing to take off. And he said for some reason, he said he didn't trust him. He said they think he'd snitch on them.

Q. So Pitchford told you all of that.

A. Yes, sir.

Q. Did Pitchford comment on where this was that he was talking about?

A. Yes, sir.

Q. What did he say about the location of it, where it was?

A. Cross Roads.

Q. Did he say who was with him, if anybody?

A. Yes, sir.

Q. Who did he say was with him?

A. Eric Bullin.

Q. Did he make any mention about what they said to the storekeeper, Mr. Britt?

A. He told me a few things.

Q. Tell us. If you will, Jim, what I want you to do is tell the ladies and gentlemen of the jury as

much as you can remember of your own personal knowledge, everything that you remember that Terry Pitchford said to you when you were talking to him about what happened out at Cross Roads. Can you do that?

A. Yes, sir. I'll try.

Q. Okay. Just go ahead and tell them.

A. Well, they went in. He told me they went in, and they had a little 22 they borrowed from a buddy of theirs. And he said he wanted to make some quick money because his son was just born. And he needed some money for his baby's momma and his son to have some clothes and food. They went in, and they demanded -- they pointed a 22 at the old man. And he said give us some money. He said we want the money. And he said we know you got a pistol. So they got the money out of the safe -- well, out of the cash register. And they get the 38. And then he noticed that the 38 was loaded. So right before they left, the way I understand it, the first shot him off with a 22. Then they commenced on shooting him, I think, they said nine or eight times, eight or nine times with a 22 and 38. And they left and they got rid of the cash register, 22 and the jacket he had on, which had blood on it.

Q. Did the defendant, Terry Pitchford, actually admit to you that he participated in the robbery and murder of Mr. Britt at Cross Roads store?

A. Yes, sir.

Q. Did he say anything about what comment Mr. Britt made?

A. Yes, sir.

Q. What was that?

A. He said son, you can take the money and the gun. He said just don't hurt me. I have a family.

Q. That was what Mr. Britt was saying to Pitchford.

A. Yes, sir.

Q, Was there -- during the course of that same conversation did the defendant, Terry Pitchford, tell you anything about an incident that occurred between a week and two weeks prior to the murder of Mr. Britt? Did he tell you about having been out there before?

A. Well, yes, sir. Him and a few other boys did.

Q. I want you to tell the ladies and gentlemen of the jury what Pitchford said about, about being, being out there sometime earlier than the day of the murder.

THE COURT: Lean into the microphone a little.

THE WITNESS: (Complied.)

A. All right. Well, about a week or so ago before it happened they said they broke down, you know, trying to work on a car. And one boy commented, making a joke and said let's go rob something. Just goofing off. And then I said man that's about the most ignorant thing I've ever heard. And we were all playing cards, and they started laughing. That is when Terry said that's when -- he said wheels started rolling in my head. It was some comment like that. And I

said man, somebody said something like that, I would have been rolling out.

Q. Okay. Did he say who, who he was with earlier?

A. Yes, sir.

Q. Who was it, if you know?

A. He was with Eric Bullin and DeMarquis Westmoreland. I don't know the other gentleman's name. Just by nickname. They call him Nookie.

Q. Okay. Did Terry say what, if anything, they took from the store?

A. They just said they took money out of the cash register and the 38. That's all they told me.

Q. Did they say where they deposited or what they did with anything that they took from the store?

A. Yes, sir.

Q. What?

A. They went to Wal-Mart and bought a cell phone and clothes and stuff for the baby.

Q. Did they say anything about the cash register?

A. They said -- I want to say they said they dumped it off over there by Little Texas, which is just across the highway.

Q. So they talked about taking the register out of the store.

A. Yes, sir.

Q. Now, where was Eric Bullin when Pitchford was making all this -- telling you all of this?

A. He was sitting on the bottom bunk.

Q. Did Mr. Pitchford -- you indicated at first what brought all of this up was that he wanted to know something about Bible verses; is that right?

A. Yes, sir.

Q. And what Bible verse was it he was wanting to know about?

A. All I can remember is something about murdering. And I looked it up in the back of the Bible that my grandma gave me while I was over there.

MR. HILL: Okay. Just one minute, Your Honor. Your Honor, we tender the witness for cross.

Tr. 427-32.

Also without objection from the defense, Dantron Mitchell offered his testimony as to Pitchford's confession:

Q. (By Mr. Evans:) What did the defendant, Terry Pitchford, tell you about what he had done as far as the robbery and murder at Cross Roads Grocery?

A. All he told me was he did it and only God knows. Him and God know.

Q. Who did he tell you was involved in it?

A. Eric Bullins.

Q. Who did he tell you went in the store?

A. Him and Eric Bullins.

Q. Okay. Did he later change that story?

A. Yes, sir.

Q. What did he tell you later?

A. He told me he did it by his self. Only him and God know what happened.

Q. This defendant, Terry Pitchford, told you he did it by his self.

A. Yes, sir.

Q. That he robbed and killed the man at the store.

A. Yes, sir.

Q. Did he mention anything about a weapon?

A. No, sir. Not at that time.

Q. All right. Did he ever in the jail mention anything about them not finding a weapon?

A. Yes, sir.

Q. What did he say to you?

A. He said they ain't got no gun. They can't do nothing about it.

Q. And this defendant right here is the one that told you that.

A. Yes, sir.

Q. Did you have an occasion on the morning of the killing to see this defendant?

A. No, sir.

Q. Did you ever have an occasion to see anything that came out of the store?

MR. CARTER: I object, Your Honor.

A. No, sir.

MR. CARTER: That question is confusing. He asked him if he saw him the day of the killing, and he said no. Now he is trying to get him to say by some trickery that he did, in fact, see it.

MR. EVANS: I object to that. I can't imagine anybody that that question would be confusing to.

THE COURT: I don't think the -- I think the witness can answer the question. I don't see it to be an objectionable question so the objection is overruled.

Q. (By Mr. Evans:) Did you ever see anything in his car that came out of the store?

A. No, sir.

Q. Okay. Did you ever tell anyone that you had?

A. No, sir.

Q. Did you talk with Eric also?

A. Yes, sir.

Q. I can't ask you what he said but you talked with him and Terry.

A. I talked with Bullin.

Q. I am talking about earlier. But this defendant is the one that told you to start with that they both did it and then changed his story and said he did it by his self.

A. Yes, sir.

MR. EVANS: Tender this witness, Your Honor.

Tr. 554-56.

For the first time on appeal, Pitchford complains the trial court was obligated to exclude the testimony of

both Hatchcock and Mitchell as it was more prejudicial than probative. As this argument was never presented to the trial court for consideration it is barred from consideration. *Walker v. State*, 913 So.2d 198, 227 (Miss.2005) (a trial court will not be held in error on a matter not presented to it for decision). Aside from the procedural bar the trial court correctly held that there was nothing presented to it to disallow the testimony as all persons are deemed able to testify. Mississippi Rule of Evidence 601. Pitchford offered no support that either witness was not qualified to testify and did not object to the testimony given. Unlike the confession to law enforcement that Pitchford volunteered there was no objection to the introduction of the jailhouse confessions to Mitchell and Hathcock which they testified to.

Pitchford goes on to further complain that the court did not correctly advise the jury as to informant testimony. Out of an abundance of caution, the trial court fashioned a jury instruction that was nearly the mirror image of the one proffered by the defense. Pitchford offered D-9 for the court's consideration:

> I instruct you that the law looks with suspicion and distrust on the testimony of a witness who has acted as an informant for the government. The law requires the jury to weigh testimony of an informant with great care and with caution and with suspicion.

R. 1132.

The trial court instead gave as S-5, the following:

> The Court instructs the jury that the law looks with suspicion and distrust on the testimony of

> an alleged accomplice or informant. The law requires the jury weigh the testimony of an alleged accomplice or informant with great care, caution and suspicion.

R. 1122.

The given instruction is nearly indistinguishable from Pitchford's requested instruction and, while given out of an abundance of caution and not actually required, it properly informed the jury as to testimony offered by an informant at trial. *Rubenstein v. State*, 941 So.2d 735, 767 (Miss.2006).

Pitchford also complains that he was entitled to instruction D-10 which read as follows:

> The Court instructs the jury that the testimony of an informant who provides evidence against a defendant for pay (or other benefit), must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. You the jury must determine whether the informant's testimony has been affected by interest or prejudice against the defendant.

R. 1133.

As the testimony was clear and uncontradicted that neither Mitchell or Hathcock asked for or received any favorable treatment, nor were any favors of any kind promised or given in exchange for their testimony, such an instruction was not necessary. *Manning v. State*, 735 So.2d 323, 335 (Miss.1999); *Gray v. State*, 728 So.2d 36, 72 (Miss.1998). Tr. 447-48, 567-68.

As the trial court correctly allowed the testimony of Mitchell and Hathcock and properly instructed the jury on the proper weighing of informant testimony

there was no error. This issue brought forth by Pitchford is barred and alternatively without merit and due to be dismissed.

VI. THE TRIAL COURT DID NOT ERR IN THE DENIAL OF A MISTRIAL.

Pitchford contends that the trial court erred in not granting a mistrial when improper testimony was elicited from a witness during cross-examination by the defense. The following exchange took place during the defense cross-examination of James Hathcock:

> Q. Are you and Pitchford good friends? Were y'all good friends?
>
> A. We lived close to each other for a little while.
>
> Q. Did y'all become real good friends where you would tell him your secrets?
>
> A. Not really.
>
> Q. Okay. And yet you want us to believe that he felt comfortable enough with you to tell you that he killed somebody.
>
> A. Well, he was selling me dope.
>
> MR. CARTER: May we approach, Your Honor, outside the --
>
> THE COURT: Step in the jury room for a minute, ladies and gentlemen.
>
> (THE JURY LEFT THE COURTROOM.)
>
> THE COURT: Yes, sir.
>
> MR. CARTER: Your Honor, I don't think there is any way in the world my question calls for that, that answer. And now that that is said and it's in the record, we worry that that comment can't be cured by any curative

instruction that would be given to the jury. Consequently, we move for a mistrial. Is there anything you want to add, Ray?

MR. BAUM: No.

MR. CARTER: That this case is already volatile enough just based on the facts alone. And the introduction of something that's totally unrelated, that I didn't ask for, would prejudice the case of Mr. Pitchford to the point that we think a conviction would be assured even despite our best efforts.

MR. EVANS: Your Honor, we warned defense counsel that they have been -- that he had been buying dope from the defendant. We purposely did not go into that. He forced him into bringing up that issue by constantly asking him why he would be talking to him, how close they were. And all he is doing is explaining why he felt that the defendant would feel close enough to him to give him that type of information. I think it was definitely asked for, and I think it was clearly only a response to what the defense asked for.

MR. BAUM: Let me say one thing. To my knowledge, I was never given any indication that there was a dope element to this individual and his connection to Terry Pitchford. So I --

MR. EVANS: That is true. It was Mr. Carter that I gave that information to.

MR. CARTER: This is Mr. Evans' witness and Mr. Evans --

THE COURT: Well, the fact is, Mr. Carter, that you got up here and you started asking him all kinds of questions about how he knew Mr. Pitchford, if he knew Mr. Pitchford's girlfriend was pregnant, if he knew Mr. Pitchford well enough Mr. Pitchford would be telling him his secrets. There were all kinds of questions that lead up to this answer that -- where you were insinuating that he didn't know Mr. Pitchford well enough to be talking to him.

And so in response to that, he told how he knew Mr. Pitchford. I am going to call the jury back out. I am going to tell them to disregard the fact that Mr. Hathcock testified that Mr. Pitchford had --

MR. EVANS: Your Honor, may I make a suggestion? I would ask that the Court tell the jury that they cannot consider that as evidence of his guilt in this case, but that they can consider it as part of his testimony.

THE COURT: I am going to tell them to disregard it totally. If you get back in this about how he knows Mr. Pitchford, then, you know, I think you are opening some doors that I think you probably want to keep closed.

MR. CARTER: Your Honor, can I just say for the record, my question went to the fact of whether or not he knew there was a relationship where they shared secretive information.

THE COURT: When you buy dope, that is pretty secretive. They don't usually do that out - unfortunately, maybe, they do on some of the

public streets here, but you certainly can't go to Wal-Mart and do it.

MR. CARTER: I just want to let the record reflect that I did not insinuate that -- make an insinuation at all that called for his answer. Mr. Evans could have legitimately perfectly told the man not to mention dope, like he told me he was going to do.

MR. EVANS: I did. And he didn't until you forced it out of him.

MR. CARTER: I didn't force it out of him.

THE COURT: Make your comments to the Court and not each other. I am going to admonish the jury that they are not to consider any evidence that Mr. Pitchford might have sold Mr. Hathcock some drugs. I am going to ask each of them to indicate by nodding their heads if they will disregard it. If they tell me, each one of them, that they will disregard it, as I am going to instruct them, we are going to proceed and mistrial is denied. But now if I have some jurors indicate they will not disregard that, then I will revisit the issue. You can bring the jury back in.

(THE JURY RETURNED TO THE COURTROOM.)

Tr. 438-442

The trial court continued:

THE COURT: Ladies and gentlemen, before we recessed there had been some testimony Mr. Hathcock had given indicating that maybe Mr. Pitchford had sold him some drugs at some

point in the past. Each of you are to disregard that. That is not to be considered as evidence at all. I want to ask each one of you, starting on the back row and then coming forward. All the way to the back row and then to the front row, I want you each to nod your head if you will assure me that you will disregard that and that it will not be a consideration in your deliberation. Sir, will you? Will you disregard that?

A JUROR: (Nodded.)

THE COURT: Sir, will you?

A JUROR: (Nodded.)

THE COURT: Ma'am, will you?

A JUROR: (Nodded.)

THE COURT: Sir, will you?

A JUROR: (Nodded.)

THE COURT: Okay. Ma'am, will you?

A JUROR: (Nodded.)

THE COURT: And sir, will you?

A JUROR: (Nodded.)

THE COURT: And ma'am, will you?

A JUROR: (Nodded.)

THE COURT: Sir, will you?

A JUROR: (Nodded.)

THE COURT: Sir, will you?

A JUROR: (Nodded.)

THE COURT: Ma'am, will you?

A JUROR: (Nodded.)

> THE COURT: Ma'am.
>
> A JUROR: (Nodded.)
>
> THE COURT: Ma'am.
>
> A JUROR: (Nodded.)
>
> THE COURT: Sir.
>
> A JUROR: (Nodded.)
>
> THE COURT: Ma'am.
>
> A JUROR: (Nodded.)
>
> THE COURT: Let the record reflect the jurors have stated that they will disregard that and it will not be a consideration in their deliberations. You may proceed.

Tr. 443-44.

The standard of review to be followed regarding motions for mistrial is abuse of discretion.

> ¶ 26. "Whether to grant a motion for mistrial is within the sound discretion of the trial court. The standard of review for denial of a motion for mistrial is abuse of discretion." *Pulphus v. State*, 782 So.2d 1220, 1222 (Miss.2001) (citations omitted); *Hoops v. State*, 681 So.2d 521 (Miss.1996); *Johnson v. State*, 666 So.2d 784, 794 (Miss.1995). "The failure of the court to grant a motion for mistrial will not be overturned on appeal unless the trial court abused it discretion." *Bass v. State*, 597 So.2d 182, 191 (Miss.1992).

Webster v. State, 817 So.2d 515 (Miss.2002).

As the statement by the witness was obviously improper the trial court immediately took steps to ensure that it did not have a prejudicial effect on the

defendant by appropriately admonishing the jury to disregard the statement and then polling each juror to ensure that they followed the directive of the court to not consider it at all in their deliberations. This procedure has been deemed by this Court as sufficient to cure any taint regarding the improper testimony. *Yarbrough v. State*, 911 So.2d 951, 957-58 (Miss.2005). In *Yarbrough*, the Court relied upon the holding in *Wright v. State*, 540 So.2d 1, 4 (Miss. 1989), that in the absence of unusual circumstances, "a judge's admonition to the jury to disregard improper testimony or comments after sustaining an objection to such testimony would not be held in error". *Yarbrough* at 958.

This Court has repeatedly held that "It is presumed that jurors follow the instructions of the court. To presume otherwise would be to render the jury system inoperable." *Chase v. State*, 645 So.2d 829, 853 (quoting *Johnson v. State*, 475 So.2d 1136, 1142 (Miss.1985)). *Gray v. State*, 728 So.2d 36, 63 (Miss.1998). *See also Yarbrough* at 958.

The trial court's actions sufficiently cured any potential prejudice to Pitchford and the court did not err in denying the motion for mistrial. This issue is therefore without merit and should be dismissed.

VII. THERE WAS NO TRIAL COURT ERROR IN THE DENIAL OF PITCHFORD'S MOTION TO SUPPRESS THE GUN RECOVERED FROM HIS VEHICLE.

The standard employed by this Court for the review of the denial of a motion to suppress is set forth as:

> In reviewing the denial of a motion to suppress, we must determine whether the trial court's

> findings, considering the totality of the circumstances, are supported by substantial credible evidence. *Price v. State*, 752 So.2d 1070(P9) (Miss.Ct.App.1999) (citing *Magee v. State*, 542 So.2d 228, 231 (Miss. 1989); Nicholson v. State, 523 So.2d 68, 71 (Miss. 1988); *Ray v. State*, 503 So.2d 222, 224 (Miss. 1986)). Where supported by substantial credible evidence, this Court shall not disturb those findings. *Ray*, 503 So.2d at 223-24.

Moore v. State, 933 So.2d 910, 914 (Miss.2006).

The uncontradicted testimony at the suppression hearing showed that when first approached at his home, where the vehicle in question was parked, Investigator Greg Conley asked for and received verbal permission from Pitchford to search the vehicle. Tr. 28, 98, However, Pitchford declined to sign a waiver to search. Tr. 98.

Pitchford's mother, Ms. Shirley Jackson, also present at the home and a co-owner of the vehicle in question also gave verbal consent to a search and also signed a waiver consenting to the search. Tr. 97-98.

Pitchford became agitated with his mother and stated to her several times that "something was in the car". Tr. 100. Despite this agitation, which led to him being restrained by the police, Pitchford never withdrew his consent to the search. Tr. 100, 108. As a result of the search a .38 caliber pistol was seized from the vehicle and introduced as evidence at trial. Tr. 105; State's Exhibit 32.

At the conclusion of the hearing the trial court ruled:

> THE COURT: The uncontradicted proof before the Court is that Miss Jackson and he were

joint owners. The law enforcement officers called the tag number in, and the tag number proved that Miss Jackson was the co-owner of the automobile. Certainly, a co-owner of property has absolute right to give permission to someone else to search it. The Powell case you mentioned is one that I am familiar with. And that case was one where a parent was title owner and had given the car to their daughter who was exclusively using it who gave it to her boyfriend to use. In this situation we have a situation where Miss Jackson had equal authority, equal dominion, equal control over the automobile. It was siting in her yard. It was titled in her name. Everything about this automobile indicates -- and she signed something saying that it was consent to search, quote, my vehicle. The defendant was standing right there at the time that she signed this and saying that it was her vehicle as well as his. He did not protest in the least bit and say mom, that's not your car. You can't tell anybody to search it. Additionally, the uncontradicted proof is that Mr. Pitchford also said you can search -- gave the officer permission to search the automobile. While he was unwilling to sign something, a valid oral consent, and as Officer Conley said, consent which was never withdrawn and never rescinded, gives him absolute right to search that automobile. So I don't think there is any question but that it was a totally valid consent. It was not an unreasonable search or seizure. I can go farther and say the closeness at which time this crime

> occurred and the fact that an automobile is something that can be easily moved also gave Officer Conley exigent circumstances to search the vehicle if nobody had given him permission to search it. But he went way beyond anything that he was required to do. Not only did he have verbal permission from Mr. Pitchford but after he got the verbal permission, he still asked Miss Jackson to sign a consent to search it. So I think he went way beyond anything that would have been required of him. I don't find the motion to suppress to be well taken and it's denied.

Tr. 117-19.

The trial court's decision that the search was valid is supported by the substantial credible and uncontroverted evidence that adequate permission was granted to search the vehicle and that permission was never recanted or revoked by either of the registered owners. As the trial court relied upon the substantial credible evidence to make its ruling there existed no abuse of discretion to warrant reversal. *Chamberlin v. State*, 989 So.2d 320 (Miss.2008). As such the court was correct in its holding and this issue brought by Pitchford is without merit and due to be dismissed. *Moore* at 914.

VIII. THERE WAS NO TRIAL COURT ERROR IN THE DENIAL OF PITCHFORD'S MOTION TO SUPPRESS HIS STATEMENTS TO LAW ENFORCEMENT.

Pitchford contends the trial court erred in not suppressing the statements he made to law enforcement after his arrest on November 7 and 8,

2004. As to the admissibility of a challenged confession, this Court has held the standard to be:

> ¶ 34. Findings by a trial judge that a defendant confessed voluntarily, and that such confession is admissible are findings of fact. *Davis v. State*, 551 So.2d 165, 169 (Miss.1989). As long as the trial judge applies the correct legal standards, his decision will not be reversed on appeal unless it is manifestly in error, or is contrary to the overwhelming weight of the evidence. *Davis*, 551 So.2d at 169 (citing *Frost v. State*, 483 So.2d 1345, 1350 (Miss.1986); *White v. State*, 495 So.2d 1346, 1347 (Miss. 1986)).

Chamberlin v. State, 989 So.2d 320, 332 (Miss.2008).

Pitchford challenged the statements he had made to law enforcement and argued that they should be suppressed by the court. A hearing was held on February 2, 2006, wherein the State presented evidence that showed Pitchford was properly advised of his Miranda rights and knowingly waived those rights each time that he spoke to law enforcement officers.

In Pitchford's first interview, all of which were conducted at the Grenada County Sheriff s Department, by Investigator Greg Conally, on November 7, 2004, beginning at 2:38 p.m., Pitchford was advised of his Miranda rights and signed a form stating so. Pitchford also agreed to waive those rights and speak with Investigator Connely at that time. Tr. 120-21, State's Exhibit 52. Pitchford gave a total of three statements on November 7. On each subsequent contact with Pitchford that day he was reminded of

his Miranda rights and acknowledged his understanding of them. Tr. 122.

On November 8, 2004, Pitchford gave what has been referred to as his fourth and fifth statements to investigators to Investigator Conley and Investigator Robert Jennings of the District Attorney's Office. Tr. 122. Prior to the taking of the fourth statement, Officer Conley again advised Pitchford of his Miranda rights in the presence of Investigator Jennings. Tr. 138. Officer Conley exited the room for the purpose of Investigator Jennings conducting an agreed upon polygraph examination. Tr. 138. Jennings then reviewed the Miranda warnings with Pitchford at that time. Tr. 138. Jennings testified that Pitchford then began to recount the events of the robbery and murder of Mr. Britt and he at that time called for Officer Conley to come back into the interview room to hear as well. Tr. 140. Jennings reported that Pitchford clearly did not wish to speak about the incident with Officer Conley in the room and that Conley then exited again. Tr. 141.

At that time Investigator Jennings stated that Pitchford began to tell the story, beginning with the earlier aborted attempt to rob the store up to the robbery and murder of Mr. Britt. Tr. 141. This last conversation between Pitchford and Investigator Jennings was labeled as the fifth statement. As stated by Investigator Jennings, the only break between statement four and statement five was that Officer Conley got up and left the room, and Jennings continued the interview by himself. Tr. 146-47.

At the close of testimony at the hearing, Pitchford conceded he had properly been advised of his rights

each time he as interviewed, with the exception of the fifth statement. Tr. 153.

After hearing all of the evidence and arguments from both sides the trial court ruled:

> THE COURT: As to statements one, two, three and four, the defense pretty much concedes that those were valid statements and he was properly Mirandised, that there was no coercion, no threats or anything else. And the Court concurs in that. And additionally, there was concern on the defense counsel's part that maybe the number of times he was interrogated somehow overcame his free will. But the Court will note that three of the statements were made on November 7 and two of them were made on November 8. So I do not think that was any problem. While it might not be conduct fitting in Sunday school, nevertheless police officers can when they are interviewing some criminal defendant tell them stuff that may not be exactly true. So I don't think that dishonest statements made by Officer Conley or, or Officer Jennings, I don't recall that he made any, but if he did that is not anything that would in any way invalidate the statements that were made to the defendant. The defense also makes a big production or big deal out of not reading the Miranda rights again before the fifth statement. But it's the understanding of the Court that the fifth statement was a continuation of the fourth statement. It was just a situation where Officer Conley was no longer in the room. I think it could have very easily been called statement four. For whatever

> reason they were transcribed at different times and considered five different statements. But nevertheless, he was properly Mirandised, Mirandised before the statement was given. Also, I have the reports from the state hospital that certainly indicate that the defendant had mental capacity to give these statements. And the law enforcement officers who had the opportunity to observe him when he was given these rights or read these rights that it was their complete and full understanding that Mr. Pitchford understood what he was doing when he gave these statements. Additionally, the Court will note that Mr. Pitchford could have, if there was anything that he disagreed with as far as the State -- the testimony of Officer Conley and Investigator Jenkins he could have taken the stand and denied those. And because he certainly would have the right to testify for those limited purposes, and he did not choose to do so. So the uncontradicted testimony before this Court is the statements were all free, all voluntary. Mr. Pitchford was properly Mirandised. The Court finds not only beyond a reasonable doubt but beyond any doubt whatsoever that these statements were freely and voluntarily given. And so the motion to suppress these statements is denied.

Tr. 154-56.

At trial, Pitchford only renewed his objection to the statement given to Investigator Jennings, referred to as the fifth statement. Tr. 568-69. The trial court ruled:

> THE COURT: I'll just, for the record, rule again that I, after the hearing, found that it was just a continuation of a previous statement. The only difference was one officer that was in the room at the time left the room and so it was just Mr. Jennings there. But it was a continuation. He had been read his rights previous. And the Court finds that that was all that was necessary under Miranda and so will overrule the objection to him testifying.

Tr. 569.

Without further objection, Investigator Jennings relayed the substance of Pitchford's confession:

> Q. Now, I want to refer to what I would -- I think has been referred to as his fourth statement. Before this fourth statement was taken, did you have an occasion to talk with him?
>
> A. Yes, I did.
>
> Q. And what, if anything, did he tell you at that time about whether or not he was willing to talk to you and tell the truth?
>
> A. He had indicated that he was willing to tell the truth about it. He had wanted to talk with Officer Conley but he couldn't bring himself to it. He started telling about the incident as it occurred, and I asked him to wait. I got Officer Conley back in the room. We started going through it again. It was obvious that he had a communication problem with Officer Conley. Conley recognized that and stepped back out of the room.

Q. Let me stop you right there. While Officer Conley was in the room, what did he tell you about the robbery and murder at Cross Roads Grocery at that point?

A. That he and Eric Bullin had committed the crime, that they had gone to the store that morning. Eric had spent the night with him. That they had gone inside the store. Somewhere during that point of him admitting this is when I stopped him and got Greg back in. He then stated that they went in the store and they left out of the store.

Q. So before Greg came in on the fourth statement he had already told you that they both committed the robbery and murder together.

A. That's correct.

Q. Okay. And when Officer Conley came in the room how far did he go in that admission in front of Officer Conley?

A. He got into the point of both of them getting up and going to the store, going into the store but that Mr. Britt was talking to them and seemed real nice. And he just couldn't go through with it, and they left back out of the store.

Q. So he backed up on what he had told you.

A. Just a few minutes prior.

Q. And said they went to the store to rob it. The man was nice. They couldn't do it. They left.

A. That's correct.

Q. Once Officer Conley stepped back out of the room - I will refer to what we have listed as his fifth statement, when it was just you and the defendant in the room. What did he tell you about the robbery and murder?

A. He went completely through it, stating that he and Eric had left early that morning going down to the store. That Eric had a 22 pistol. That as they went in the store he walked toward the end of the counter. And just all of a sudden Eric started screaming he's got a gun. And then he heard three shots. He turned and Eric started asking him well, are you going to do anything, are you going to do anything. At that point he had a gun. He said he fired into the floor. I asked him to then go back through the entire scenario, the whole situation including a week and a half prior to the actual crime where there were others involved in a conspiracy to that.

Q. Okay. So basically he gave you a version. He changed it a little when Greg came in. Then he changed it again when it was just you some.

A. That's correct.

Q. But in the first version that he gave you, he said him and Eric went in and robbed and killed the man in the store.

A. That's correct.

Tr. 571-73.

The trial court correctly found that the uncontradicted evidence clearly showed that Pitchford voluntarily confessed to the crime and had

at all interviews been properly advised of his rights and that he knowingly waived those rights prior to making his statements. The finding was not manifestly wrong or contrary to the overwhelming weight of the evidence. Rather, the admission of the confession was in accordance with the overwhelming weight of the evidence presented. Therefore this issue is due to be dismissed as lacking merit. *Davis v. State*, 551 So.2d 165, 169.

IX. THE TRIAL COURT DID NOT ERR BY ADMITTING ANY IMPROPER OTHER BAD ACTS EVIDENCE DURING THE COURSE OF THE TRIAL.

Prior to trial the prosecution informed the court it intended to introduce evidence of Pitchford's prior attempt to rob the same store that he did in fact rob on November 7, in order to show, motive, intent and planning on Pitchford's part.

> MR. CARTER: Okay. Your Honor, let's start with the first one then. This is Motion Number 1, Motion for Notice of Intent to Introduce Bad Act Evidence Against the Defendant Under Rule 404(b) or 608(b)of the Mississippi Rules of Evidence and Motion for a Determination of the Admissibility of the Alleged Evidence in Advance of Proceeding Where Its Introduction Would Be Sought. More or less. I'm just trying to find out if the prosecution --
>
> MR. EVANS: We are prepared to go forward on that one. Your Honor, as far as what I know, the State would consider bad acts that would fall under 404(b) we have none. There is one issue that we do intend to go into in case

opposing counsel wants to argue it. We do intend to go into the fact that the two codefendants when this defendant planned the robbery originally about a week, week-and-a-half before this and went to the store to rob it, we do intend to go into that to show motive. I guess you could in a way argue that that was bad acts but I don't think that falls under what the statutes call bad acts. But that would be the only thing, if any, that I know of that the Court may want to rule on before we go forward and put on that proof. I know of no criminal history that we intend to go into, anything like that. We do know of some other bad acts that we do not intend to try to bring out. It's possible that they may come out in mitigation, but it would not be anything that the Court would have to rule on as far as the case in chief. Not in mitigation but in the second phase.

MR. CARTER: Your Honor, I can -- I accept that and I understand that they are going to bring up the incident he talked about earlier. I'll just object to it at a -- I have no motion that deals specifically with that today but I will object to it at trial at the court date.

THE COURT: Okay. You can reserve your objection on that issue until you are ready to argue it.

MR. CARTER: Yes, sir.

THE COURT: Of course, I have always -- I think anybody that practices in front of me knows I just almost never allow bad acts or prior crimes or anything else to be presented. I

> always have the idea that they should be - the jury should be focused on the matter in front of them and not at what somebody may have done at some point in the past. Of course, the State has already conceded that, you know, they are not going to attempt to determine -- I mean not going to attempt to introduce any bad acts other than possibly some planning and preparation ahead of time. I guess the State knows me well enough to know that that wouldn't be allowed if they attempted to. So that motion will be granted.

Tr. 56.

The prosecution brought up the issue again just prior to opening statements at which time Pitchford did lodge an objection.

> MR. EVANS: And second, Your Honor, I really don't even think this applies, but out of precaution I want to raise it. I was planning on mentioning in my opening statement about the plan and witnesses that are going to testify about it. I don't think it's a prior bad act per se. I think it's just a plan to committing this. But I think out of precaution it would be good for the judge to do the balancing test on it and rule on the probative and prejudicial values of it.
>
> THE COURT: As I understand from the motions last week, approximately a week before this alleged crime occurred there was a plan where Mr. Pitchford and others were present intending to go in and rob the -- What's the name?
>
> MR. EVANS: Crossroads.

> THE COURT: -- Crossroads Grocery. And somehow that plan was thwarted. And a week later the exact same crime was allegedly committed. That seems to me to be under the heading of plans, preparation, motive and the -- and admissible as evidence. And so the Court finds that to be highly probative. And the probative value would substantially outweigh any prejudice. So that is testimony the Court will allow. And we'll proceed unless there is something more.
>
> MR. EVANS: That is all the State had.
>
> MR. CARTER: Can I get two or three minutes to go down to my car and get my notes?
>
> THE COURT: Yes, sir. If you need to step down to your car for just a second.
>
> MR. BAUM: Your Honor, for the record, we do object to the State getting into this prior act. I am sure it was covered in the motion, but we do have an objection to it.

Tr. 338-39.

Now on appeal Pitchford alleges the trial court erred in allowing the introduction of evidence related to the aborted attempt to rob the Crossroads Store prior to November 7, in violation of Rule 404(b) and Rule 403 of the Mississippi Rules of Evidence. Those rules reads as follows:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes

> such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

404(b) Miss.R.Evid.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

403 Miss.R.Evid.

Looking at the introduction of other crimes evidence this Court has held:

> ¶ 85. "Rule 404(b), M.R.E., precludes evidence of other crimes, wrongs, or acts to show that the defendant acted in conformity therewith. However, if evidence of other crimes, wrongs, or acts is offered to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, it is admissible under M.R.E. 404(b)." *Parker v. State*, 606 So.2d 1132, 1136-37 (Miss.1992) (citing *Lewis v. State*, 573 So.2d 719, 722 (Miss. 1990); *Robinson v. State*, 497 So.2d 440, 442 (Miss. 1986)). Even evidence not admissible because prejudicial under Rule 403 may be admissible under Rule 404(b). *Jenkins v. State*, 507 So.2d 89, 92 (Miss. 1987).

Burns v. State, 729 So.2d 203, 221-22 (Miss.1998).

Pitchford's argument does not correspond with the record. Rather than "expressly" arguing the issue as evidence of Pitchford's character, the prosecution put

the issue before the court for a ruling on its admissibility which was granted. The trial court properly found the issue to be offered under M.R.E. 404(b) and then conducted a balancing test under M.R.E. 403 and determined the evidence to be more probative than prejudicial. The evidence was legitimately entered into evidence in compliance with the dictates of this Court and the rules of evidence and as such this issue is due to be dismissed. *Id.*

X. DR. HAYNE WAS PROPERLY ACCEPTED AS AN EXPERT AT TRIAL AND OFFERED COMPETENT TESTIMONY.

Pitchford contends the trial court erred in accepting Dr. Hayne as an expert in forensic pathology, therefore his testimony regarding Pitchford should not have been allowed at trial and that Dr. Hayne offered testimony outside of area of expertise.

Pitchford did not offer any objection to the acceptance of Dr. Hayne as an expert in the area of forensic pathology and besides a hearsay objection, discussed more fully *infra*, and an objection to photographs which is not argued in this appeal, there was no objection at all. Tr. 396-417. Nor did Pitchford raise any issue for consideration regarding Dr. Hayne's testimony in any of his motions for new trial or JNOV and is therefore barred from presenting the argument for the first time on appeal. *See Moawad*, 531 So.2d 632, 634 (Miss.1998) (trial judge cannot be put in error on matter not presented to him for decision); *Walker*, 823 So.2d 557 (Miss.App.2002) (failure to raise issue at trial level bars consideration at appellant level). Therefore this assignment of error

is procedurally barred from review by this Court. *Howard*, 507 So.2d 58, 63 (Miss.1987).

Alternatively, without waiving any applicable bar, an examination of the merits of the claim shows there is no merit. Pitchford takes issue that Dr. Hayne listed as part of his experience as a forensic pathologist, "Also work as the state pathologist for the Department of Public Safety Medical Examiner's Office for the State of Mississippi." Tr. 396. What Pitchford ignores is that Dr. Hayne was tendered and accepted, without objection, as a forensic pathologist, not as the Chief Pathologist of the State. Pitchford does not question Dr. Hayne's testimony regarding Mr. Britt's autopsy results that are consistent with the information confessed to by Pitchford as to the infliction of gunshot wounds upon the defenseless victim. Pitchford does nothing more than make a bare insinuation that Dr. Hayne did not comply with accepted standards of the profession by reference to facts outside the record. As Dr. Hayne has been found by this Court to be a qualified expert in the field of forensic pathology and Pitchford has failed to present any credible evidence to the contrary in support of his argument and this issue is due to be dismissed. *Duplantis v. State*, 708 So.2d 1327, 1339 ¶ 46 (Miss.1998) (Dr. Hayne is unquestionably qualified to testify in our courts as a forensic pathologist).

As to Pitchford's allegation that Dr. Hayne testified outside his area of expertise this issue is also barred from consideration as the record clearly shows no contemporaneous objection was made.

> Q. Yes, sir. All right. Dr. Hayne, as an expert, I'd like for you to take into consideration we

expect there to be testimony that when the 38 with the pellet shot or rat shot was recovered, four bullets had been fired from that gun. Would your conclusions be inconsistent with him being shot anywhere from one to four times --

MR. BAUM: Object to leading --

Q. -- with that weapon?

MR. BAUM: -- Your Honor.

THE COURT: I'll overrule.

Q. (By Mr. Evans:) You may answer.

A. It would not be inconsistent with that, sir.

Tr. 416.

At the conclusion of Dr. Hayne's direct testimony, the following discussion took place:

MR. BAUM: May we approach, Your Honor?

(MR. EVANS, MR. HILL, MR. CARTER AND MR. BAUM APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE JURY.)

MR. BAUM: Your Honor, I just wanted to be clear about my objection a moment ago when Mr. Evans was asking Dr. Hayne about what another witness would say. I was objecting because he was informing him what another witness would say and he was leading. But also, my real problem is, as Mr. Evans just stated, Dr. Hayne's expertise is in determining cause and manner of death. That's what he has been here designated as an expert to the Court to

> testify about. The question he asked him required expertise in, I believe, another branch of --
>
> THE COURT: You are going back and backing up and making an objection different than the contemporaneous objection. You cannot do that. That is -- the only objection made at that point was as to leading, and I allowed it based on that. So you can't go back and change the reasoning behind what the objection was. That is not what was stated on the record.
>
> MR. BAUM: But, Your Honor, when he asked the question he was leading. His answer was — I didn't know that his answer was going to be in a different field.
>
> THE COURT: That is not correct. The question was prefaced on whether it was consistent with -- whether the wounds were consistent with four projectiles being shot out of that gun. And that was the question. And his answer was yes. I don't think this witness, for the record, has to be an expert in the field of firearms to be able to look and tell how many projectiles were in Mr. Britt. Again, the objection was strictly an objection as to leading. The Court is of the opinion it was not leading. It was not suggesting an answer that the State of Mississippi wanted to elicit from the doctor. So we can proceed.

Tr. 418-19.

The record is clear as to the lack of a contemporaneous objection and the trial court's proper handling of the objection. The issue is barred

from consideration. *See Moawad*, *Walker*, *Howard*, *supra.*

Alternatively, without waiving the procedural bar, looking to the merits of the issue the testimony provided by Dr. Hayne was clearly within his area of expertise. This Court has held, "Dr. Hayne was qualified as an expert in forensic pathology, which includes expertise in how wounds are received." *Bell v. State*, 725 So.2d 836, 853(¶ 50) (Miss.1998); *see also Holland v. State*, 705 So.2d 307, 341 (¶ 127) (Miss. 1997) (this Court held forensic pathologist permitted to testify about wounds and the means of infliction of injury).

At the time of his testimony, Dr. Hayne had before him State's Exhibits 22, 23, 25. Each Exhibit displays a photograph showing wounds inflicted upon different areas of Mr. Britt's body by the rat shot projectiles in the .38 caliber pistol which were discussed in detail, without objection, regarding Dr. Hayne's initial observations of Mr. Britt's body. TR. 400-01. As Dr. Hayne was testifying regarding the infliction of the wounds, and the evidence shows the different areas of Mr. Britt's body attacked by the rat shot projectiles, the testimony falls within the accepted area of expertise and is consistent with the evidence presented. *Id.*

Pitchford's arguments regarding Dr. Hayne's testimony is procedurally barred and alternatively without merit and as such is due to be dismissed. *Moawad*, *Walker*, *Howard.*

XI. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE GUILT PHASE OF THE TRIAL.

Pitchford contends the trial court erred in denying defense instructions D-9, D-10, D-18, D-30 and D-34. Pitchford goes on to argue the trial court also erred in not excluding the prosecution's instructions S-1, S-2A and S-3.

Regarding challenges to jury instructions this Court has held:

> ¶ 224. This Court's standard of review for jury instruction issues is well-established. "When considering a challenge to a jury instruction on appeal, we do not review jury instructions in isolation; rather, we read them as a whole to determine if the jury was properly instructed." *Scott*, 878 So.2d at 966. "In determining whether error lies in the granting or refusal of various instructions, the instructions actually given must be read as a whole. When so read, if the instructions fairly announce the law of the case and create no injustice, no reversible error will be found." *Coleman*, 697 So.2d at 782 (quoting *Collins v. State*, 691 So.2d 918 (Miss.1997)). There is no error "if all instructions taken as a whole fairly, but not necessarily perfectly, announce the applicable rules of law...." *Scott*, 878 So.2d at 966 (citing *Milano v. State*, 790 So.2d 179, 184 (Miss.2001)).

Rubenstein v. State, 941 So.2d 735, 784-85 (Miss.2006).

Pitchford alleges the trial court erred in denying his jury instructions D-9 and D-10, which are discussed fully in Issue V *supra* at 47-48. He now includes D-18 in that argument as having been necessary to present

to the jury. Pitchford's requested instruction is nearly the mirror image of the trial court's S-5 that was given. D-18 states:

> I instruct you that the law looks with suspicion and distrust on the testimony of an alleged accomplice. The law requires the jury to weigh testimony of an alleged accomplice with great care and with caution and with suspicion.

R. 1141.

Instruction S-5 stated:

> The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged accomplice or informant. The law requires the jury weigh the testimony of an alleged accomplice or informant with great care, caution and suspicion.

R. 1122.

Because the trial court fashioned instruction S-5 to include the reference to the jury's consideration of testimony by informants and accomplices it was found that D-18 would then be repetitive and not required to be given separately. Tr. 614. There was no error and this issue is due to be dismissed as the trial court was not required to give instructions that were repetitive or fairly covered elsewhere, as was the case with this instruction. *Thorson v. State*, 895 So.2d 85, 107 (Miss.2004).

As to defense instruction D-30, Pitchford correctly notes the trial court stated that there was no evidence to support the instruction, however, Pitchford ignores the totality of the exchange between counsel and court.

> THE COURT: I don't see anything that would support a lesser included instruction of just simple murder. There is not one bit of evidence, in fact, that would support this instruction. So I am going to refuse D-30. We've already got a Court instruction that --
>
> MR. CARTER: I'll withdraw it, Your Honor. I think 32 -- is that covered by yours, Your Honor?

Tr. 604.

As Pitchford had withdrawn the instruction for consideration there can be no basis on appeal for arguing its inclusion. *Guilbeau v. State*, 502 So.2d 639, 644 (Miss.1987).

Even if Pitchford had not withdrawn the lesser included offense instruction it was still properly excluded by the court. When the defendant admits in his confession to murder committed during the commission of a robbery the trial court is correct to deny a lesser included offense instruction of murder. *Davis v. State*, 684 So.2d 643, 656-57 (Miss. 1996).

Pitchford's instruction D-34 was denied as well for being repetitious as found by the trial court:

> THE COURT: I think this is like the third time too that I have had this instruction already that I looked at. So it's refused. Well, as -- or maybe not the exact wording, but it's very close to others that I've already looked at. But the S-instructions already telling them what they must prove. And unless the State has proved all those elements then, beyond a reasonable doubt, they can't convict on -- based on other instructions already given.

Tr. 607.

As the instruction was fairly covered elsewhere and was repetitive there was no error in its denial. *Thorson* , 895 So.2d 85, 107.

As to Pitchford's assertion that several of the State's instructions were improperly given, he initially accepted S-1. Tr. 591. A moment later Pitchford revisited the instruction and claimed that the inclusion of "either with or without deliberate design" in the instruction as it "could be confusing to the jury". Tr. 592. As was discussed, the language complained of tracked the language of the statute. The language is found in the capital murder statute states in pertinent part:

> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of twelve (12), or nonconsensual unnatural intercourse with mankind, or in any attempt to commit such felonies;

Mississippi Code Ann. 97-3-17(2).

The complained of language tracks that of the statute and of the indictment and is therefore proper to administer to the jury. Clearly, the language contained in Instruction S-1, tracks the statute and the indictment, which this Court has found to be legally sufficient, nor is the language in any way confusing and was therefore properly allowed by the court. *Byrom v. State*, 863 So.2d 836, 880-81 (Miss.2003).

As to Instruction S-2A, the defense objected on the grounds that it was unnecessary and confusing. The Instruction reads:

> If you believe from the evidence in this case beyond a reasonable doubt that the defendant, TERRY PITCHFORD, in Grenada County, Mississippi, on or about November 7, 2004, willfully, unlawfully and feloniously by his own acts or by acting in concert with or aiding, abetting or assisting another, with felonious intent to permanently deprive the owner thereof, did take, steal and carry away the personal property of Reuben Britt, from the presence of or from the person of and against the will of Reuben Britt by violence to his person, with a deadly weapon, then the same would constitute armed robbery.
>
> A thing is in the "presence" of a person, in respect to robbery, which is so within his reach, inspection observation or control, that he could, if not overcome with violence or prevented by fear, retain his possession of it.

R. 1119.

The court allowed the instruction, stating:

> THE COURT: I think it's necessary to lay out the elements of the crime of armed robbery, because if we don't have the elements of the crime of armed robbery they are not going to be able to decide whether he was engaged in the commission of an armed robbery at the time murder took place. So I'll give 2-A.

Tr. 592.

There was no rebuttal or alternative offered by Pitchford. It is the responsibility of the trial court to see that the jury is properly instructed. *Duvall v. State*, 634 So.2d 524, 526 (Miss. 1994). As correctly held by the court, the jury was properly advised by this instruction as to elements to be proven for armed robbery. There was no error in giving this instruction.

Lastly, Pitchford erroneously claims that an objection was made concerning Instruction S-3. This is entirely baseless as the defense did nothing more than point out for the court a misspelled word in the instruction. Tr. 593-94. This claim, similar to all of Pitchford's claims, has no merit whatsoever and is therefore due to be dismissed.

XII. THE TRIAL COURT DID NOT IMPROPERLY LIMIT PITCHFORD'S PRESENTATION OF MITIGATION EVIDENCE.

Pitchford next contends the trial court erred in not allowing him to present evidence during the penalty phase that would show the impact his death would have upon his young son, that the court wrongfully denied the defense to opportunity to produce a videotape of Pitchford interacting with his son and that the court erred in not allowing testimony about the impact his father's illness had on all members of his family.

Pitchford's complaint of not allowing the mother of his child to speculate on how Pitchford's death would affect their two year old son should not be a point for consideration on appeal as, upon objection Pitchford immediately requested the question be stricken from the record. Tr. 688. Notwithstanding Pitchford's

withdrawal of the question, he did offer some explanation to the court as to the reasons for the question. Tr. 688-89. Regardless, as pointed out by the State, the impact the appellant's death would have on others relevant evidence.

> Evidence of a criminal defendant's death and the effect it would have on the life of his family is not relevant and is properly excluded since such evidence does not impact on the defendant's character, the record, or the circumstances of the crime.

Jordan v. State, 786 So.2d 987, 1020 (Miss.2001), quoting *Wilcher v. State*, 697 So.2d 1123, 1133-34 (Miss. 1997).

The trial court did not err in not allowing the question complained of by Pitchford and as such the issue is due to be dismissed as being wholly without merit.

Pitchford next alleges the court committed reversible error in not allowing a videotape of Pitchford and his son interacting. In reality, there was no motion or attempt by Pitchford to introduce any videotape into evidence. Rather, Pitchford asked the court to require the sheriff to provide the means for a videotape to be made. The following discussion took place regarding the issue:

> THE COURT: I have read the motion, and I don't see that it is any problem with the State being present when it's heard. But, you know, I've read it and considered it already. Because as I say, you did a very good job of sending these motions to me several days ago. So I've had an opportunity to read them ahead of time. As I

understand it, you are basically just wanting almost like a day-in-the-life video where the children of the defendant can be seen visiting him in jail.

MR. CARTER: Yes, sir.

THE COURT: And I don't see that that -- and basically me require the sheriff to provide space and an opportunity for all that to be done. And I don't see that that is appropriate. You know, if he is a loving and doting father, then I'm sure that there are going to be photographs of him interacting with his children at other occasions. And there will be photographs, you know. And I'm sure that the mother of his children can come in and testify about what a wonderful father he has been to his children and how he has been a supportive father and made sure their needs were met and that they were taken care of financially. But I -- you know, basically just a staged video, you know, I don't think is appropriate.

MR. CARTER: Well, Your Honor, if I might add, the video is not going to be staged. The video -- we have no pictures of Mr. Pitchford and his children interacting. We certainly don't have --

THE COURT: Then that would certainly be staged then. It would be trying to make it look like that he was something he is not.

MR. CARTER: No. Staging would require, Your Honor, us to -- I agree if we tried to Hollywood fix it, it would be staging it. But setting up a camera without saying anything to Mr.

Pitchford about what they do, without having any influence or control over the child and just have them interact is not the same as staging. It certainly would show them interacting but there won't be any staging on our part. We have no problem with -- we would have done it without my asking the Court but the Court -- the, the sheriffs department changed ownerships or something. I don't know exactly how to explain it. And whoever that runs the jail now told us they have no problem with us doing it but we have to get the Court's approval to do it. We have done it in other cases. Your Honor, mitigation can be anything. Mitigation is not locked into those statutory schemes. It could be anything. The jury could possibly see a video of him interacting with his children and decide for themselves that it's mitigation or not mitigation. Mitigation could be anything.

MR. EVANS: Your Honor, I didn't know about the motion but the jail did contact me. They said this is against their policy. They refused to do it. And they were not going to do it unless ordered by the Court, because they didn't want to do it over. They didn't have the ability to do it. And they didn't -- they didn't think it would be appropriate. It is strictly an attempt to garner on the sympathy for the jury and that is not appropriate.

MR. CARTER: Sympathy is not disallowed when it comes to the second phase of a capital murder trial. Sympathy is disallowed during the first phase. Sympathy is not disallowed during the second phase. I will present cases, if

necessary, at trial to prove that. Mr. Evans knows --

THE COURT: Like I say, if he is the type father that a video of him hugging his children in jail would tend to show that he is, then there is going to be plenty of people that can come into this courtroom and testify live about what a doting father he has been, how good he has been with his children and all of that. And, and if there is no witnesses that can come in to testify to that, then, then the video would be nothing more than a sham that would be presented to the jury. And so for that reason, I'm not -- you know, a day in the life or a staged event where he is -- while you may not tell him what he ought to do, I have a feeling Mr. Pitchford is smart enough to know what to do if the camera is turned on. And so, you know, if there is -- I don't know how old his children are, but if he has had so little interaction with them that he can't even find a photograph of himself with his children, then that says more than anything a video could say.

MR. EVANS: Your Honor, I know the Court's ruled, but just for the record, one other observation I would like to add, if the defendant testifies in the second phase, he can go into these things. If he doesn't testify, then this is another attempt for him to be allowed to testify without us being be allowed to ask him any questions.

THE COURT: I agree with that too, Mr. Evans. And I should have stated that because when I

read this motion previously that also is something that had entered my mind was the idea it would be testimonial in nature to a large extent and not subject to cross-examination. But I mean Mr. Pitchford can certainly, if the time comes when there is a sentencing phase, testify about how involved he is in the life of his children and how they need him and how important it is for him to be around for them.

MR. CARTER: Just for the record, Your Honor, and I'll move on, 1 think there's some confusion. The video is being treated as if it's being offered during the first phase of the case.

THE COURT: I understand when you want to bring it in. I just -- I think a staged video --

MR. CARTER: We are not going to stage it, Your Honor.

THE COURT: I guess you are not going to be there with Steven Spielberg directing things. But I mean in all other respects, it's going to be just something there where it's going to show him hugging on children that apparently he hasn't had any contact with close enough that he would have even had a picture of himself made with them. And I think that would create a total misconception of the truth and would allow him to present himself as the father of the year without ever having to testify about any involvement he has got with the children. And I'm -- you know, I'm not going to override the policy of the jail. If they want to voluntarily let you in and film that and then -- I'd consider it at the appropriate time whether I would admit

> something like that -- allow something to be admitted. But I'm not going to start micro-managing the jail and tell them how they need to operate it.
>
> MR. CARTER: Your Honor, can I just ask that the Court order Mr. Evans not to interfere with the jail and tell the jail what to do with respect to whether they can do this or not?
>
> MR. EVANS: Your Honor, I don't believe I have ever had the authority to tell the jail what to do. I was asked a question, and I responded to it.

Tr. 89-92.

The trial court in no way hindered the defense from presenting relevant mitigation of any sort. As advised by the court, Pitchford was informed that if he were to indeed obtain a videotape of interactions between himself and his son the court would rule on its admissibility at the appropriate time. Pitchford never presented the trial court with such evidence. The trial court can not be put in error for matters not presented to it for determination. This issue is without merit and must be dismissed. *See Moawad*, 531 So.2d 632, 634; *Walker*, 823 So.2d 557; *Howard*, 507 So.2d 58, 63.

Finally under this heading Pitchford claims the trial court erred in not allowing testimony from Pitchford's mother as to the impact of the illness and death of Pitchford's father on herself and other members of the family. The trial court was correct in ruling the testimony irrelevant. The use of mitigating evidence is virtually unlimited with the only restriction being that it that it must be relevant to the defendant's background, character or the circumstances of the crime. *Simmons v. State*, 805 So.2d 452, 497-98, ¶ 123-

25 (Miss. 2001); *Edwards v. State*, 737 So.2d 275, 297, ¶¶ 42 (Miss. 1999). The testimony was in no way relevant to Pitchford's background or character and certainly not related to the circumstances of the crime and was therefore properly excluded by the trial court.

XIII. THERE WAS NO TRIAL COURT ERROR IN WRONGFULLY PERMITTING THE PROSECUTION TO PRESENT EVIDENCE DURING THE SENTENCING PHASE.

Under this heading Pitchford first complains there was improper victim impact evidence given during the penalty phase. Beyond the general allegation, there is no specific objection and Pitchford does not point to any place in the record that reveals improper testimony being offered, the exception being the objection lodged regarding the letter from a grand niece of the victim, discussed infra. As Pitchford declines to identify the portions of the testimony he deems improper he has waived argument on the issue. *Brawner v. State*, 947 So.2d 254, 269 (Miss.2006).

Alternatively, and without waiving any applicable bar, this issue is without merit. Victim impact evidence is admissible at sentencing. The United States Supreme Court endorsed the use of victim impact testimony in *Payne v. Tennessee*, 501 U.S. 808 (1991):

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth court was wrong in stating that this kind of evidence leads to the arbitrary

imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that 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. *See Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 2470-2472, 91 L.Ed.2d 144 (1986). Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative of the harm caused by Payne's double murder.

We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. "[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Booth*, 482 U.S. at 517, 107 S.Ct. at 2540 (WHITE, J., dissenting) (citation omitted). By turning the victim into a "faceless stranger at the penalty phase of a capital trial," *Gathers*, 490 U.S. at 821,109 S.Ct. at 2216 (O'CONNOR, J., dissenting), Booth deprives the State of the

> full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

Payne, *Id.* at 825.

The Fifth Circuit has adopted the rationale of Payne:

> In *Payne v. Tennessee*, the Supreme Court held that victim impact evidence is admissible to "show [...] each victim's uniqueness as an individual human being." 501 U.S. 808, 823-27, 111 S.Ct. 2597, 115 L.ED.2d 720 (1991). "Victim impact evidence is [a] method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 825, 111 S.Ct. 2597. Evidence "about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* at 827, 111 S.Ct. at 2609. Victim impact evidence is admissible unless it "is so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's Due Process rights. *Id.* at 825, 111 S.Ct. 2597; *see also Jones v. United States*, 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

U.S. v. Bernard, *et al.*, 299 F.3d 467, 480-81 (5th Cir. 2002) (emphasis added) (noting that improper characterizations of the defendant by the victims and

requests for the jury to sentence the victim to death are the types of evidence that are considered inadmissible on this subject but, nonetheless, holding the error harmless).

The Mississippi Legislature and this Court also have recognized the necessity of victim impact testimony. This Court adopted the Payne holding in *Hansen v. State*, and noted, "A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Hansen*, 592 So. 2d 114, 146 (Miss. 1991), cert. denied, 112 S.Ct. 1970, 118 L.Ed. 2d 570 (1992). Miss. Code Ann. Section 99-19-157(2)(a), while not specifically enumerating capital murder cases, allows for an oral victim or written impact statement at "any sentencing hearing" with the permission of the courts.

There is no evidence in the record that the witness presented anything other than appropriate victim-impact testimony and therefore this allegation is due to be dismissed. . *Brawner* at 269.

Pitchford next argues the trial court erred in allowing the victim's widow to read from a letter written by one of his grand nieces. At trial, the only objection made by the defense regarding the letter in question was that it had not read the letter in order to, "know if anything is in there that is objectionable." Tr. 660. After reading the letter Pitchford obviously found nothing specifically objectionable and allowed the reading of it to go forward. Tr. 660-62. As Pitchford offered no objection to the reading of the letter after having reviewed it for objectionable

material this allegation is due to be dismissed as the trial court can not be held to be in error where no objection is made for it to rule upon. *See Moawad*, 531 So.2d 632; *Walker*, 823 So.2d 557; *Howard*, 507 So.2d 58.

During the sentencing phase the court was of the opinion that both sides had waived an opening statement to the jury. Tr. 669. The defense informed the trial court it wished to present an opening statement. Tr. 668. The prosecution then voiced its desire to the court to have an opening as well. Tr. 668. Pitchford contends the trial court erred in wrongfully allowing the prosecution to give an opening statement and the statement that it gave essentially amounted to a closing argument at that time.

First, the State would point out that this issue is barred from consideration as Pitchford has failed to cite to relevant authority in support of his argument. Pitchford relies solely upon the case *of McFadden v. Mississippi Board of Medical Licensure*, 735 So.2d 145 (Miss.1999) to support his argument. McFadden took exception to opening statements being waived at his administrative hearing. 735 So.2d at ¶63. This Court found:

> ¶ 54. The Board reminds this Court that administrative hearings are unlike courtroom proceedings, in that the formalities of practice, procedure and evidence are relaxed. *See Riddle*, 592 So.2d at 43.

735 So.2d 145, 158.

The case relied upon by Pitchford is premised on administrative rules and not those applicable to trials in the criminal courts. As the appellant has not relied

upon relevant authority in support of his argument this issue is due to be dismissed. *Brawner*, 947 So.2d 254, 269.

Additionally, Pitchford now presents a different argument on appeal than that of the one presented at trial. Pitchford requested the trial court ensure the prosecution in fact give an opening statement rather than be allowed to present matters more appropriate to a closing argument. Tr. 670. The court agreed and the defense offered no further objection to the opening statement of the prosecutor. Tr. 670. As Pitchford now presents this Court with an objection different from the one raised at trial this issue is barred from consideration and due to be dismissed. *Jones v. State*, 606 So.2d 1051, 1058 (Miss.1992).

XIV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE SENTENCING PHASE OF THE TRIAL

Pitchford claims the trial court erred in refusing instruction DS-7 which states:

> You may find that death is not warranted even if there are one or more aggravating circumstances and not a single mitigating circumstance. You are not required to find any mitigating circumstances in order to return a sentence of life imprisonment. Nor does the finding of an aggravating circumstance, require that you return a sentence of death. You, as a juror, always have the option to sentence Mr. Pitchford to life imprisonment, whatever findings you may make.

R. 1225.

This Court has found similar instructions to be improper as it is a "mercy instruction", and that a "defendant has no right to a mercy instruction." *See Doss v. State*, 709 So.2d 369, 394 (Miss.1996) (quoting *Ladner v. State*, 584 So.2d 743, 761 (Miss.1991). *See also Chamberlin v. State*, 989 So.2d 320, 342 ¶82 (Miss.2008), for the Court's holding that *Kansas v. Marsh*, 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006), "does not speak to or even consider the issue of whether a mercy instruction is required". The instruction was properly denied by the trial court.

Pitchford next complains the trial court erred in the denying the inclusion of DS-17 (g)'s[3] assertion that stated, "Mr. Pitchford had mental health problems as a child that were never treated". R. 1215. Even Pitchford had problems with the proposed instruction in that he wanted to alter it himself:

> THE COURT: The fact is we don't have any doctor that has testified to that. We don't have anything in the record that at all supports that Mr. Pitchford had any mental health problems.
>
> MR. CARTER: Your Honor, can I change it to emotional? What is the proper word? Emotional. Emotional problems as a child that were not treated. I don't see how that is false.

Tr. 733.

The trial court was correct in denying the instruction as there was no evidence of mental illness presented in the record by either expert or lay

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[3] Misidentified by Pitchford as D-17(h).

witnesses. The evidence does support Pitchford's related proposed instruction DS-17 (l) which stated, "Mr. Pitchford had a history of conduct problems for which he never received treatment". R. 1215. That instruction was presented to the jury as SS-1A-(B)(2)(7). R. 1206. As the court was correct in denying the proposed instruction regarding allegations of mental illness there was no error and this issue is without merit. The instructions, taken as a whole, fairly informed the jury as to the applicable rules of law. *Rubenstein* at 784-85.

Pitchford next argues the trial court erred in denying instruction DS-13 which stated:

> I have previously read to you the aggravating circumstances which the law permits you to consider. These are the only aggravating circumstances you may consider. However before you may consider any of these factors you must find that factor is established by the evidence beyond a reasonable doubt.

R.1220.

The trial court correctly found the instruction to be cumulative as the sentencing instructions contained in instruction SS-1A informed the jury of the listed aggravators and the requirement of proof beyond a reasonable doubt. Tr. 754; R. 1205-06. As the instruction duplicated another there was no error in its denial. *Thorson* , 895 So.2d 85, 107.

Pitchford next complains the trial court erred in the denial of DS-15, which states:

> If you the Jury chooses to sentence Mr. Pitchford to life imprisonment without the possibility of parole, Mr. Pitchford will never be

> eligible for parole. Further, his life sentence without possibility of probation or parole cannot be reduced or suspended.

Tr. 1218.

The trial court properly denied the instruction as repetitive as it was covered in SS-1A and the court was under no obligation to give duplicative instructions. Tr. 755. *Thorson* at 107.

Also, as correctly noted by the prosecution, such an instruction is improper to present to the jury. *Rubenstein*, 941 So.2d 735 (Miss.2006); *Flowers v. State*, 842 So.2d 531, 556-58 (Miss.2003).

Pitchford next argues the trial court erred in the presentation of instruction SS-1A and the Verdict Form to the jury. R. 1205-1213, 1234-35. Contrary to Pitchford's allegation of the court's refusal to conform the instruction or form based on his objection, there was no objection at all. Pitchford offered no alternative form of the verdict for the court's consideration nor did he suggest any changes that needed to be made to the form as presented. Tr. 759. Pitchford merely requested that all sentencing options be included on one page, if possible. Tr. 760. All options were contained on the same page as requested by Pitchford with only signature lines contained on the second page. R. 1234-35. As there was objection made by the defendant as to the form of the verdict in this case there was no error by the trial court. All of the issues brought forward by the appellant under this heading are without merit and due to be dismissed. *See Moawad* (trial judge cannot be put in error on matter not presented to him for decision);

Walker (failure to raise issue at trial level bars consideration at appellant level).

XV. THERE WAS NO ERROR REQUIRING VACATION OF THE DEATH SENTENCE.

Pitchford contends that the case *of Baze v. Rees*, 128 S.Ct. 1520 (2008) precludes his execution as it would be in violation of the Eighth Amendment prohibition against cruel or unusual punishment. Pitchford directs the Court to an affidavit attached to the petitioner's brief in the Northern District of Mississippi case of *Walker v. Epps*, No. 4:07-cv-00176, for the proposition that Mississippi's lethal injection procedure may not be constitutionally adequate.

Pitchford ignores the holding of this Court regarding the issue presented. In *Bennett v. State*, 990 So.2d 155 (Miss.2008), this Court held:

> ¶ 20. Bennett next argues that death by lethal injection violates his First- and Eighth-Amendment rights under the U.S. Constitution. Although Bennett failed to raise this issue on direct appeal, we do not hold that it is procedurally barred from further review on collateral appeal. *Jordan v. State*, 918 So.2d 636, 661-62 (Miss.2005).
>
> ¶ 21. On April 16, 2008, the United States Supreme Court decided *Baze v. Rees*, upholding the State of Kentucky's lethal-injection protocol as not being violative of the Eighth Amendment. *Baze v. Rees*, 553 U.S. ----, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). In so doing, Chief Justice Roberts's plurality opinion announced the standard which we must use to determine whether our method of execution

violates the Eighth Amendment. *Id.* The Supreme Court's plurality found that cruel and unusual punishment occurs where lethal injection as an execution method presents a "substantial" or "objectively intolerable risk of serious harm" in light of "feasible, readily implemented" alternative procedures. *Id.* at 1531, 1532. However, the analysis was focused on the manner of lethal injection, and did not question the validity of lethal injection or the constitutionality of the death penalty as such. *Id.* at 1537. The *Baze* Court held:

> Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States ... [which] if administered as intended ... will result in a painless death. The risks of maladministration ... such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel-cannot be remotely characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment.

Baze, 128 S.Ct. at 1537.

¶ 22. For "the disposition of other cases uncertain," Justice Roberts clearly stated that "[a] State with a lethal injection protocol

substantially similar to the protocol we uphold today would not create a risk that meets [the 'substantial risk'] standard." *Id.* at 1537 (emphasis added).FNl

> FN1. Such comparative analysis is followed by other jurisdictions as well. *See Emmett v. Johnson*, 532 F.3d 291, 299 (4th Cir. Va. 2008) (comparing Virginia's protocol to Kentucky's to prove it does not violate the Eighth Amendment); *Jackson v. Houk*, 2008 WL 1946790, **75-76 2008 U.S. Dist. LEXIS 36061, at *215-217 (N.D.Ohio May 1, 2008) (declaring Ohio's method of execution, same as followed by Kentucky, to be constitutional).

¶ 23. If differences exist between Mississippi's execution protocols and those used in Kentucky, then, the inquiry is whether Mississippi's lethal-injection protocol meets Constitutional muster in light of this recent Supreme Court decision. The Fifth Circuit, when considering inmate Dale Leo Bishop's Eighth-Amendment challenge to Mississippi's lethal-injection procedures, recently announced that "Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in *Baze*." *Walker v. Epps*, 2008 WL 2796878 at *3, 2008 U.S.App. LEXIS 15547 at *3 (5th Cir.Miss. July 21, 2008). We agree with the Fifth Circuit's analysis, and hold that Bennett's Eighth Amendment challenge to the lethal

> injection protocol in Mississippi is without merit.

Bennett, 990 So.2d 155, 160-61 (Miss.2008).

As this Court has held that Mississippi's method of execution passes constitutional requirements this argument is without merit.

Pitchford next alleges the indictment in this case was deficient in that it did not include the aggravating circumstances or a *mens rea* element. The charge of capital murder is contained in the indictment charging the appellant with capital murder under Section 97-3- 19(2)(e) reads in pertinent part as follows:

> . . .
>
> TERRY PITCHFORD
>
> on or about the 7th day of November 2004, in grenada County, Mississippi 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, without authority of law and with or without the deliberate design to effect death, kill and murder Reuben Britt, a human being, while engaged in the felony crime of ARMED ROBBERY, as set forth in section 97-3-79 of MISS. CODE ANN. as amended, and against the peace and dignity of the State of Mississippi.
>
> C.P. at 10.

This indictment is sufficient to charge the death eligible offense of capital murder during the commission of an armed robbery.

Pitchford relies primarily on the cases of *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for the proposition that the indictment in this case was defective. This Court has long held that the decisions in *Ring* and *Apprendi* have no application to the Mississippi capital sentencing scheme. The Court has addressed this same question in *Hodges v. State*, 912 So.2d 730, 775-76 (Miss.2005), wherein this Court held:

> ¶ 101. Hodges argues that *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428,153 L.Ed.2d 556 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), require that his sentence be vacated. Since both of these issues deal with the application of *Apprendi* and *Ring*, these two issues will be combined.
>
> ¶ 102. First, Hodges contends that his indictment was improper as it failed to enumerate the aggravating factors and the mens rea element. Hodges claims that *Williams v. State*, 445 So.2d 798, 804 (Miss. 1984), which held that the indictment in a death penalty case need not include aggravating circumstances, must be reconsidered in light of *Apprendi* and *Ring* in which the Court held unconstitutional a sentencing scheme where a judge rather than a jury determined whether there were sufficient aggravating circumstances to warrant imposition of the death penalty. Hodges also argues that *Ring* prohibits the duplicative use of the burglary aggravator at the penalty phase when the jury had previously found that Hodges had committed the crime at the culpability phase. This Court has

previously discussed all of these issues as they relate to *Ring and Apprendi.* As this Court has continuously held, these cases have no application to Mississippi's capital murder sentencing scheme. Therefore, these issues are without merit. *See Berry v. State*, 882 So.2d 157, 170-73 (Miss.2004) (We have previously discussed these cases at length and concluded that they address issues wholly distinct from our law, and do not address indictments at all).

¶ 103. *In Berry v. State*, 882 So.2d 157 (Miss.2004), we held that:

> Mississippi's capital scheme is distinct from Arizona's in the single, most relevant respect under the *Ring* holding: that it is the jury which determines the presence of aggravating circumstances necessary for the imposition of the death sentence. *See* MISS. CODE ANN. § 99-19-101 (2000).

Likewise, the *Ring* court considered Mississippi's scheme to be part of a majority of states who have responded to its Eighth Amendment decisions and require that juries make the final determination as to the presence of aggravating circumstances. *Ring*, 536 U.S. at 608, 122 S.Ct. 2428 n. 6.

Berry, 882 So.2d at 173. In *Stevens v. State*, 867 So.2d 219 (Miss.2003), the defendant argued that his death sentences should be vacated because the aggravating circumstances which charged capital murder were not included in his indictment. In *Stevens*, the defendant also

relied on *Ring* and *Apprendi*. *Id.* at 225. This Court held that:

> The State is correct in its assertion that a defendant is not entitled to formal notice of the aggravating circumstances to be employed by the prosecution and that an indictment for capital murder puts a defendant on sufficient notice that the statutory aggravating factors will be used against him. *Smith v. State*, 729 So.2d 1191,1224 (Miss.1998) (relying on *Williams v. State*, 445 So.2d 798 (Miss. 1984)).
>
> We believe that the fact that our capital murder statute lists and defines to some degree the possible aggravating circumstances surely refutes the appellant's contention that he had inadequate notice. Anytime an individual is charged with murder, he is put on notice that the death penalty may result. And, our death penalty statute clearly states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment. *Id.* at 804-05. This issue is without merit.

Stevens v. State, 867 So.2d at 227. *See also Puckett v. State*, 879 So.2d 920 (Miss.2004); *Holland v. State*, 878 So.2d 1, 9 (Miss.2004).

Hodges v. State, 912 So.2d 730, 775-76 (Miss.2005).

Additionally, *in Knox v. State*, 901 So.2d 1257 (Miss.2005):

> ¶ 46. Knox next argues that his indictment was defective because the aggravating factors were not included in the indictment. He cites *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct 2428, 153 L.Ed.2d 556 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct 2348, 147 L.Ed.2d 435 (2000); *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999); and *United States v. Allen*, 247 F.3d 741 (8th Cir.2001).
>
> ¶ 47. The State answers that this issue was raised, considered and found to be without merit by this Court in *Simmons v. State*, 869 So.2d 995 (Miss.2004), *Puckett v. State*, 879 So.2d 920 (Miss.2004) and *Berry v. State*, 882 So.2d 157 (Miss.2004). This Court found that Ring's holding was that juries must find aggravating factors; that in Mississippi, only juries can find aggravating factors in capital cases; and that none of the cases cited by Petitioners mandated that indictments for state capital defendants include all aggravating factors. This issue is without merit.

901 So.2d at 1269.

This Court has rejected Pitchford's argument in every instance it has been raised. *See Goff v. State*, --- So.3d ----, 2009 WL 1477246, ¶ 172-77 (Miss.2009); *Loden v. State*, 971 So.2d 548, 564-65, ¶¶ 35-36 (Miss.2007); *Powers v. State*, 945 So.2d 386, 396, ¶¶ 19-23 (Miss.2006); *Havard v. State*, 92 8 So.2d 771, 800-02, ¶¶ (Miss.2006); *Jordan v. State*, *918* So.2d

636, 661, ¶¶ 77 (Miss.2005); *Knox v. State*, 901 So.2d 1257, 1269, ¶¶ 46-47 (Miss.2005); *Berry v. State*, 895 So.2d85, 104-05, ¶¶ 44-45 (Miss.2004); *Brown v. State*, *890* So.2d 901, 917-18, ¶¶ 60-62 (Miss.2004); *Gray v. State*, 887 So.2d 158, 173-74, ¶¶ 45-48 (Miss.2004); *Mitchell v. State*, 886 So.2d 704, 710-11, ¶¶ 15-21 (Miss.2004); *Berry v. State*, 882 So.2d 157, 170-73, ¶¶ 57-69 (Miss.2004); *Puckett v. State*, 879 So.2d 920, 944-47, ¶¶ 86-97 (Miss.2004); *Holland v. State*, 878 So.2d 1, 7-9, ¶¶ 21-27 (Miss.2004); *Simmons v. State*, 869 So.2d 995, 1008-1011, ¶¶ 43-53 (Miss.2004); *Stevens v. State*, 867 So.2d 219, 225-27, ¶¶ 21-27 (Miss.2003).

Without foundation or meaningful discussion, Pitchford attempts to add a new twist to this argument that has been repeatedly rejected by this Court by stating the holding in *Kansas v. Marsh*, 126 S.Ct. 2516 (2006) requires this Court to now reverse itself. Pitchford relies on the bare allegation that the Mississippi, Kansas and Arizona sentencing statutes are similar, therefore this Court must now apply *Ring*. Pitchford fails to inform the Court as to the foundation this accusation is based upon.

Pitchford's indictment was correct and adequate that he was put on notice that he was charged with capital murder and that the death penalty might be a result making this argument without merit and due to be dismissed. *See Stevens v. State*, 867 So.2d 219, 227 (Miss.2003).

Pitchford next argues briefly and without specific reference to this case at bar, that it is unconstitutional to use the underlying felony in a capital case as an aggravator in the sentencing phase. Pitchford

concedes this Court has found no constitutional violation for such usage in the past and only urges the Court to revisit the issue and presumably reverse itself. . The State would assert that Thorson has failed to present a meaningful and relevant argument to support this claim of error. This Court has held that when an appellant fails to present a relevant and meaningful argument the Court will decline to address the issue. *Brown v. State*, 798 So.2d 481,494,116 (Miss. 2001); *Brown v. State*, 690 So.2d 276,297 (Miss. 1996). Therefore, the State would submit this claim is procedurally barred from consideration on this appeal.

In Pitchford's final allegation of error under this issue he claims the verdict can not Stand as it is violation *of Enmund v. Florida*, 458 U. S. 782 (1982) and *Tison v. Arizona*, 107 S.Ct. 1676 (1987). According to Pitchford, the evidence presented at trial that showed he was a willing participant in an armed robbery that resulted in the murder of Reuben Britt was based on inadmissable evidence of his confession to police and to cell mates. Claiming the evidence to be inadmissable, Pitchford says there could not have been a finding that he intended to kill, attempted to kill, actually killed and contemplated that lethal force would be employed in violation of *Enmund* and *Tison.*

The jury in this case found all four factors, beyond a reasonable doubt, that Pitchford intended to kill, attempted to kill, actually killed and contemplated that lethal force would be employed in the killing of Reuben Britt. C.P. 1234-35. Here, Pitchford appears to only dispute the testimony heard at trial should not have been admissible, not that the *Enmund* factors were in and of themselves incorrect.

As previously discussed in Issue V, the testimony of Dantron Mitchell and Demarquis Westmoreland, was properly received by the court and admissible at trial. Likewise, Pitchford's confession to Investigator Jennings was properly admitted at trial as discussed in Issue VIII. There was no error in allowing the testimony and as such the *Enmund* factors found by the jury were supported by the evidence presented at trial. As the jury properly found beyond a reasonable doubt that Pitchford intended to kill, attempted to kill, actually killed and contemplated that lethal force would be employed in the killing of Reuben Britt, the death sentence was reached in a constitutionally proper manner. *Jordan v. State*, 786 So.2d 987, 1029 (Miss.2001). This issue is without merit and due to be dismissed.

XVI. PITCHFORD'S DEATH SENTENCE IS NOT DISPROPORTIONATE.

This Court is required by statute to review the proportionality of the death sentence in every direct appeal, including: whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and, whether the sentence of death is excessive or disproportionate to the penalty in similar cases, considering both the crime and the defendant. See Miss. Code Ann. § 99-19-105; *Cabello v. State*, 471 So.2d 332, 350 (Miss. 1985);*Locket v. Ohio*, 438 U.S. 5 86 (1978).

Pitchford only argues the death sentence is disproportionate based on his concession, that although he was a willing participant in an armed

robbery, he only inflicted non-lethal wounds on the victim.

Pitchford presents no evidence that his sentence was imposed under the influence of passion or prejudice and besides his argument that he only suffered non-lethal wounds to the victim he merely argues generally that the sentence was disproportionate and to evidence not contained in the record as to co-defendant punishment. As such the issue does not warrant consideration. *See Conley v. State*, 790 So.2d 773 (Miss.2003)(citing MRAP 28(a)(6)), and noting that an assignment of error is not properly before this Court, where the appellant fails to "cite any specific instance in the record" of the alleged error). Without appropriate argument from Pitchford on the issue, the State would submit that, considering the crime and the appellant, the death penalty in this case was neither excessive nor disproportionate. This case is similar to other cases where this Court, in accordance with the legislative mandates of § 99-19-105, studied both the defendant and the crime to affirm the imposition of the death penalty.

The death penalty has been upheld in cases involving capital murders during the commission of a robbery. *See Doss v. State*, 709 So.2d 369 (Miss.l997)(death sentence proportionate where defendant robbed and shot victim); *Cabello*, 471 So.2d 332 (death sentence proportionate where defendant strangled and robbed victim); *Evans v. State*, 422 So.2d 737 (Miss. 1982)(death penalty proportionate where defendant shot and robbed victim).

The death penalty has been upheld in cases involving capital murders committed by defendants

that have claimed to have mental problems. *See Berry v. State*, 703 So.2d 269 (Miss.l997)(death sentence proportionate where defendant claimed to be paranoid schizophrenic, functioning with brain damage and having impaired intellectual capability); *McGillberry v. State*, 741So.2d 894 (Miss.l999)(death sentence proportionate where defendant was diagnosed with a significant mental defect, "sociopathic personalty structure.").

The death penalty has been upheld where the defendant was of a young age. *See Puckett v. State*, 879 So.2d 920 (Miss.2004)(defendant eighteen at time of murder). The death penalty has been upheld where the defendant claimed to have not inflicted the fatal blows. *See Bishop v. State*, 812 So.2d 934, 949 (Miss.2002)(facts sufficient to justify death sentence even where actual killer did not receive death sentence).

Pitchford planned and carried out the robbery and murder of Reuben Britt. He was apprehended and confessed to friends and law enforcement. After consideration of this evidence by way of direct and cross-examination, including mitigation evidence from several witnesses, the jury was correctly instructed upon both the aggravating and mitigating circumstances put forward by both parties. Pitchford has presented no argument, and has presented no evidence that the death sentence in his case was in violation of § 99-19-105. The death sentence in this case is neither disproportionate or excessive, nor was it imposed arbitrarily. Accordingly this assignment of error by Pitchford is without merit.

XVII. THERE WAS NO CUMULATIVE ERROR IN THIS CASE.

Finally, Pitchford argues that the cumulative error in this case warrants reversal. However, he has presented no list nor does he point to specific errors which should be cumulated or aggregated to show error. This Court has condemned this practice. *See McGilberry v. State*, 741 So.2d 894, 924, ¶124 (Miss. 1999); *Foster v. State*, 639 So.2d 1263, 1303 (Miss. 1994). The State respectfully submits that there is no error in this case, cumulative or otherwise. Moreover, to the extent that the issues raised by Pitchford are barred, this issue is also barred. That is, this Court has held that capital murder convictions and death sentences will not be reversed on grounds of cumulative error, where the alleged errors, if any, are procedurally barred. *See Simmons v. State*, 805 So.2d 452 (Miss.2001)(citing *Doss v. State*, 709 So.2d 369, 401 (Miss. 1996)). Without waiving any applicable bars, the substance, if any, of each issue raised by Pitchford has been refuted by substantial authority outlined above. Based on this authority, the State submits that Pitchford's assignments of error on appeal are without merit. "Where there is no reversible error in any part, ... there is no reversible error to the whole." *Doss*, 709 So.2d at 400 (quoting *McFee v. State*, 511 So.2d 130, 136 (Miss. 1987)).

Alternatively, however, even if this Court were to find errors to exist, the State submits that such errors are not substantial enough to warrant reversal.

> A criminal defendant is not entitled to a perfect trial. *Sand v. State*, 467 So.2d 907, 911 (Miss.1985). The evidence of guilt in this case

> was overwhelming and . . . our independent review of the sentencing phase reveals no errors. [The defendant/appellant] received all that he was entitled to a fair trial. This assignment of error is without merit.
>
> *See McGilberry v. State*, 741 So.2d 894, 924 (Miss. 1999).

Pitchford's argument to the contrary is partially barred, and, alternatively, completely without merit.

CONCLUSION

For the above and foregoing reasons, the State submits that Appellant's conviction of capital murder and sentence of death should be affirmed.

Respectfully submitted,

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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: Nov. 9, 2009

REPLY BRIEF OF APPELLANT

APPELLANT'S ARGUMENT IN REPLY

Introduction

Defendant does not gainsay the principle that, while all litigants are entitled to have a fair trial, none is entitled to a perfect one. *Blake v. Clein*, 903 So.2d 710 (Miss. 2005). Nor does he dispute that, under this principle, even a criminal conviction that deprives an individual of life or liberty may upheld where error has occurred so long as that error is "harmless," i.e. can be shown beyond a reasonable doubt NOT to have contributed to the outcome in the matter. *Bruton v. United States*, 391 U.S. 123, 135, (1968); *Brown v. State*, 995 So.2d 698, 704 (Miss. 2008), *Sand v. State*,

467 So.2d 907 (Miss. 1985). This is no more, and no less, than what is required by the Constitution. *Chapman v. California*, 386 U.S. 18, 24 (1967).

In the instant matter, the repeated assertions by the State that any error that occurred is harmless seem to relate only to harmlessness relative to the evidence supporting the guilt phase verdict of conviction. This ignores entirely this Court's commitment in cases where the death penalty has been imposed to evaluate the prejudice of an error not only with respect to evidence of guilt, but also with respect to possible effects on the jury respecting sentence. *Stringer v. State*, 500 So.2d 928, 957 (Miss. 1986). Hence, the cumulative effect of errors or misconduct in a death penalty case may require reversal even where the individual errors might otherwise pass muster under that standard, or be harmless even cumulatively in a case where a death sentence had not been imposed, *Ross v. State*, 954 So.2d 968, 1018-19 (Miss. 2007); *Flowers v. State*, 947 So.2d 910, 940 (2007) (*Flowers III*) (Cobb, P.J., concurring).

This is because under the Mississippi's sentencing statute even one juror having a reasonable doubt about imposing a sentence of death would result in that sentence not being imposed, Miss. Code Ann. §99-19-101(3). Therefore even otherwise harmless errors – especially errors of prosecutorial misconduct or overreaching, either alone or in combination with "near errors" of the same nature – are likely to be prejudicial even where evidence of guilt would be adequate to support a conviction notwithstanding the error. *Stringer*, 500 So.2d at 947; *Flowers v. State*, 842 So.2d 531, 564 (Miss. 2000) (*Flowers II*). *See also Wiggins v. Smith*, 539 U.S. 510, 537-38 (2003) (finding

prejudice where matters not presented in mitigation of sentence merely "*might well* have influenced the jury's appraisal" of whether or not the death penalty was warranted) (emphasis added).

Further, the State's repeated apparent concession of the substance of error and reliance on procedural bar ignores this Court's fierce commitment to reverse – no matter how strong the evidence of guilt may be or how disappointing to the hopes of resolution to the victims of crime – under the plain error doctrine, especially where the misconduct or error has deprived the accused of a fundamentally fair trial or affected his fundamental rights as to either culpability or sentence. This is not merely to vindicate rights of the accused, but to preserve the integrity of the administration of justice, as well. *Flowers II*, 842 So.2d at 564-5, *Stringer*, 500 So.2d at 931 (citing *Hill v. State*, 72 Miss. 527, 534 (1895)). *See also Brown*, 995 So.2d at 404-05; *Flowers III*, 947 So.2d at 927; *Williams v. State*, 794 So.2d 181, 187 (Miss. 2001); *Mickell v. State*, 735 So.2d 1031, 1035 (Miss. 1999), *Griffin v. State*, 557 So.2d 542, 552 (Miss. 1990); *West v. State*, 485 So.2d 681 (Miss. 1985), *Wood v. State*, 257 So.2d 193, 200 (Miss. 1972) (all reversing for plain error).

Terry Pitchford respectfully submits that the errors and misconduct raised in this appeal are exactly the kinds of things that this Court has in the past deemed prejudicial to criminal accuseds, and particularly to persons sentenced to death, and to the integrity of the justice system as a whole. Those errors therefore, individually and cumulatively, warrant reversal of the conviction and sentence in this matter, whether

preserved below (as in most instances they were) or on the basis of plain error.

I. THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM

A. Batson Violation

The Defendant preserved his *Batson* claim by timely making his *Batson* objection at the time of the strikes, and by renewing it before the jury was empanelled and again in his Motion and Amended Motion for New Trial. Tr. 321-24, 331, R. 1250, 1262. At the time of the initial objection, he expressly requested that that the trial court make findings on the basis of all relevant circumstances, not merely on the reasons articulated by the State. Tr. 324. At the time the *Batson* motion was renewed prior to the seating of the jury, the trial court expressly found that the *Batson* claim had been preserved for review and reiterated its final, albeit erroneous, ruling on that claim. Tr. 331. The State's heavy reliance on procedural bar is therefore entirely without support in the record.

The Brief of Appellant (hereafter "Pitchford's Brief") sets forth in detail why this properly preserved objection was erroneously denied by the trial court, itemizing how the implausible and/or racially disparately applied reasons proffered by the prosecution for its purge from service on the trial jury of all but one African American venire member who came up for their consideration but were not also used to strike comparable white prospective jurors. [1] Nothing that the State presents in its Brief of

[1] Appendix A to Pitchford's Brief, updated with the juror numbers by which the State refers to venire members its brief, is reproduced as Exhibit A to this brief.

Appellee (hereafter "State's Brief") suggests that the facts on which this claim is based are untrue, or that the trial court ever put forth any explanation of why it found those reasons to suffice not only to articulate a non-racial reason for the strike but also to affirmatively establish the plausibility of the reason advanced and the absence of racial discrimination under the totality of the circumstances as required by the 14th Amendment. *Snyder v. Louisiana*, --- U.S. ----, 128 S. Ct. 1203 (2008); *Batson v. Kentucky*, 476 U.S. 79 (1986).

The most striking evidence of discrimination in this case is the hugely disparate treatment of black and white venire members by the prosecutor during voir dire and jury selection. The State makes no attempt to justify or refute any of it. Disparate treatment is perhaps the most important indicator of racial discrimination in the panoply of "indicia of pretext" established by this Court for assessing *Batson* claims. *Flowers v. State*, 947 So.2d 910, 917 (Miss. 2007) (*Flowers III*) (identifying numerous instances of such disparate treatment that were at least "suspect" *see* 918-19, 921, 926, 928, 930 n.9, and reversing for two of them, one as a matter of plain error, concluding that, "[t]hough a reason proffered by the State is facially neutral, trial judges should not blindly accept any and every reason put forth by the State, especially where, as here, the State continues to exercise challenge after challenge *only upon members of a particular race*). *Id.* at 937 (emphasis supplied).[2]

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[2] How and why each of the individual juror strikes was the product of disparate treatment is discussed in detail in Pitchford's Brief at 15-26. The overall pattern these individual

Nor was there any attempt to refute or explain away the history of discriminatory jury selection by this particular DA's office. *See Flowers III*, 947 So.2d at 938 (reversing, after the trial in the instant matter, a conviction for *Batson* violation by same District Attorney in a case tried before the instant one). *See also* trial court ruling granting defense *Batson* challenge to this prosecutor's strike of an African American venire member, Hon. C.E. Morgan, III,

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disparities create is also telling. *Every* black prospective juror struck by the State shared with at least one white prospective juror accepted by the State one or more of the traits the State cited as a "non-racial" reason for striking the black juror. Similarly, all but four of the traits identified by the State as "non-racial reasons" for having struck black prospective jurors were shared by one or more identified white venire members accepted by the State. One of the remaining four reasons, being late back from lunch, was also shown by the record to be shared with other unindividuated jurors, and was specifically found by the Court to be no impediment for particular African American juror who was stricken to serve as a juror. Tr. 318. Such strikes are especially suspect. *See Snyder* v. *Louisiana*, --- U.S. ----, ---128 S. Ct. 1203, 1211 (2008). The other three traits claimed to be "non-racial" -- allegedly suffering from mental problems, or being a known drug user, or having a history of speeding tickets -- obviously became significant to the State only after it was called upon to explain away a glaring pattern of racial discrimination. These things had not been asked about in the juror questionnaire, the contents of which the State had previously expressly approved, Tr. 5 and no one involved believed these things to be of enough import to voir dire any venire member about these topics. It seems inconceivable that none of the whites on the panel had ever had mental problems, used drugs or, certainly, hadn't had multiple speeding violations in his or her relative youth. Lack of voir dire on a particular topic that is later used as a "non-racial reason" for a strike is, in and of itself, evidence that the claimed reasons are mere pretext. *Lynch v. State*, 877 So.2d 1254, 1272 (Miss. 2004).

Circuit Judge, Montgomery County. Tr. 1349, 1356-64 in Supreme Court record, MSSC No. 1999-DP-01369-SCT, decided on other grounds *Flowers v. State*, 842 So 2d 531 (Miss. 2003) (*Flowers II*) (neither side claiming *Batson* error on appeal). This, where it exists, powerful corroborative evidence of racial discrimination in jury selection in a particular case. *Miller- El v. Dretke*, 545 U.S. 231, 236 (2005), *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003). *See also Johnson v. State*, 792 So.2d 253, 257 (Miss. 2001) (acknowledging that even without an affirmative right to a jury racially proportionate to the county's population racial makeup, racial proportion of the final jury is relevant to the totality of the circumstances analysis leading to ultimate conclusion concerning discrimination or lack of it).

Rather than dispute what happened, the State asserts that because the non-racial reasons cited by the State have not been rejected as invalid reasons by this Court as a matter of law in other cases, *Stevens v. State*, 806 So 2d 10310, 1048 (Miss. 2001) requires that this Court defer to the trial court's finding of no discrimination regardless of how strong the evidence of record supporting a finding of discrimination may be. In that it is mistaken. The deference accorded by *Stevens* is not to the non-racial nature of reasons themselves. Those reasons are only the first step in the process by which the trial court is supposed to arrive at a final determination. Deference is accorded that final determination, *but only where* the trial court has undertaken third step process of determining under "all the relevant circumstances" whether the reason is both plausible and the actual reason for the strike, and also making specific findings about why it

has made that determination. *Id.* at 1047. Where the court has not done that, there are no findings to defer to and the reviewing court must make the final assessment itself, or remand for that process to occur in the trial court. *Snyder*, 128 S.Ct. at 1209; *Walker v. State*, 937 So.2d 955, 957-58 (Miss. Ct. App. 2006), *Puckett v. State*, 737 So.2d 322 (Miss. 1999).[3]

The State's only other argument -- that this Court is procedurally barred from considering the *Batson* claim – is also not dispositive. Any deficiencies in the record are the product of trial court error, not the default of the defendant. Upon the Defendant's timely *Batson* objection, the trial court properly found that the act of striking all available four black jurors tendered to it in the selection process so far was enough to require the state to give reasons for those strikes. Tr. 323. However, once that was done, the trial court erroneously pretermitted the Defendant from making any rebuttal to those reasons and disregarded the Defendant's request that the trial court make a final totality of the circumstances analysis required under *Batson*. Tr. 324.

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[3] *Booker v. State*, 5 So.3d 356 (Miss. 2008) is not to the contrary. In *Booker*, a closely divided Court gave deference to the trial court's decision despite evidence that would have supported a finding of discrimination, but only because the trial court had held third step proceedings when the matter was raised on motion for new trial and entered findings explaining how the record supported a finding of no discrimination, "thereby distinguishing this case from *Snyder*, wherein . . . the trial judge simply allowed the challenge without explanation." 5 So.2d at 360, n.8. Four justices would have reversed for, *inter alia*, *Batson* error, despite the presumption in favor of the trial court's findings. *Id* at 362-69.

Instead, recognizing that the issue had been as fully preserved as it was willing to permit, Tr. 331, it made a final ruling of non-discrimination solely on the basis of the reasons as articulated by the State and without permitting rebuttal or considering the totality of the circumstances, and took a similar approach when *Batson* objection was renewed at the conclusion of the striking process but before the jury was empanelled.[4] This default is not default on the part of the Defendant, but rather is trial court error in failing to follow this Court's clearly established process for determining these claims, which require *at the least* a remand to complete the process. *Puckett v. State*, 737 So.2d 322 (Miss. 1999).

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[4] For example, ruling on the second of four challenged strikes: "I find that to be race neutral. *And you [State] can go forward*." Tr. 325. Ruling on the final challenged strike: "The Court finds that to be race neutral as well. *So now we will go back and have the defense starting at [tendered juror] 37*." Tr. 326. When the objection was reiterated prior to empanelment, the trial court expressly acknowledged that it had been earlier preserved, "You have already made it in the record so I am of the opinion it is in the record," Tr. 331 but also pretermitted any further development of 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." Id.* The requirement that a party must make an exception to preserve an objection made and ruled on by the trial court for appellate review was long ago abolished in Mississippi. Miss. Code Ann. § 9-13-31 (1972) ("provided objections are duly made and noted, no exceptions need be taken, either for the purposes of appeal or otherwise"). *See also* Miss. R. Civ. P. 46, Comment (noting that Rule 46 and § 9-13-31 both "conform[] to traditional Mississippi practice").

Nor did the trial court itself, as it is required to do even in the absence of affirmative evidence of pretext being offered by the proponent of the *Batson* challenge, offer any explanation of why it was accepting the reasons on the basis of the record as it was then before it. *Snyder*, 128 S. Ct. at 1212. This failure not only deprives the trial court of presumptive deference to its determination, but is reversible error in and of itself where, as here, the record establishes that the reason was implausible and likely a mere pretext for discrimination. *See Miller El v. Dretke*, 545 U.S. at 252 (*Batson* "requires the judge to assess the plausibility of that reason in light of all evidence bearing on it"); *Batson v. Kentucky*, 476 U.S. 79, 96-97 (1986); *Stewart v. State*, 662 So.2d 552, 557-58 (Miss. 1995).

Even assuming *per arguendo* that the defendant's failure to insist that the Court revisit its clear final determination of the issue or to make a post-ruling attempt to itemize the numerous incidences of disparate treatment documented in the record before the trial court does constitute procedural default, it does not prevent this Court from taking remedial action under the plain error doctrine where a defendant's fundamental rights are affected. *Flowers III*, 947 So.2d at 927 ("Because the error in upholding the strike . . . affects a substantial right, we apply the plain error rule to find that a *Batson* violation occurred." (citations omitted)). *See also Brown v. State*, 995 So.2d 698, 404-05 (Miss. 2008).

Finally, the State's invocation of procedural bar also ignores that *Batson* violations are never matters of mere procedure, or exclusively related to the defendant's right to a fair trial. Race discrimination

not only deprives the defendant of his fundamental right to a fair trial before a fairly constituted jury, it also violates the rights of the prospective jurors and of the system of justice as a whole to be free from racial discrimination. *Powers v. Ohio*, 499 U.S. 400, 407-11 (1991). The Supreme Court therefore vests in the courts an obligation to eradicate such discrimination of their own accord:

> The Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system. *Rose v. Mitchell*, 443 U.S. [545,] 555 [(1979)]. [The] prohibition on discrimination in the selection of jurors . . . makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an *affirmative duty* to enforce the strong . . . constitutional policies embodied in that prohibition. *See Peters v. Kiff*, 407 U.S. [493,] 507 [(1972)] (WHITE, J., concurring in judgment); *see also id*., at 505 (opinion of MARSHALL, J.).

Powers, 499 U.S. at 415-16 (emphasis supplied; internal quotation marks and string cites omitted).

Since the trial court failed to carry out that duty in the instant matter, this Court is clearly empowered to do so. *Snyder*, 128 S. Ct. at 1211-12 (noting that disparate treatment of white jurors was properly considered on appellate review even though not raised in the trial court because the entire venire had been questioned on the subject matter and that questioning

revealed the disparity in the record). *See State v. Snyder*, 750 So.2d 832, 840 and n.10 (La. 1999) (establishing that the defendant in *Snyder* made no claim in the trial court of disparate treatment of comparable whites to support his objection or rebut the prosecutor's articulated reason).

Because the prosecutor in the instant matter was, as he has been found to have done before, "violating the principles of *Batson* by racially profiling jurors," and turning the voir dire and jury selection process in this case into "an exercise in finding race neutral reasons to justify racially motivated strikes," Mr. Pitchford is entitled to a new trial. *Flowers III*, 947 So.2d at 937, 939. *See also Powers* 499 U.S. at 411 (1991) ("racial discrimination in the selection of jurors casts doubt on the integrity of the judicial process . . .and places the fairness of a criminal proceeding in doubt"); *Manning v. State*, 765 So.2d 516, 521 (Miss. 2000) ("the harmless error standard has no place in the *Batson* analysis"); *Walker v. State*, 937 So.2d 955, 957-58 (Miss. Ct. App. 2006).

B. Witherspoon-related violations

Pitchford preserved his objection to the racial discrimination resulting from the *Witherspoon* process by making it prior to the court's releasing any of the individuals identified as *Witherspoon* ineligible at a time when the trial court could have corrected the error. Tr. 315-16. The objection to all cause strikes made by the Court or the State was reiterated in Mr. Pitchford's Motion and Amended Motion for New Trial. R. 1249, 1261.

The State's contention that an individual objection to excusing each *Witherspoon* ineligible venire

member is required to maintain an objection to the cumulative effect of that process makes no sense. As even the case relied on by the State in its argument points out, disproportionality resulting from systematic error is the gravamen of the forbidden conduct being challenged by this objection, not the subjective motivation for the exclusion of each particular venire member excluded (as in a *Batson* challenge). *Yarbrough v. State*, 911 So 2d 951 (Miss. 2005) (quoting *Duren v. Missouri*, 439 U.S. 439, 364 (1977)). *See also Peters v. Kiff*, 407 U.S. 493 (1972); *Castenada v. Partida*, 430 U.S. 482 (1977) The objection could not be made until the process had been completed and its effect known.

The instant matter is distinguishable from *Yarbrough* on the merits, however. There, in a general petit jury composition challenge, this Court found that "[the defendant] failed to prove that the black population of Neshoba County was not fairly or reasonably represented in the venire." 911 So.2d at 956. Here, as was invited to the attention of the trial court when this motion was renewed, along with the *Batson* objection, immediately prior to the empanelment of the jury, Tr. 331, the disproportion of the jury racial makeup to the population from which the venire was drawn was expressly shown. Moreover, in the instant matter, the systematic exclusion operated not only on the final composition of the jury, but in how the venire members themselves were disproportionately treated. They have an independent right to be allowed to serve without being systematically discriminated against. *Powers*, 499 U.S. at 407-09.

As to the exclusion from service, as *Witherspoon* ineligible, of four jurors who had expressed an ability, despite their scruples regarding the death penalty, to follow the instructions of the court and consider it if a sentencing hearing were required, the objection to this exclusion was subsumed in the Motion and Amended Motion for New Trial. Supp. R. 1249 (¶ 6), 1251(A) (¶ 19), 1261 (¶ 6), 1263(A)(¶19).

This also affected a fundamental right of the Defendant and may be reviewed either on the basis of the Motion for New Trial, or if not that, for plain error, even in the absence of a contemporaneous objection. *Brown v. State*, 995 So.2d 698, 704-05 (Miss. 2008); *Williams v. State*, 794 So.2d 181, 187 (Miss. 2001). Trial before a fairly constituted jury is among the most fundamental of the guarantees accorded to a criminal accused under the Constitution. *Groppi v. Wisconsin*, 400 U. S. 505, 509 (1971). Moreover, even if, due to the lack of contemporaneous objection, it cannot of its own accord be the basis for reversal of the case, it can still contribute to the accumulation of errors which, though not reversible individually, collectively require it. *Ross v. State*, 954 So.2d 968, 1018-19 (Miss. 2007); *Flowers v. State*, 947 So.2d 910, 940 (2007) (*Flowers III*) (Cobb, P.J., concurring).

On the merits of this claim, Mr. Pitchford relies on the facts, law and argument contained in his brief in chief at 28-29. The State's arguments are inapposite to the Defendant's claims or unsupported by applicable law or the facts of record and thus do not undercut it. In addition, to the extent that the precedent of this Court is contrary to the Defendant's position here, Defendant respectfully submits that such precedent is inconsistent with the correct

interpretation of the United States Constitution, and this Court should alter or overrule that precedent and adopt the interpretation consistent with the Defendant's arguments in his Brief.

C. *Improper Limitation on Voir Dire Concerning Mitigation*

Defendant made several pretrial motions to obtain the right to voir dire fully on mitigation and other matters. *See* Motions 28, 29, and 30, R. 977-985. All were heard and overruled. Tr. 73- 80. He attempted to conduct voir dire on ability to consider mitigation during his voir dire of the panel, but repeated objections to his doing so were made by the State and sustained by the Court. Tr. 283-87. These matters were renewed in his new trial motions. R. 1263(A)

The State's argument that the defendant was allowed sufficient voir dire on mitigation under *Morgan v. Illinois*, 504 U.S. 719 (1992) misapprehends the argument being made by the Defendant here, and consequently fails to meet it. Indeed, possibly because of this misapprehension, the lengthy excerpts from the voir dire that the State quotes in its Brief at 20-24 actually reinforce the ways in which the limitations placed on his voir dire undercut the Mr. Pitchford's fundamental right under the Eighth Amendment to have a jury which could "give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence" in the event a sentencing proceeding were held. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007).

The issue raised by Mr. Pitchford is not whether the defendant was allowed use, or get prospective jurors to say, the words "consider mitigating evidence"

during the voir dire process. Clearly, as the State asserts, those words were said many times in the quoted portions of the record. Permitting that, however, does not satisfy the requirements of the Constitution. *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (expressly finding that "the mere mention of 'mitigating circumstances' to a capital sentencing jury [does not] satisfi[y] the Eighth Amendment. Nor . . . is [it] constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence.).

The error raised by the Defendant here is that the trial court's rulings not letting the defendant discuss the nature of the mitigation he was going to be presenting effectively deprived him the voir dire that sufficiently explored the prospective jurors' ability to "give meaningful effect" to or make a "reasoned moral response" to all the kinds of mitigating evidence that the defendant is permitted to offer, *Abdul-Kabir*, 550 U.S. at 264, or to be able to carry out their obligation under the Mississippi statutory scheme "to balance aggravators against mitigators." *Foster v. State*, 639 So.2d 1263, 1275-76 (Miss. 1994).

Nothing in the State's arguments or the record quoted by it in its brief makes the restrictions on voir dire imposed by the trial court consistent with the dictates of the United States Supreme Court. In a series of decisions over the past decade that Court has reiterated not only that there are "virtually no limits" on the kind of evidence that a defendant may offer in mitigation of his sentence concerning himself, *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) but also (in the context of instructing the jury) the affirmative duty trial courts to ensure that the jury meaningfully

considers and gives full effect to that evidence. *Id.*, *Penry*, 532 U.S. at 797. Where the trial court impedes the jury from doing so, no matter how powerful the evidence of guilt or of statutory aggravation warranting a death sentence that the sentencing jury ultimately had before it, the sentence must be reversed and resubmitted to a jury that has not been impeded in its ability to give meaningful consideration to *all* of the mitigating evidence the defendant wishes to offer. *Smith v. Texas*, 550 U.S. 297, 315-16 (2007). *See also Abdul-Kabir* 550 U.S. at 250, 254, 259, 262, 264 (2007) (reiterating that if the trial court does not facilitate such meaningful consideration by the jury "the sentencing process is fatally flawed"). It is useless to require the court to instruct the jury on specific mitigators if the parties are not permitted to discover and eliminate jurors incapable for whatever reason, of meaningfully considering them. *Morgan*, 504 U.S. at 734.[5]

By limiting the defendant to only asking the jury "if they would consider mitigating factors or would they be automatically disposed to the death penalty" Tr. 286, the trial court erroneously restricted the defendant from doing anything in voir dire beyond

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[5] For example, though trial court properly instructed on the statutory mitigator of young age, it expressly denied Pitchford the chance to inquire of any jurors whether they had experiences or beliefs that might prevent them from giving such information "full effect" as the mitigator it is statutorily intended to be. Tr. 285. Such things might include a moral or religious belief that children and youths are not mentally or morally different from adults (which is what undergirds the legislative judgment to make age a statutory mitigator), or an experience of having been victimized by a young person, and being unable to set those things aside in deliberating sentence.

merely mentioning mitigating circumstances in the abstract, and completely impeded his ability to question the jurors about whether they could give meaningful consideration to the kind of mitigating evidence he anticipated they would have to consider. *Tennard* 542 U.S. at 285. Without being able to explore this in voir dire, the defendant's right not to be tried by jurors who could meaningfully consider and give full effect to mitigation would be "rendered nugatory." *Morgan*, 504 U.S. at 734. This impediment to seating a jury that could do its duty in that regard requires reversal of at least the defendant's death sentence, if not his conviction. *Abdul-Kabir*, 550 U.S. at 264, *Smith v. Texas*. 550 U.S. at 315-16.

II. THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHTS TO PRESENT A FULL, COMPLETE AND ADEQUATELY DEVELOPED DEFENSE AND/OR TO HAVE HIS COUNSEL RENDER CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN DOING SO

A. The Trial Court Erred In Failing To Grant A Continuance Of The Trial

Mr. Pitchford preserved this error by way of written pretrial motions, ore tenus reassertion prior to the commencement of trial, and in his Motion and Amended Motion for New Trial. R. 867-954; 1045-85; Tr. 32-38; 338-39 R. 1249-52. 1261-63; Supp. R. 1251(A) and (B), 1263 (A), (B), (C). Where, as in the instant matter, the Defendant's counsel identifies with specificity multiple reasons why, no matter how much time he has had, he needs additional time or resources to present an adequate defense, delay of the

trial until such time as that can be accomplished is the only remedy available and denial of the continuance is an abuse of discretion. *Lambert v. State*, 654 So 2d 17 (Miss. 1995). The determination of whether a trial court abused its discretion in denying a continuance must be made on a case by case basis and implicates not only state rules of procedure, but also state and federal constitutional protections. *Fulks v. State*, --- So.3d ----, ----, (Miss. 2009), 2009 WL 2183064 at *4, No. 2007-KA-01572- SCT at ¶ 12 (Miss. July 23, 2009) (not yet released for publication).

In *Lambert*, this Court concluded that the trial court had abused its discretion in denying a continuance, notwithstanding the trial court findings that counsel had been appointed for several months prior to trial, tried the defendant in another count and filed several pretrial motions. It reversed the conviction and remanded the case for a new trial, expressly finding that "[c]ounsel's representations to the court that he was not adequately prepared should have been given greater weight." 654 So 2d at 22 (also noting that the trial court had erred by ignoring the fact that "[t]his case does not involve just a single reason for the continuance but several").

In the instant matter the State makes no argument that the reasons advanced in support of the continuance by Mr. Pitchford's counsel were untrue, only that the trial court was entitled to disregard them. In this it is wrong. The need for a continuance in the instant matter is, if anything, even more compelling than in *Lambert*. As in *Lambert*, counsel in the instant matter raised multiple reasons for seeking the continuance. He announced his own unpreparedness and documented in detail exactly

what, including his own competing obligations and his last minute receipt of expert information, had prevented him from completing the requisite investigation and preparation, Tr. 33-47, R. 1047-49.

In addition, counsel in the instant matter went further. He supported Mr. Pitchford's continuance request not only with his own representations, but also by the affidavits of two other individuals with particular expertise regarding death penalty defense, one from a Mississippi death penalty practitioner the concerning very specific additional preparation that was needed *in the instant matter* to properly prepare for a death penalty trial in Mississippi. R. 1068-71 (Affidavit of Robert McDuff), the other from a leading national expert in mitigation preparation relating specifically how each of those additional preparation steps was related to meeting the constitutional standards for minimally effective death penalty representation established by the U.S. Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003) and its progeny, R. 1082-85 (Affidavit of Russell Stetler).

The trial court failed to take any of these circumstances account. Nor did it credit the unrefuted representations by the Defendant's counsel concerning why this made him unprepared to proceed. Instead it erroneously substituted its own judgment of what was and was not needed to prepare for this matter for that of the counsel working on it. Tr. 50-55. This was clearly an abuse of discretion, led to significant omissions in the defense presented at both

the guilt and penalty phases of the trial and requires reversal as a remedy.[6]

This Court has been particularly diligent in protecting a death sentenced defendant's constitutional right to have his counsel fully investigate and prepare to present an effective penalty phase defense when the claimed error is that the defense counsel failed to seek or take the necessary time to do this. *See Doss v. State*, --- So.3d ---, ---- (Miss. 2009), 2009 WL 3381810, No. 2007-CA-00429-SCT at ¶¶ 6-32 (Opinion on Motion for Rehearing, Oct. 22, 2009), *Ross v. State*, 954 So.2d 968, 1005-07 (Miss. 2007). In the instant case, defense counsel attempted to comply with his constitutional obligation to investigate and prepare by seeking the time necessary to do so, but the trial court prevented it. It is no less a violation of the defendant's constitutional rights when the trial court thwarts a defense counsel's efforts to comply with this obligation than it is when counsel fails to make those efforts at all. *See Lambert*, 654 So 2d at 22. *See also State v.*

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[6] As in *Lambert*, the trial court relied heavily on the length of time counsel had been appointed on paper to improperly ignore his claims of unpreparedness, without considering unrefuted record facts about what still needed to be done despite that period of appointment and the competing obligations of counsel during the appointment period. Nor did the trial court recognize that that one of the most significant pieces of evidence related to mitigation – the results of a long-awaited evaluation by doctors at the Mississippi State Hospital that "raised a whole host of new questions, problems and issues that competent counsel must investigate" T. 1058, 1083 – had not even come into existence until less than two weeks before the scheduled trial, and clearly required additional investigation and expert assistance that could not be completed in the time available. R. 1058-1061.

Citizen, 898 So.2d 325, 338-39 (La. 2005) (finding that Sixth Amendment right to counsel requires suspension of prosecution upon application of defendant until such time as sufficient funding to permit adequate compensation of counsel to prepare for trial is identified).[7]

The State's contention that, despite the shortcomings resulting from the denial of the continuance, there was no prejudice to the defendant or manifest injustice is unfounded. In support of this contention, the State cites *Simmons v. State*, 805 So.2d 452 (Miss. 2004). *Simmons*, is, however, inapposite to the instant matter. In *Simmons*, two separate requests for continuance were made. Both dealt with meeting guilt phase evidence that was not primarily significant to the capital count of Mr. Simmons indictment (the robbery-murder of a male decedent), but rather to proof of a non-capital count of

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[7] As the State correctly recognizes, ineffective assistance of trial counsel, *per se*, cannot be either litigated or waived on direct appeal where, as here, trial counsel handles the direct appeal. Miss. R. App. P. 22; *Lynch v. State*, 951 So 2d 549 (Miss. 2007). In suggesting that this is what is being argued here, however, the State misapprehends the nature of the error asserted. Mr. Pitchford is not raising a freestanding claim of ineffective assistance of counsel. He is asserting trial court error in failing to grant defendant's counsel and his investigative staff the time needed to adequately investigate and prepare the case in the manner the constitution requires in order to adequately protect the defendant's rights where he faces a death sentence. The standards for what amounts to prejudice in that preparation, which must be shown for a continuance denial to be reversible, Miss. Code. Ann. § 99-15-29, has been established largely in effectiveness cases and Mr. Pitchford therefore must establish his claim using that standard.

the indictment (the rape of the decedent's female friend, who testified at the trial). *Id*. at 470-71.

With respect to the first request in *Simmons*, a one day extension was actually *granted* to consult with a DNA expert about newly received expert evidence that linked defendant to the rape. The Defendant effectively made use of that assistance in cross examining the state's witness. No manifest injustice was found to result from denying a longer delay where the defendant neither called that expert to testify, nor sought to have that expert perform independent DNA testing. *Id.* at 484.

The only basis for the *Simmons* second continuance request, which was denied, was the need to meet a recently changed version events given by the female friend about whether or not a co-defendant, whose trial had been severed from that of Mr. Simmons, had also raped her during the events in question. No manifest injustice was found in denying that request because the defendant was able to cross examine the witness regarding the trustworthiness of her testimony as a whole in light of the inconsistencies this represented, but the question of whether he acted alone or in concert with his co-defendant was otherwise irrelevant to the issue of whether Mr. Simmons himself was guilty of the rape, a crime that was not the capitalizing felony. *Id.* at 485.

By contrast, the instant case involved a single count capital murder indictment and most of what the defendant asked for a continuance for his counsel to do dealt with matters pertaining to mitigation of sentence, all of which required additional work and travel to complete. This included completing the

investigation of the defendant's family, social and mental health history in both Mississippi and California and obtaining potential witnesses who could effectively present the mitigating information and who could explain damaging matters that might otherwise weigh against the defendant in sentencing Tr. 34-38, R. 867-954, 1045-85. These tasks form the core of preparation for the sentencing phase, and where they are left undone for any reason, as they were in the instant matter due to the failure of the trial court to grant the continuance, reversal of at least the sentence is required. *Doss*, at ¶¶ 6-32 *Ross*, 954 So.2d at 1005-07. *See also Wiggins* 539 U.S. 510 (finding that the Constitution requires more investigation than receiving a single mental health professional's report); *Rompilla v. Beard*, 545 U.S. 374 (2005) (finding that the Constitution requires investigation of negative information that may be used against defendant at sentencing before determining sentencing strategy).

Where, as here, the error pertains to matters affecting mitigation of sentence, the standard for prejudice is not whether the outcome likely *would* have been different in the absence of the error, but whether the absence of the error *might* have tipped the balance against imposing a death sentence for even one juror. Miss. Code Ann. § 99-19-101(3). *See Wiggins*, 539 U.S. at 537-38; *Ross*, 954 So.2d at 1018 ("all genuine doubts about the harmlessness of error must be resolved in favor of the accused because of the severity of the punishment."). *See also Brown v. State*, 995 So.2d 698, 704 (Miss. 2008) (reversing for plain error).

The instant case did not present a fact situation – killing an adult during a capitalizing violent felony – that inevitably, however legally inexcusable the defendant's conduct is or however painful the loss is to the loved ones of the victim, garners a death sentence, even when such cases are submitted to a jury for sentencing consideration. *See, e.g.*, *Spires v. State*, 10 So.3d 477 (Miss. 2009), *Lattimore v. State*, 958 So.2d 192 (Miss. 2007) *Hudson v. State*, 977 So.2d 344 (Miss. Ct. App. 2007), *Young v. State*, 981 So.2d 308, (Miss. Ct. App. 2007), *Duplantis v. State*, 708 So.2d 1327 (Miss. 1998), *Larry Tyrese Minter v. State*, 2009-TS-00922-COA, presently pending on appeal from Circuit Court of Harrison County, District 1 Case # B2401-07-00648 (sentence of life in prison without parole entered on unanimous jury verdict after penalty phase trial); *Emerson Osborne v. State*, No. 2009-TS-00658-SCT, presently pending on appeal from Circuit Court of Bolivar County, District 2 Case # 2007-028-CR2 (same).

Even the prosecutor in this matter agreed that this particular crime did and does not need to be punished by a sentence of death. The co-defendant who was identified as carrying the pistol that actually fired the fatal shot was allowed to plead guilty to the lesser offense of Manslaughter and received a sentence of only 40 years, with the possibility of parole and other early release. Mr. Pitchford was likewise offered the opportunity to enter a guilty plea to capital murder and receive life in prison without parole rather than the death penalty. Tr. 1-3; 7-31.[8]

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[8] Mr. Pitchford was successfully qualified to enter a plea, Tr. 17-24 and tendered one that would have met the

Under these circumstances, the denial of the Mr. Pitchford's pretrial Motion and Amended Motion for Continuance and his post-trial New Trial motion renewing the continuance error, was an abuse of the trial court's discretion which caused manifest injustice to the defendant's right to have his counsel prepare, investigate, strategize and present an effective mitigation of sentence case. Mr. Pitchford respectfully submits that his sentence, at least, must be reversed as a result.

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

The record in this matter reflects the trial court's knowledge of unavailability of the witness, and that the trial court was actually requested to, and did, verify the unavailability with the court whose subpoena was preventing the witness from attending. Supp Tr. 35-37. Defendant preserved this claim of error in his Motion for New Trial and Amended Motion for New Trial. R. 1250, 1262. In the event that this is deemed insufficient due to the special circuit judge's finding that no contemporaneous request for

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requirements of *North Carolina v Alford*, 400 U.S. 25 (1970), but not the desires of the State and trial court that he either acknowledge the truth of everything in the proffer or give an account of the crime that otherwise amounted to an admission of guilt as a condition of the plea. The plea colloquy was abruptly pretermitted by the trial court at that point. Tr. 30-31. Arguably, the trial court's permitting the State to pursue the death penalty under these circumstances is unconstitutional vindictiveness for defendant's having asserted a constitutional right, *Ross v. State*, 480 So.2d 1157, 1161 (Miss. 1985) even in the absence of a presumption of such. *Alabama v. Smith*, 490 U.S. 794 (1989).

continuance was made, the defendant seeks reversal on the basis of "plain error" *See* Brief of Appellant at 40. There is nothing "spurious" about asserting plain error and where it is prejudicial, as it was here, and such plain error might have made the difference between life and death, it can and should be the basis for reversal of a conviction by this Court. *Flowers v. State*, 842 So.2d 531, 551-53 (Miss. 2003) (*Flowers II*). *See also Ross*, 954 So.2d at 1018, *Brown*, 995 So.2d at 704.

The unavailability of the only expert who could offer mitigation testimony about the interaction between the defendant's family and social history, psychological makeup and age that no other expert could provide to the jury, Supp Tr. 30-31, 33-34, is something that might have tipped the balance in this matter and, refusing to grant the mere 24 hours that was needed to get him before the jury was a clearly erroneous abuse of discretion resulting in manifest injustice that warrants reversal of at least the death sentence rendered in the instant matter. *Stringer v. State*, 500 So.2d 928, 931 (Miss. 1986). It clearly cannot be said beyond a reasonable doubt that under the circumstances of the instant matter, denying the jury the opportunity to consider this testimony did not contribute to the verdict of death. *Brown*, 995 So.2d at 704.

III. PROSECUTORIAL MISCONDUCT AND THE TRIAL COURT'S FAILURE TO CURB IT DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHTS.

The State opens its argument on this point with a blanket assertion that "Pitchford never raised any

objection at trial or in his motions for new trial that the prosecution had engaged in misconduct," State's Brief at 29. This is at best hyperbole. The State actually later concedes several. State's Brief at 34-35. Others were cited to in Mr. Pitchford's brief in chief. *See* Pitchford's brief at 43-44, 52 (citing to Tr. 379, 390-92, 415-18, 453, 473, 530, 565 (improper examination of witnesses at guilt phase), 709-10 (improper examination of witnesses penalty phase), 648, 799 (other improper penalty phase arguments)) and/or raised by way of new trial motion. R. 1249-52. 1261-63; Supp. R. 2 1251(A), 1263(B). This approach by the State is, however, indicative of its failure to comprehend either the law or facts that compel reversal here.

This Court's powerful commitment to preventing prosecutorial misconduct was given eloquent voice nearly 115 years ago and has been reiterated over the ensuing century when subsequent prosecutors, including the very prosecutor whose misconduct is being raised in the instant matter, have failed to heed it:

> The fair way is the safe way, and the safe way is the best way in every criminal prosecution. The history of criminal jurisprudence and practice demonstrates, generally, that if everyone prosecuted for crime were fairly and fully conceded all to which he is entitled, and if all doubtful advantages to the state were declined, there would be secured as many convictions of the guilty, and such convictions would be succeeded by few or no reversals. *Johnson v. State*, 476 So.2d 1195, 1215 (Miss.

1985) (citing *Hill v. State*, 72 Miss. 527, 534, 17 So. 375, 377 (1895)).

Flowers v. State 842 So.2d 531, 564 (Miss. 2003) (*Flowers II*) (noting that "the State had more than ample evidence with which to try its case against Flowers" but that its election to engage in "prosecution overkill" nonetheless required reversal). *See also Stringer v. State*, 500 So.2d 928, 931 (Miss. 1986) (stating that that "[f]ar too many cases, like this one, are reversed for errors in prosecutorial conduct which are not difficult to anticipate or correct"); *Hales v. State*, 933 So.2d 962 (Miss. 2006) (declining to reverse in non death case, but noting that "the prosecutor's actions unnecessarily jeopardized what was otherwise a solid evidentiary case. Therefore, for future reference we take this opportunity to point out that prosecutors can avoid such a quandary by taking the fair and safe route regarding inadmissible evidence during trial").[9]

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[9] Other decisions reversing for prosecutorial misconduct and quoting *Hill* include *Thomas v. State*, 474 So.2d 604, 606 (Miss. 1985) *overruled by legislative action on other grounds* (urging trial judge to likewise act in accordance with *Hill*); *Wiley v. State*, 449 So.2d 756, 763 (Miss. 1984) (vacating death sentence and remanding for a new sentencing proceeding stating that "we admonish prosecutors throughout the state that the convictions they strive to achieve are secure only when they confine themselves to argument tolerated under our rules of criminal jurisprudence. To step behind these rules, as did the argument in this case, is asking for a mistrial"); *Roberson v. State*, 185 So.2d 667, 670 (Miss. 1966) (finding misconduct by the trial judge in an unobjected to exclamation, stating that "The officers of a court, and especially the judge, district attorney and sheriff, because of the attributes of the offices they hold, unconsciously exert tremendous influence in the trial of a case, and they should

Where such misconduct impairs the fundamental rights of a defendant, as it did in the instant case, a conviction and/or sentence obtained in the proceedings in which it occurred must be reversed for plain error even in the absence of a contemporaneous objection in order to ensure that the constitutional rights of the accused, personally, are protected. *Brown v. State*, 995 So.2d 698, 404-05 (Miss. 2008); *Ross v. State* 954 So.2d 968, 1002 (Miss. 2007); *Mickell v. State*, 735 So.2d 1031, 1035 (Miss. 1999), *Griffin v. State*, 557 So.2d 542, 552 (Miss. 1990); *Wood v. State*, 257 So.2d 193, 200 (Miss. 1972). This is the only way that this Court can keep its commitment that, however apparently guilty a defendant is, or how painful to the survivors of victims of crimes not having a final conviction and sentence of someone for their loved one's death may be, "[o]ur solemn duty is to guarantee a fundamentally fair trial to the state of Mississippi and all criminal defendants" *Stringer*, 500 So 2d at 931. *See also Flowers II*, 943 So 2d at 564.

In addition to the rights of the parties to any particular case, the fair administration of justice itself, and the integrity of the judicial system, also requires no one in the system be allowed to "ignore the *Hill* admonition to be fair."

> [W]ere we to ignore our well-established and long-standing case law concerning admissibility of evidence-were we to ignore our decision in Flowers I-were we to ignore our

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be astutely careful so that unintentionally the jurors are not improperly influenced by their words and actions"); *Borroum v. State*, 22 So. 62, 64(Miss. 1897) (invoking *Hill* to reverse for denial of continuance requested so defense witness could be made available).

> constitutional oaths-we could simply turn our heads and affirm [the defendant's] conviction and sentence of death. However, this we cannot and will not do. We must do that which our allegiance to the law requires us to do.

Flowers II, 943 So 2d at 564-65.

In his brief in chief, Mr. Pitchford identifies sixteen separate acts of prosecutorial misconduct, three during guilt phase witness examination, seven during guilt phase argument, three during examination of the defendant's penalty phase witnesses, and three during its closing argument at the penalty phase. The State makes no merits response at all to some of these acts, and only partial merit responses to most of the others, apparently conceding that much of the claimed misconduct occurred. Instead, it relies on procedural bar or lack of prejudice to prevent it being redressed in this Court. *Walker v. State*, 913 So 2d 198 (Miss. 2005), *Goodin v. State*, 787 So.2d 639, 653 (Miss. 2001).

This approach ignores not only the multiple places where the Defendant did make contemporaneous objections, but also this Court's commitment reversing where the constitution and fair administration of justice require it, regardless of the likely guilt of the defendant. *Stringer*, 500 So 2d at 931. *See also Flowers v. State*, 947 So.2d 910, 940-41, Miss. 2007 (*Flowers III*) (Cobb, J. concurring in reversal for cumulative error, including prosecutorial misconduct, in the trial held after the reversal and remand ordered in *Flowers II*); *Flowers II*, 943 So 2d at 564.

The State makes no merits response to any of the claimed prosecutorial misconduct in direct examination of witnesses during the guilt phase. There were multiple objections to this pattern of conduct; all were overruled or ignored by the trial judge. *See* Tr. 379, 390-92, 415-18, 453, 473, 530, 565; R. 1249-52. 1261-6; Supp. R. 2 1251(A), 1263(B). The complained of misconduct consisted of the prosecution systematically leading and coaching its witnesses during direct examination, eliciting improper opinion testimony from its experts, and asking police and lay witnesses questions about matters without a factual basis in the actual evidence. Tr. 376, 378-79, 390-92, 400-401, 411, 415-17, 430, 447-48, 453-54, 473, 505-09, 522-25, 530, 564-65, 567, 571-73. This misconduct was part and parcel of an effort to make it look to the jury like the defendant's statements were more internally inconsistent and more incriminating than they really were, and to make the unreliable codefendant and informant testimony appear more corroborated by both lay and expert testimony than it really was. *See Flowers v. State*, 773 So.2d 309, 326-28 (Miss. 2000) (*Flowers I*) (involving misconduct in examining witnesses at guilt phase by same prosecutor who prosecuted the instant matter).

As is more fully set forth in Defendant's brief in chief, this misconduct, particularly the prosecutor's injecting facts not in evidence and leading during his direct examination of the police officers about defendant's statements – which were discussed by the officers, but never introduced into evidence, apparently the customary *modus operandi* of this

DA's office, *Id.* – was particularly egregious.[10] These examinations, in particular, clearly bore prejudicial

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[10] *See*, *e.g.* Tr. 509 (suggesting in a question that defendant claimed he didn't know who did it when the statement the officer was testifying about was one where Mr. Pitchford acknowledged being there with a companion with the intent to rob, but withdrawing from the scheme before the robbery occurred); Tr. 571 (suggesting that a statement by the defendant which the recounted as Mr. Pitchford's having said that entered the store with co-participant Eric Bullins, but then left without committing the robbery was telling the officer "that they both committed the robbery and murder together"); Tr. 505 (suggesting that Mr. Pitchford acknowledged taking a .38 pistol loaded with shot that morning from the store, whereas Mr. Pitchford consistently claims to have purchased it earlier).

Similar efforts were used not only to "tee up" his improper closings that would be based on these mischaracterizations, but also to improperly engage in actual argument by way of the leading questions. *See*, *e.g.*,

Q: [D.A. Evans]: *So through three statements he has given inconsistent versions*; is that right?

A: [Officer Greg Conley]: Yes

Q: But he never admits any involvement in the crime in all of those statements?

A: Yes

Tr. 507 (emphasis supplied)

Q: So in that statement he is admitting that him and Eric went to the store to rob it, that he had a 38 in his pocket. *The only 38 involved is going to be the one that came out of the store; is that correct?*

A: That's correct

Q: *So it would have been kind of hard to have that one in his pocket when he walked into the store*, *wouldn't it?*

A: Yes, sir.

Tr. 508-09 (emphasis supplied)

fruit at the penalty phase, where the jury was evidently trying to sort out what the statements actually said from the misleading questions being asked about them, and asked for copies of the statements themselves. Tr. 809. However, since the statements were not in evidence, the jury was instructed to rely on what was – which included the improper questioning. Tr. 810.

Given all of the foregoing, it certainly cannot be said beyond a reasonable doubt that the examination of the police officers did not contribute to at least the death sentence imposed. Hence, prejudice clearly ensued, resulted in the denial to defendant of a fair trial and requires reversal, either on the basis of the many objections made and denied, or on the basis of plain error. *Brown*, 995 So.2d at 704; *Flowers I*, 773 So.2d at 329-30. *See additionally* Pitchford's Brief at 44-48.

The State also mounts no defense on the merits to the prosecutorial misconduct in the penalty phase cross examination of two of defendant's mitigation witnesses, his mother and sister (the latter over a contemporaneous objection, Tr. 709-10), regarding purported specific acts of school related misconduct during his childhood and youth. These questions were not relevant to any question in issue at the penalty phase: The witnesses did not testify on direct examination to anything about specific acts of conduct by defendant while in school that opened the door to

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Q: Okay. So basically he gave you a version. *He changed it a little when Greg came in. Then he changed it again when it was just you some*.

A:[Officer Robert Jennings]: That's correct.

Tr. 573 (emphasis supplied).

these questions, nor at any time did Mr. Pitchford ever attempted to establish by any means that he had NOT been disciplined at school. Tr. 708-09, 714-19. Nor was this information relevant to either of the two aggravating circumstances the state attempted to establish – robbery for pecuniary gain, and killing to escape detection and conviction. R. 1205-06.

This Court has recognized that in a death penalty case, where the prosecution attempts, by way of ostensible impeachment, to put inflammatory evidence of little or no relevance before the jury, the sentence resulting from it, if not the entire conviction, must be set aside. *Lester v. State*, 692 So.2d 755, 781-82 (Miss. 1997) *overruled on other grounds*, *Weatherspoon v. State*, 732 So.2d 158 (Miss. 1999); *Walker v. State*, 740 So.2d 873, 883-86 (Miss. 1999). Moreover, these questions did not bear any but the remotest relevancy to impeaching the credibility, knowledge base or bias of the witnesses. Instead, it is otherwise improper evidence being introduced under the "guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible." *Harrison v. State*, 534 So.2d 175, 178 (Miss. 1988) (citations omitted) (emphasis in original); *Foster v. State*, 508 So.2d 1111, 1115 (Miss. 1987). *See also* Pitchford's Brief at 49.

Acknowledging that contemporaneous objections *were* interposed to two other incidents of misconduct in witness examination at the penalty phase – cross examination Dominique Hogan, the mother Mr. Pitchford's son, about alleged acts of misconduct, extra-relationship sex and fighting, between herself and Mr. Pitchford when they were a dating couple Tr. 688-90 and the inflammatory question of Mr.

Pitchford's sister Veronica suggesting that losing a father to cancer, where "at least [Mr. Pitchford] had a month" to see him before he died was "better than somebody just being murdered and their family not [having that time]" to say goodbye, Tr. 711 – the State did make an attempt to argue that these were not error. Neither of these arguments holds water.

As to the questioning of Ms. Hogan, a contemporaneous objection clearly covered both subject matters, and went not only to the lack of a good faith basis to ask these questions at all, but also to their calling for "damaging and inflammatory speculation," Tr. 689, their lack of substantive relevancy to any issue before the court; [11] the fact that the basis for asking the questions constitutionally inadmissible hearsay evidence (the defendant's unmirandized statements given to psychiatrists Bailey and McMichael in preparation for trial rather than for treatment purposes);[12] and the impropriety of the questions as improper character based 13 impeachment of the witness herself.[13]

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[11] "MR. CARTER [Attorney for Defendant]: I object to the relevance of it, Your Honor." Tr. 690.

[12] "MR. CARTER [Attorney for Defendant]: My response to that, Your Honor, would be that Dr. Bailor's [sic] statement is hearsay. Reb McMichael's statement is hearsay. Whatever Mr. Pitchford says cannot be used to cross examine this witness." Tr. 690.

[13] "MR. CARTER [attorney for Defendant]: Your Honor, let me just say too that you didn't give me a chance to finish my objection. . . . [I]t is not all right for him to ask her whether or not she had another boyfriend or whether she was -- had ever went out with somebody else or talked with somebody else. That's certainly not proper. That is meant to try to make this

The trial court's finding that the prosecutor had a factual basis for asking the question from reports from the Mississippi State Hospital and a private consulting psychiatrist that neither party called as a witness is not dispositive of the question of whether inquiring about it was prejudicial misconduct. Tr. 691. While it may mean the question was not asked in subjective bad faith, such questioning is still improper because its primary purpose is to put highly prejudicial, and otherwise inadmissible hearsay evidence about the defendant before the jury *Lanier v. State*, 533 So.2d 473, 486-90 (Miss. 1988) (reversing because of cross examination of witness on basis of report by non-testifying Whitfield doctors who conducted mental health exam). Because the evidence being introduced in this means is testimonial hearsay, the Sixth Amendment confrontation clause is also implicated. *Davis v. Washington*, 547 U.S. 813 (2007), *Crawford v. Washington*, 541 U.S. 36 (2004). *See also Estelle v. Smith*, 451 U.S. 454 (1981) (use at sentencing of unmirandized statements given by criminal defendants during court ordered mental health examinations violates defendant's 5th and 6th Amendment rights to silence and to counsel). Indeed, even if the evidence on which the question was based would have been admissible if offered by way of other witnesses, the fact that the State did not in fact offer it is enough to require reversal for prosecutorial misconduct in inquiring into it. *Flowers I*, 773 So.2d at 330-31 (finding penalty phase misconduct for asking one of defendant's mitigation witness about

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woman, to call some kind of question about her character which is not even proper." Tr. 691-92.

alleged prior bad acts of defendant which could have been, but were not, established by other means).

The contemporaneous objection that this irrelevant inquiry was of such an inflammatory and speculative nature as to be unduly prejudicial, and therefore also improper, is also clearly valid. Tr. 689-92. The witness never testified about his character or conduct towards her during her intimate relationship with him. Her testimony went only to Pitchford's parental relationship with their common child. Tr. 685-97. Hence her testimony did not open the door to discussing the subject at all. There was no claim by Mr. Pitchford through any other witness that he had a good character as a romantic or domestic partner as mitigation of sentence in any other way, either. R. 1206 (jury instruction itemizing mitigation to be considered and expressly not mentioning anything about that aspect of his life).

Nor is the existence of acts of promiscuity or possible domestic violence relevant to the only two aggravating circumstances – robbery for pecuniary gain, and escape from detection – on which the jury was instructed. R. 1206. Hence, as with the irrelevant inquiries of his mother and sister, these questions of his child's mother were merely an attempt to introduce inflammatory evidence of little or no relevance before the jury. This requires that the sentence resulting from it be set aside. *Lester v. State*, 692 So.2d 755, 781-82 (Miss. 1997) ; *Walker v. State*, 740 So.2d 873, 883-86 (Miss. 1999). *See also* Miss. R. Evid. 403.

Moreover, such questioning was, as the defendant's objection pointed out, not proper impeachment of

witness herself under Miss. R. Evid. 608. Tr. 691-92. These questions did not go at all to her character for truthfulness, which is the only kind of character impeachment of witnesses permitted under this rule or its companion Rule 609. *See Hopkins v. State*, 639 So.2d 1247, 1252 (Miss. 1993), *McInnis v. State*, 527 So.2d 84, 87 (Miss. 1988) (noting that the rules allow evidence of prior bad acts "for the purpose of attacking the credibility of the witness *and for no other*. The issue with respect to which [the evidence] must be relevant, if it is to be admissible, is [to the] propensity for truthfulness as a witness") (emphasis supplied).

The inflammatory questioning of Veronica Dorsey is equally indefensible. Even assuming *per arguendo* that victim impact testimony can be elicited from anyone other than the actual victim/survivor him or herself, such evidence is very limited in its scope. Certainly, it is admissible only where it is presented in a non-inflammatory way that does not incite the jury to inject undue emotion into its sentencing decision. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (expressly recognizing that the due process clause provides a remedy against inflammatory presentation of victim impact testimony), *Branch v. State*, 882 So. 2d 36, 67 (Miss. 2004). *See also Blue v. State*, 674 So.2d 1184, 1225 (Miss. 1996) (requiring that jury decide sentence on things other than "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling"). Presenting it an unduly inflammatory manner is reversible prosecutorial misconduct in and of itself, even if the same facts presented in some other manner might be acceptable. *Shepard v. State*, 777 So 2d 659, 661-62 (Miss. 2001).

Contrary to the State's argument, the inflammatory nature of the question is exactly the objection that was made, and it was made not only expressly on that basis at the time, but the record also reflects that the comment not only could have created, but actually did create an emotional outburst in the courtroom that required judicial admonishment. Tr. 711-12.[14] The

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[14] The entire relevant exchange is as follows:

Q. [District Attorney Evans] That is better than somebody just being murdered and their family not --

MR. CARTER [Attorney for the Defendant]: Your Honor, that is absolutely improper question and he knows it.

THE COURT: I'll overrule the objection.

MR. CARTER: Your Honor, somebody --

Q. You can answer the question.

MR. CARTER: May we approach, Your Honor?

(MR. EVANS, MR. HILL AND MR. CARTER APPROACHED THE BENCH FOR THE FOLLOWING BENCH CONFERENCE HAD OUTSIDE THE HEARING OF THE JURY.)

MR. CARTER: If the Court -- maybe the Court can't hear. Somebody in the back of the courtroom is talking and answering questions. And it is somebody with the victim's family. When I objected and said that question was improper. Somebody in the back said no, it is not. Would the Court please advise --

THE COURT: I did not hear it, but –

MR. CARTER: I heard it before too.

THE COURT: I am not disputing what you said. I am not in the least bit. I was just saying I did not. But if you said it, I do not question it. I was going to say if, if, if you heard something, I will admonish the members of the audience at this time to refrain from any statements.

MR. CARTER: Yes, sir. Thank you.

(THE BENCH CONFERENCE WAS CONCLUDED.)

THE COURT: I want to make it clear to everybody in the courtroom that they are not to make any comments about

State's reliance on *Goodin v. State*, 856 So.2d 267, 284 (Miss, 2003), for the proposition that the grounds cited in the trial court were different from the argument in this Court is therefore misplaced. In *Goodin*, the grounds on which defendant relied at trial were narrow, hearsay rule exception questions of law, and bore no relation to the additional grounds raised on appeal. Here, as the record makes clear, the objection at trial, erroneously overruled by the trial judge, was exactly what is complained of on appeal.

The State takes a similar approach to the prosecutors improper "in the box" penalty phase argument long ago condemned by this Court in *Stringer v. State*, 500 So.2d 928, 938-39 (Miss. 1986). It does not deny that the prosecutor twice told the jury the final closing, when no rebuttal was possible, that it was there to impose the death penalty and not a sentence of life imprisonment. He opened his argument with the statement that "*y'all know what you are here for*. The law is clear in this state. The death penalty is an appropriate punishment," Tr. 799, and reiterated it later that "it would make y'all's decision easy if you just said well, we will just go

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anything that is going on. You are a spectator and observer, guest of the Court. And you are not to make any comments. You are not to make any noise at all during this process. You can proceed.

MR. EVANS: Thank you, Your Honor.

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

ahead and sentence him to life. *But that is not your job*." Tr. 804-05)

Defendant expressly objected to this argument when it first occurred. The objection was overruled with a ruling that clearly gave the prosecutor permission to reiterate it when he did. Tr. 799. This should be sufficient to overcome any procedural bar to considering this misconduct, especially since the exact language of the second statement was also raised as misconduct in Defendant's Motion and Amended Motion for New Trial, ¶ 28, Supp. R. 1251 (A), 1261(B). *Hodges v. State*, 912 So.2d 730, 751 (Miss.2005). Given its nature it may, in any event, be reviewed on the basis of plain error. *Stringer*, 500 So.2d at 938-39; *Griffin v. State*, 557 So.2d 542, 552-53 (Miss.1990).

Nor does the State dispute the clearly erroneous and prejudicial nature of the argument by the prosecution at the penalty phase that the autopsy photos showed that the crime was "brutal" and that therefore "this is the type of crime that the death penalty is for." Tr. 804. Though the words "heinous, atrocious and cruel" were not actually spoken, this argument was basically an argument that this statutory aggravating circumstance ("HAC") should be considered by the jury without either legally sufficient evidence to support submitting that aggravator to the jury and, more importantly, without the required cautionary instruction when the potentially inflammatory HAC aggravator is submitted for their consideration at all. *Clemons v. Mississippi*, 484 U.S. 738(1990); *Knox v. State*, 805 So.2d 527, 533 (Miss.2002); *West v. State*, 725 So.2d 872 (Miss. 1998); *Taylor v. State*, 672 So.2d 1246 (Miss. 1996). Pitchford's Brief at 52.

Although there was not a contemporaneous objection to this particular statement, the Defendant had been vigorously objecting to the improper nature of the District Attorney's argument throughout the closing; the objections were not only overruled on all occasions, but Defendant's counsel was frequently met by personal admonition from the trial court for having made them at all. Tr. 799, 800, 802-03.

Further, after what turned out to have been the final objection was overruled, the District Attorney demanded a bench conference, apparently for no purpose other than to issue a threat of physical reprisal against Mr. Pitchford's counsel for making his objections, Tr. 802, and to have the objection overruled once again in disparaging terms. Tr. 802-03.[15] After that, Mr. Pitchford attempted no more objections. The two improper exhortations – the

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[15] Both state and defense counsel were threatened with jailing for this exchange. Mr. Pitchford's counsel immediately accepted both the overruling of his objection and the admonishment and attempted to resume his seat. The trial court nonetheless detained counsel at the bench and further dressed defense counsel down with a lecture on how to make an objection. Tr. 802. However, when the defense attempted to comply with those instructions and requested the record be read back to document his objection the trial court pretermitted that effort, justified the State's argument, and again overruled the objection. Tr. 803. Under the circumstances, Mr. Pitchford had no choice but to rely on his prior objections to encompass the entire improper tenor of the State's closing argument, which the trial court was clearly going to let proceed. For the next few minutes that argument continued as it had since the time of the first objection, a tissue of inflammatory, improper argument aimed at exciting only passion and prejudice in the jury, rather than deliberate consideration of sentence. Tr. 804-07.

second "in the box" argument and the backdoor HAC argument – occurred immediately thereafter. Tr. 804.

Even if these objections are not sufficient to overcome the contemporaneous objection rule, both of these improper exhortations by the prosecutor, whether considered individually or in combination with each other or with the multiple other acts of misconduct throughout the argument and the trial, are exactly the kind of behavior warrants reversal on the basis of plain error. *Stringer*, 500 So.2d at 938-39; *Griffin v. State*, 557 So.2d 542, 552-53 (Miss. 1990). It certainly cannot be said that the misconduct beyond a reasonable doubt did not contribute to the sentence of death imposed by the jury who heard it. *Brown*, 995 So.2d at 704. *See also Wiggins*, 539 U.S. at 537-38.

The State makes a partial merits defense of the prosecutor's inflammatory and evidentiarily unsupported personal opinion in guilt phase closing that Mr. Pitchford, who had not testified at trial, was "as close to a habitual liar as I have ever seen." Tr. 649. State's Brief at 32. The claimed record support for that statement expressly made to the jury is purported contradictions within Mr. Pitchford's out of court statements, whose content had been introduced exclusively through the testimony of the officers who took them.[16] The statements were not themselves

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[16] As is noted above, the testimony by which these officers provided this evidence was separately tainted by misconduct which attempted, by asking questions that mischaracterized their actual contents, to exaggerate the contradictions within them, which also means that the argument is similarly tainted to the extent that it relied on those mischaracterizations. *See* n. 10, *supra*. *See also Flowers v. State I*, 773 So 2d 309, 329-30 (Miss. 2000)(this D.A.'s misuse of defendant's statements in

introduced, nor had Mr. Pitchford testified at trial. The State's only rationale for this inflammatory attack is that it was proper rebuttal to arguments by the defendant that co-defendant and informant witness testimony was untruthful and motivated by desires to help themselves with the prosecution in resolving matters concerning their own criminal conduct. *McNeal v. State*, 551 So.2d 151 (Miss. 1989), State's Brief at 32.

This rationale, however, ignores entirely that the use of those statements as the basis for calling Mr. Pitchford an habitual liar was an improper comment on the defendant's failure to testify, and thus clearly an error. *Griffin v. State*, 557 So.2d 542, 552 (Miss. 1990).

> This Constitutional right has been construed by this Court to have been violated, not only when a direct statement is made by the prosecution as to the defendant's not testifying, but also by a comment which could reasonably be construed by a jury as a comment on the defendant's failure to testify. *Jimpson v. State*, 532 So.2d 985, 991 (Miss.1988); *Livingston v. State*, 525 So.2d 1300, 1305-08 (Miss.1988); *Monroe v. State*, 515 So.2d 860, 865 (Miss.1987); *Bridgeforth v. State*, 498 So.2d 796, 798 (Miss.1986); *Wilson v. State*, 433 So.2d 1142, 1146 (Miss.1983); *Davis v. State*, 406 So.2d 795, 801 (Miss.1981).

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closing is reversible error); *Flowers v. State II*, 842 So.2d 531 (Miss. 2003) (Same, re argument from information improperly solicited from witnesses on cross examination).

Griffin, 557 So.2d at 552. Because this error affects a fundamental right, it is subject to reversal on basis of plain error, even in the absence of a contemporaneous objection. *Id.*

Moreover, comment on non-testifying defendant's out of court statements can likely never be justified as "invited error" even where those statements are in evidence. *Davis v. State*, 970 So.2d 164, 172 (Miss. Ct. App. 2006) (citing *Livingston v. State*, 525 So.2d 1300, 1306 (Miss. 1988) and *West v. State*, 485 So.2d 681, 688 (Miss. 1985)). Even if the invited error doctrine could be invoked, it would have to be limited to circumstances where the defendant had argued that the statement in evidence itself actually said something that the statement did not say, and not to rebut arguments about the credibility of other witnesses. *Davis*, 970 So.2d at 172-73.

Even if the State were not making an improper comment on the defendant's failure to testify and could defend its inherently unreliable witnesses' version of events and general truthfulness by commenting on inconsistencies in defendant's competing account of the events, this still does not open the door to the state arguing the general *character* of the defendant for truthfulness as calling him an "habitual liar" did. Instead it is, in the argument context, improperly using impeachment of a witness other than the defendant as a "guise for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible" concerning the character of the defendant. *Flowers I*, 773 So.2d at 326-27; *Harrison*, 534 So.2d at 178; *Foster v. State*, 508 So.2d at 1115. What is improper and prejudicial to present evidence about is clearly

equally improper and prejudicial to argue to the jury. Moreover, even if the defendant's character for truthfulness were proper rebuttal to a defendant's argument questioning the veracity of other witnesses, there was no supporting evidence of record to support that argument. The State recognized this when it withdrew the cautionary instruction required when such evidence was adduced. Tr. 608-10.[17]

The State also makes no response to the undisputed legal precept that "a prosecutor is forbidden from interjecting his personal beliefs regarding the veracity of witnesses during closing argument." *Evans v. State*, 725 So.2d 613, 673 (Miss. 1997) (citing *United States v. Young*, 470 U.S. 1, 5, 18-22, 10 (1985); *Dunaway v. State*, 551 So.2d 162, 164 (Miss.1989) (prosecutor who referred to defense expert as "a whore" committed error); *Tubb v. State*, 217 Miss. 741, 743-45, 64 So.2d 911, 912-13 (1953) (prosecutor who tells jury during closing argument he knew the State's witnesses were

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[17] Since the defendant did not testify, the State could not, and did not, attack his character for truthfulness in any of the limited ways permitted by Miss. R. Evid 608. Nor for the same reason, could or did the Defendant attempt to support it by any of the means at his disposal had he testified and the State attacked it. *Id.* There was no attempt to impeach Mr. Pitchford's character under any of the limited exceptions permitted by the rules for an accused who does not testify, either. M.R.E. 404. *Nicholson v. State*, 704 So.2d 81 (Miss.1997). The limitations on how and when such evidence can be admitted are very strong specifically because the undue prejudice such evidence, ordinarily irrelevant to any actual issue in the case, can induce in a jury. MRE 404 Comment (a). *See also Rubenstein v. State*, 941 So.2d 735, 761-65 and nn. 13,14 (Miss. 2006) (reaffirming that "no person may be convicted upon his reputation or character" and requiring instruction to jury to cure any errors in this regard).

telling the truth commits error which may be reversible). The "habitual liar" comment clearly transgresses this precept and was part of a pattern of misconduct that warrants reversal of the conviction.

The State made a similar ineffective attempt to defend the trial court's permitting the prosecutor, over the objection of the defendant, and immediately after the habitual liar comment, to make the inflammatory and factually tenuous argument at the guilt phase that "we would have had two more dead people" if the crime had occurred even a few minutes later. Tr. 649. This is argument inciting prejudice and fear by appealing to a jurors fears for themselves or other bystanders even if there were some basis for an inference in that regard. *Shepard*, 777 So.2d at 661. The error lies not in whether or not there were some basis to infer this, which is the State's only defense of the remark. The error lies in the inflammatory nature of the argument itself: Preying on jurors fears for themselves or other community members not harmed by the crime is a bell very difficult to unring, much less to prove beyond a reasonable doubt that it did not affect the outcome. *Brown* 986 So.2d at 275, *West*, 485 So.2d at 689-90.[18]

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[18] Perhaps if this were the only improper thing said during the argument, the error would not be reversible. But given the context, it clearly was part and parcel of a cumulatively erroneous and prejudicial course of prosecutorial misconduct, and reversal is warranted here, particularly for the improper resonance this phase it likely had at the penalty phase. *Forrest v. State* 335 So 2d at 903, There, this argument would clearly have been improper, since the jury was not being permitted to consider the aggravating factor of creating risk to many people. Indeed, the fact that the legislature had to affirmatively make

The State also asserts without any supporting citation, that there was an evidentiary basis for the State's arguing at both the guilt and penalty phases that Pitchford was the person who fired the fatal shot at both phases of the trial. Tr. 649, 734. State's Brief at 31. There is in fact no such support. The only evidence directly stating who carried the 22 from which the State claimed the fatal shot was fired was that it was carried by Quincy Bullins in his aborted attempt to rob the store a few days earlier, Tr. 524, and by Quincy's cousin Eric Bullins the morning of the crime. Tr. 573. The only evidence concerning a weapon carried by Mr. Pitchford concerns a .38 loaded with birdshot. Tr. 508, 493-95. Hence, there was in fact no evidentiary basis for arguing at either the guilt or penalty phases that Mr. Pitchford was carrying the 22, and the error requires reversal because of prejudice to both the guilt and sentencing proceedings. *Flowers II*, 842 So.2d at 554-57.

At the guilt phase, this argument was made in the State's final closing when no rebuttal from Defendant was possible, Tr. 849, and in combination with the prosecutor's misrepresentation and manipulation of the facts in witness examinations clearly prejudiced the defendant's conviction. *Flowers I*, 773 So.2d at 329-30. *See also Randall v. State*, 806 So.2d 185, 212-14 (Miss.2001); *Shepard*, 777 So.2d at 661, *West* 485 So.2d at 689-90, *Augustine v. State*, 201 Miss. 277, 28 So.2d 243, 244-47 (1946).

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this an aggravating factor relating to sentence when it could be established beyond a reasonable underscores its complete impropriety as argument at the guilt phase.

The State's claim that the accomplice liability instruction renders the question of who had the gun irrelevant, and any argument about without evidentiary support it not prejudicial ignores the huge prejudice the repetition of this argument caused when it was reurged at the penalty phase. Tr. 734. In that iteration, it went to the heart of the *mens rea* finding the jury had to make to even consider the death penalty. Miss. Code Ann. § 99-19-101 (7), *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987). Given the importance of these findings to sentencing it clearly cannot be shown beyond a reasonable doubt that impossible that this argument did not affect that verdict.

The State concedes that the issue of departure by a trial court from its role as neutral and detached tribunal is properly raised by way of Motion for New Trial. Its assertion that Mr. Pitchford failed to do so in "any of his motions for new trial," State's Brief at 36, is simply wrong. As Mr. Pitchford's brief in chief pointed out at 55, n.36, the Defendant's Amended Motion for New Trial specifically raises exactly the same argument as is raised in this claim of error. Supp. R. at 1263(B) (Supplemental Record volume filed 8/18/08 in response to Mr. Pitchford's request to correct the record filed with this Court and served on, inter alia, the State on 7/28/08).[19] Hence the State's

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[19] Paragraph 31 of the Amended Motion for New Trial states as follows: "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

reliance on failure to raise this matter by way of Motion for New Trial as a procedural bar to consideration of this claim is without merit.

The State's substantive response to the allegations is equally inadequate to defeat this claim of error. The State legitimately (though conclusorily) responds to one part of Mr. Pitchford's argument by reference to its claim that prosecutorial misconduct had not occurred at all. Hence, it argues, the trial court's failure to stop it could not be evidence that it was not a detached and impartial tribunal. However, there is no response to Mr. Pitchford's extensive record citations to incidents relating to matters not involving prosecutorial misconduct, also cited in support of the claim of judicial bias. Mr. Pitchford – fully mindful of his obligations under the rules – has been scrupulous to raise this claim of error solely with reference to the record facts he contends support it, and without any disrespectful or contemptuous language towards or about the trial court or the trial judge personally. In lieu of a similarly tempered fact-based response, however, the State resorts to disparagement of Mr. Pitchford apparently for having raised the issue at all, employing inflammatory language in doing so that would, if it were employed in an appellate brief about a trial court arguably transgress Miss. R. App. P. 28(k) or if used in a pleading in a civil case likely be strikeable under Miss. R. Civ. P. 12(f) as scandalous or impertinent.

Because no substantive response was made by the State to Mr. Pitchford's arguments concerning judicial

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process, or the equal protection of the law were accorded the defendant" Supp. R. 1263 (B)

bias, other than to incorporate its arguments that no prosecutorial misconduct occurred in the trial court which are fully responded to, *supra*, Mr. Pitchford relies on the arguments in his brief in chief on this point and respectfully submits that they, whether standing alone, or as a result of the cumulative error they are part of, establish error and warrant reversal of his conviction by this Court.

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.

Undue emotional responses from the courtroom audience, can, if communicated to the jury, deprive a defendant of his constitutional right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940). The failure of the trial court to properly redress such displays in the instant matter, whether provoked by specific prosecutorial misconduct or occurring without it, is independent error requiring reversal here. *Stringer v. State*, 500 So.2d 928 (Miss.1986); *Fuselier v. State*, 468 So.2d 45 (Miss.1985).

The State's assertion that there were no such displays rewrites the record of the trial. Even the trial court acknowledged that at least one was of sufficient severity at the penalty phase to require intervention, Tr. 711-12. However, contrary to the State's assertion that the admonishment given by the court to the *audience* on this occasion was sufficient to redress the problem, the Court's failure to also determine the effect on the jury and instruct it to disregard the

emotion violates this Court's long standing requirements. *Bell v. State*, 631 So.2d 817, 819-20 (Miss. 1994); *Snow v. State*, 800 So.2d 472, 485 (Miss. 2001). Even the case the State relies on to support its claim of no error on this point agrees that such curative instructions to the jury are required. *Walker v. State*, 671 So.2d 581, 620 (Miss.1995).

Nor does the State's argument that this error was not sufficiently preserved hold water. This Court has recently reaffirmed that making a pretrial motion denied by the trial court preserves the issue raised in that motion for review even in the absence of a contemporaneous objection when it happens at trial. *Goff v. State*, 14 So.3d 625, 640 (Miss. 2009). Defense counsel filed a pretrial motion seeking to have the trial take action to prevent such outbursts R. 170-72. The trial court, denied the motion, but stated that it would take corrective action regarding such outbursts brought to its attention at trial. Tr. 70-71.

In keeping with that order, Mr. Pitchford brought two such incidents to the trial court's attention, alluding in both cases to a continuing pattern of such disruptive behavior. On neither occasion did he receive sufficient corrective action or instruction of the jury, and he seeks redress of those errors here. Tr. 432-34; 711-12. The State's contention that this following of the trial court's ruling was insufficient to preserve the error for review is therefore without merit.

V. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER INHERENTLY UNRELIABLE TESTIMONY OF A JAILHOUSE INFORMANT OR IN

FAILING TO GIVE THE REQUESTED REQUIRED CAUTIONARY INSTRUCTION CONCERNING IT

The State's only argument on this point is that Defendant is procedurally barred from raising his claim that the trial court improperly permitted two jailhouse snitches to testify. It asserts that the testimony was taken "without objection from the defense" at the time the evidence was offered, State's Brief at 41, 44. [20] It makes this claim despite the fact that the Defendant had made a pretrial motion seeking to exclude this testimony which was called up for hearing and denied by the court prior to trial. R. 990-92. Tr. 83-84. This Court rejected an identical claim in *Goff v. State*, 14 So.3d 625 (Miss. 2009), holding instead that:

> Presentation of issues by means of motions in limine offers opportunities to expedite trials, eliminate bench conferences, avoid juror annoyance and permit more accurate rulings.... When, as here, a specific evidentiary issue is presented to the trial court in advance of trial, the primary purposes of the contemporaneous objection rule-to permit the trial court to accurately evaluate the legal issues and to enable the appellate court to apprehend the basis of the objection-are satisfied. Requiring an additional formal objection and ruling in all

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[20] The State's only factual or legal support for that claim is to reproduce the entire direct testimony, apparently to demonstrate the absence of any such objections at trial, though the quoted matter actually does include, despite the representation, an objection from the defendant to at least one aspect of it. Tr. 55. States Brief at 41-48.

> cases would undermine the benefits provided by the motion in limine procedure.

Id. at 640 (quoting *Kettle v. State*, 641 So.2d 746, 748 (Miss.1994). Clearly the claim that these witnesses' testimony was too unreliable and prejudicial for the jury to hear was fully preserved.

The State's further contention that the defendant's motion – which claimed that this testimony was not sufficiently reliable under this Court's long established standards set forth in *McNeal v. State*, 551 So. 2d 151 (Miss 1989) and *Dedeaux v. State* , 87 So. 664 (Miss. 1921) and did not therefore pass due process muster-- did not also subsume include the claim that the probative value of the testimony was outweighed by its prejudice is similarly unfounded. The gravamen of the *McNeal/Dedeaux* objection is exactly that, and the weighing process required by Rule 403 is no different from that required under *McNeal/Dedeaux.* The only distinction is that because snitch testimony is so unreliable *McNeal/Dedeaux* does not make a cautionary instruction optional as Rule 403 does. The possibility of prejudice is so great that the trial court is *required* to give one where a snitch testifies. *Moore v. State*, 787 So.2d 1282 (Miss. 2001).

The cautionary instruction given here, S-5, R. 1122, despite the State's assertion to the contrary, did not do all that was required because it omitted the explanation to the jury of *why* it was being asked to view the testimony with caution – i.e. the witness's self interest – which is what the defendant's rejected proposed instructions D-10 and D-11 did. R. 1132-33. As this Court noted in *McNeal*, the mere fact that a

witness has testified or a prosecutor has represented that no express promise was made as a quid pro quo for the testimony of the snitch, does not dispose of the need to remind the jury why it must regard his testimony with suspicion. Such a witness "is the sort of witness whose testimony ought generally be viewed with caution and suspicion *even in the absence of any proof of a leniency/immunity agreement*." *McNeal*, 551 So. 2d at 158 (quoting *Barnes v. State*, 460 So.2d 126, 132 (Miss.1984)) (emphasis supplied).

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN JAILHOUSE INFORMANT JAMES HATHCOCK TESTIFIED TO INADMISSIBLE AND PREJUDICIAL MATTERS.

In the instant matter, the mistrial was sought after Mr. Hathcock deliberately testified to the inflammatory and inadmissible information of unrelated criminal conduct by the defendant, allegedly selling Mr. Hathcock drugs. The State does not seem to address the gravamen of Mr. Pitchford's claim, which is that this information was not admissible for any of the purposes permitted by Miss. Rule. Evid. 404(b). In recognition of the special prejudice that giving the jury this kind of information can create, the Mississippi Rules of Evidence expressly anticipate that it will not be sprung on the jury or the other side without pretrial judicial determination of its admissibility. Mr. Pitchford made pretrial motions asking expressly for notice of this kind of information under the rule, Tr. 54, and separately for the exclusion of this witness's testimony altogether, Tr. 83. Though the State did not reveal this information at the hearings on these

motions, Tr. 54-56, 82-85 when it came out at the trial, the State made no attempt to defend its admissibility and claimed to have expressly cautioned the witness not to mention it. Tr. 441.

Where the witness has apparently defied instructions or not been so instructed, this kind of information is so prejudicial that the only cure is having a new jury, not exposed to the damaging and inadmissible information, hear the case anew. *Campbell v. State*, 750 So.2d 1280, 1283 (Miss. Ct. App. 1999) (noting that the problem "should have been easily prevented through the State instructing its witnesses to refrain from interjecting any extemporaneous matters.") *See also Tucker v. State*, 403 So.2d 1274, 1275 (Miss.1981); *Killingsworth v. State*, 374 So.2d 221, 223 (Miss.1979); *Sumrall v. State*, 272 So.2d 917, 919 (Miss.1973); *Sumrall v. State*, 257 So.2d 853, 854 (Miss.1972); *Cummings v. State*, 219 So.2d 673 (Miss.1969); *Ladnier v. State*, 254 Miss. 469, 182 So.2d 389 (1966); *Brown v. State*, 224 Miss. 498, 80 So.2d 761 (1955); *Pegram v. State*, 223 Miss. 294, 78 So.2d 153 (1955); *Floyd v. State*, 166 Miss. 15, 148 So. 226 (1933).

In the context of all the other improprieties going on during this trial, permitting the jury which had been exposed to this clearly improper testimony to deliberate either guilt or sentence clearly caused irreparable prejudice to the defendant's case and makes the denial of the mistrial motion error. *Campbell*, 750 So.2d at 283, *Parks v. State*, 930 So.2d 383, 386 (Miss. 2006).

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

The State seems to have entirely missed the basis on which Defendant claims error here. Although denying a motion to suppress evidence may be upheld on conflicting testimony if there is substantial credible evidence to support it, the trial court determination will not be upheld if the trial court "*applied an incorrect legal standard*, committed manifest error, or made a decision contrary to the overwhelming weight of the evidence." *Anderson v. State*, 16 So.3d 756, 758 (Miss. Ct. App. 2009) (*citing Moore v. State* 933 So.2d 910, 914 (Miss. 2006))(emphasis added).

The defendant's main argument here, to which the State makes no response, is that that under even under the undisputed facts as described by the State, the search was improper a*s a matter of law* under *Georgia v. Randolph*, 547 U.S 103, 115 (2006) and the trial court therefore applied an incorrect legal standard. The State concedes that the police relied on the consent by the co-owner of the vehicle to the search, and that the defendant himself was attempting to prevent the search so strenuously that he had to be physically restrained in order for the search to take place. Tr. 132. State's Brief at 56. There is nothing in the record to contradict the testimony of the officer conducting the search that he went forward with the warrantless search solely on the basis of that co-owner consent, and that in its absence he would have sought a warrant. Tr. 106. Where police rely in

this fashion on the consent of a co-owner to overcome the objection of the defendant to the search, the evidence, however probative or useful to the prosecution, and however apparently guilty the defendant is, must be suppressed, even though the police did not have the benefit of the *Randolph* decision when they made the decision to proceed without a warrant. *U.S. v. Sims*, 435 F. Supp. 2d 542, 545 n. 4 (S.D.Miss. 2006).

Nor does the State's argument in this case address the main factual issue argued by Mr. Pitchford on this point, that the Court failed to consider the unrefuted evidence of revocation of consent by the defendant's conduct, not only by his declining to sign the written consent for but, more importantly, by his vigorously immediately thereafter demanding that no search of his vehicle take place, and physically interfering with the search. Tr. 98, 100-01, 232, 496-97. Under Mississippi law such conduct renders the consent suspect and vitiates any prior consent given. *Graves v. State*, 708 So.2d 858, 863 (Miss. 1997) (*quoting Schneckloth v. Bustamonte*, 412 U.S. 218, 226-28 (1973). The trial court ignored that legal standard in concluding that valid consent had been given, and the conviction must be reversed as a result.

VIII. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE STATEMENTS GIVEN BY DEFENDANT TO LAW ENFORCEMENT OFFICERS AFTER HIS ARREST

As this Court recently reiterated in the very case cited by the State in support of is argument on this point of error, the Fifth Amendment protection against self incrimination requires that a defendant

not only be advised of his right not to speak to police but *must also waive that right*, and he must do *both* of these things every time police initiate a new contact with him or her. *Chamberlin v. State*, 989 So.2d 320, 334 ¶¶ 42, 46 (Miss. 2008) (citing *Michigan v. Mosley*, 423 U.S. 96, 104 (1975), *Michigan v. Tucker*, 417 U.S. 433, 450, (1974)).

Like Mr. Pitchford, Ms. Chamberlin was questioned several times by police. In the first interrogation, which was initiated by police, Ms. Chamberlin was advised of her rights, but when she declined to waive them questioning of her ceased, as *Miranda* requires it should. *Id.* at 334 ¶ 40. In her second interrogation, also initiated by police, Ms. Chamberlin was both advised of her rights and signed a written waiver of them, and the statements made during it were therefore admissible against her. *Id.* at 334 ¶ 44. Similarly, when officers initiated the third and fourth interviews of Ms. Chamberlin she was both advised of her rights and signed written waivers of them, hence anything she said during them was admissible against her *Id.* at 334 ¶ 47.

The only statement before which Ms. Chamberlin did not affirmatively re-waive her right to silence was the fifth and final interrogation. The product of that session was admissible despite no new *Miranda* waiver, but *only* because Ms. Chamberlin was found to have been the initiator of the contact and also of the conversation regarding the crime in question, which permitted further interrogation of her by police without their requiring readministration of such warnings or obtaining a new waiver of them. *Id*. at 334 ¶ 48 (citing *Edwards v. Arizona*, 451 U.S. 477, 485 (1981). *See also Pannell v. State*, 7 So.3d 277 (Miss.

Ct. App. 2008) (invocation of right to counsel gives even further protections, and makes even contact initiated by the accused insufficient to warrant further interrogation about the crime without counsel present if the accused does not himself also initiate the specific subject matter).

In the instant matter, Mr. Pitchford gave several statements, three November 7, 2004, and two (or three[21]) more on November 8, 2004. He waived his right to silence only one time: when he signed a waiver form at 2:38 p.m. on November 7, 2004, shortly after being taken into custody Tr. 120-21 Ex. S-52. The first statement was obtained from him shortly thereafter by Officer Conley and is the only statement obtained on the basis of that waiver, since the interface between Mr. Pitchford and police was completely terminated, and Mr. Pitchford was returned to the holding cell after that. Tr. 122, 129-30. Where there is a temporal and physical break of several hours in the

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[21] On November 8, Mr. Pitchford was questioned first by Officer Conely and Investigator Robert Jennings together in a recorded statement, then by Jennings alone briefly in an unrecorded statement into which Conley was called, and finally in a recorded statement by Jennings. If the unrecorded time with Jennings is considered a separate statement there were a total of three, with the final statement being the sixth one given. For purposes of this argument, this is a distinction without a difference. The officers all agree that at no time on that date at did Mr. Pitchford ever waive his right to silence at all, and that he affirmatively declined to do during the Jennings/Conley first statement and once during the unrecorded conversation with Jennings. He also affirmatively invoked his right to silence at the conclusion of his unrecorded conversation with Jennings when Conley came back in the room, and certainly never was advised of or waived his right to silence thereafter. Tr. 123-35, 139-40, 146-47, 151, Ex. 60.

interrogation of this nature, the remoteness in time makes the earlier waiver rights is insufficient to operate as a waiver of those rights with regard to subsequent, separate interrogations and an entirely new waiver be given at least as to any officer initiated contact. *Mosley*, 423 U.S. at 104, *Chamberlin*, 989 So.2d at 333-34.

Two further statements were, however obtained from Mr. Pitchford on November 7 after the conclusion of the first statement that day without, as established by the testimony of the officer himself, obtaining any new waiver of the right to silence. Tr. 121-22. The second statement commenced at 4:45 p.m., possibly initiated by contact from Mr. Pitchford himself, was terminated and Mr. Pitchford again returned to his holding cell. A third statement was given after contact with Mr. Pitchford was initiated by an officer some hours later that night (Statement 3). Tr. 122, 129-30. Under *Chamberlin*, therefore at least the third statement must be suppressed because it was newly initiated by the officer at a time several hours after the initial waiver of the right to silence, but without reobtaining a waiver of it. 989 So.2d at 334 ¶¶ 40-47.

On November 8, 2004, the waiver obtained the day before was clearly to remote in time to cover any questioning conducted that day. *Mosley*, 423 U.S. at 104; *Chamberlin*, 989 So.2d at 333-34. When Officer Conley, along with District Attorney's office Investigator Jennings, resumed interrogating Mr. Pitchford at 9:15 that morning one or the other of the officers advised Mr. Pitchford of, *inter alia*, his right to silence, but when tendered the waiver form to sign, Mr. Pitchford affirmatively *refused* to waive it. Tr.

123-35,146-47, Ex. 60. Hence, under *Chamberlin*, questioning of him should have immediately ceased, and even if reinitiated would require both new warning concerning the right to silence and a new waiver of it. 989 So.2d at 334 ¶¶ 40-47. Instead, Conley left the room and permitted Investigator Jennings, who was also a polygrapher, to take over the interrogation alone. Tr. 139.

Jennings testified that while he was alone with Mr. Pitchford he also went over Mr. Pitchford's rights on the unsigned *Miranda* waiver form but agreed that Mr. Pitchford did not sign it for him either. Tr. 139. Nonetheless, he continued the conversation and attempted to obtain the necessary written rights waiver to administer the polygraph examination. Again, Mr. Pitchford did not give him that waiver either orally or in writing Tr. 139-40. Notwithstanding having neither the general *Miranda* nor specific polygraph waivers in hand, Jennings began to discuss the case with Mr. Pitchford by telling him that the polygraph was effectively infallible. This misrepresentation apparently elicited a torrent of information from Mr. Pitchford. Tr. 140. However, when Conley reentered the room to participate in that interrogation, Mr. Pitchford expressly requested that the statement cease. Tr. 140, 151. Apparently understanding that this was an affirmative invocation of the right to silence, Conley withdrew and questioning ceased for a few minutes. Tr. 141.

However, despite the invocation of the right to silence made while Conley was present, Jennings turned on a tape recorder and resumed the his interrogation of Mr. Pitchford, but, crucially, without even readvising Mir. Pitchford of his rights, and

certainly without obtaining any waiver from him of those rights. Tr. 139-43; 146-47, 151.[22] This final statement, was the most damaging of the statements obtained from Mr. Pitchford, but clearly failed to meet the requirements of this Court in *Chamberlin*, or the United States Supreme Court in *Edwards*, *Mosley* and their progeny, for admissibility, since it was not supported by any waiver of the right to silence whatsoever, and was undisputedly officer initiated. Mr. Pitchford's conviction must therefore be reversed.

XI. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE CONCERNING ALLEGED PRIOR BAD ACTS OR OTHER CRIMES BY THE DEFENDANT

The State concedes, as the record requires it must, that this issue was properly preserved by way of pretrial motion and contemporaneous objection at trial. R. 42-45, Tr. 54-56, 337-38. Though the State's argument on this point extends to nearly four pages of single spaced quotations from the record and from the case it cites in support of its position, it ignores this Court's clear jurisprudence on two points.

First, that even where evidence of other crimes may have relevance to the crime in question under Rule 404(b) it may still be excluded under Rule 403, which requires not merely a recitation that its probative

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[22] Both Jennings conversation with Mr. Pitchford about the infallibility of the polygraph exam, and his final interrogation of him involved some of the many factual misrepresentations and psychological tricks that rendered the statements obtained not only *Miranda* violations, but also affirmatively involuntary under *Jackson v. Denno*, 378 U.S. 368 (1964). Mr. Pitchford relies on his arguments in his brief in chief on those matters. Pitchford's Brief at 76-78.

value outweighs its prejudicial value but that the record support that conclusion, as well. *See Howell v. State*, 860 So.2d 704, 733 (Miss. 2003) (citing *Foster v. State*, 508 So.2d 1111, 1117 (Miss.1987) (*overruled on other grounds*)), *Flowers v. State*, 842 So.2d 531, 539-40 (Miss. 2003) (*Flowers II*).

Second, and perhaps even more relevant in the instant matter, regardless of how probative to a Rule 404(b) permitted purpose evidence of other crimes may be, it is reversible error to interweave it so thoroughly into the prosecution's case that there is no way to show that the jury did not also consider it for improper and prejudicial purposes as well. *See Flowers v. State* 773 So.2d 309, 325 (Miss. 2000) (*Flowers I*) ("the cumulative effect of the prosecutor's pattern of repeatedly citing to [the other crimes] throughout the guilt phase proceedings leads us to hold that [the defendant] was absolutely denied a fundamental right to a fair trial."), *Flowers II*, at 550. Certainly, where the evidence has been used, as it was here, in the sentencing process, at least the sentence must be reversed. *Stringer v. State*, 500 So.2d 928 (Miss. 1986).

In the instant matter, the record reflects that the information about the defendant's alleged participation in an earlier attempt to rob the same store was entirely based on testimony by the inherently unreliable co-participant witnesses, which is of clearly recognized minimal probative value. Tr. 449-65, 522-31, *See McNeal v. State*, 551 So.2d 151 (Miss. 1989). Hence, in the Rule 403 calculus, it is clearly outweighed by its prejudicial effect notwithstanding the trial court's brief recitation to the

contrary in its summary, unexplained ruling admitting the testimony. Tr. 338-39.

Moreover, as in *Flowers I and II*, this information was treated by the prosecution in witness examinations at the guilt phase and in argument at both phases of the trial essentially not as a separate crime, but as part of the same crime for which the defendant was being prosecuted even though it was being treated by them for purposes prosecuting Mr. Pitchford and other defendants as entirely separate crimes in separate indictments. *See, e.g.* Tr. 523-26; 449-54; 625-27; 630-32; 769-71; 773-74. Reversal is therefore required here.

X. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO HEAR TESTIMONY FROM DR. STEVEN HAYNE.

On the substance of this claim, Mr. Pitchford relies on the arguments in his brief in chief at 82-27. However, because the State's arguments relating to procedural bar are simply unfounded, he responds to them here. This Court's obligation to preservation of an honest, fair system of justice surely gives it the power to reject on the basis of plain error testimony obtained by the State from a perjurious or facially unqualified expert whenever that information is brought to its attention, just as it may sanction other prosecutorial overreach or misconduct. *See Stringer v. State*, 500 So.2d 928, 931 (Miss. 1986), *Flowers v. State*, 842 So.2d 531, 564 (Miss. 2003).

Dr. Hayne has, since the trial in this case, been publically exposed both in this Court and in the public sphere as having overreached his own expertise, the evidence before him, and the standards of his

profession. *Edmonds v. State*, 995 So.2d 787, 792 (Miss. 2007), *Treasure Bay Corp v. Ricard*, 967 So.2d 1235, 1242 (Miss. 2007), Radley Balko, *CSI: Mississippi*, Wall St. J. Oct 6, 2007, at A 20. For this Court *not* to reexamine on the basis of plain error a conviction and death sentence obtained in any part on the basis of such testimony would inconsistent with this Court's and the United States Supreme Court's longstanding commitment to preserving the integrity of the system of justice, and according criminal accuseds their right to a fundamentally fair trial. *Groppi v. Wisconsin*, 400 U. S. 505, 509 (1971), *Hill v. State*, 72 Miss. 527, 534, 17 So. 375, 377 (1895).

Moreover, as the State acknowledges (despite its statement elsewhere to the contrary) there was an objection to the scope of the expert's testimony regarding matters outside his expertise preserved during the trial, though the trial court overruled it, Tr. 417-18 expressly argued as error in Mr. Pitchford's brief in chief at 83-84 and n.49. For all of the reasons cited in Mr. Pitchford's brief in chief, therefore, the conviction and sentence must also be reversed for the error in admitting Dr. Haynes' testimony.

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

With respect to the errors in the culpability phase instructions, Mr. Pitchford relies on the arguments on this point in brief in chief at 87-90. The State's arguments are inapposite to the Defendant's claims or

unsupported by applicable law or the facts of record and thus do not undercut it. In addition, to the extent that the precedent of this Court supports finding no constitutional violation from the giving or failure to give the instructions objected to or sought, Mr. Pitchford respectfully submits that such precedent is inconsistent with the correct interpretation of the United States Constitution, and this Court should alter or overrule it.

XII. THE TRIAL COURT ERRONEOUSLY LIMITED THE MITIGATION EVIDENCE AND ARGUMENTS THEREON THAT DEFENDANT WAS PERMITTED TO PRESENT DURING THE PENALTY PHASE PROCEEDINGS

Mr. Pitchford. respectfully submits that in addition to the arguments raised in his brief in chief at 90-93 on this point, the arguments regarding limitations on voir dire set forth in Argument I.C. of this Reply Brief also support his contention that at least his sentence must be reversed because of the unconstitutional restriction on mitigation evidence imposed on him by the trial court.

To the extent that *Wilcher v. State*, 697 So.2d 1087 (Miss. 1997) and other jurisprudence cited by the State in support of its arguments could be construed to support the exclusion of this mitigation evidence, it should be revisited in light of the Supreme Court's recent holdings in *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007), *Smith v. Texas*. 550 U.S. 297, 315-16 (2007), further elucidating *Tennard v. Dretke*, 542 U.S. 274 (2004), *Smith v. Texas*, 543 U.S. 37 (2004); *Penry v. Johnson*, 532 U.S. 782 (2001), and

Kansas v. Marsh, -----U.S. ------, 126 S. Ct. 2516, 2526 (2006)).

XIII. THE TRIAL COURT ERRONEOUSLY PERMITTED THE STATE TO PRESENT IMPROPER MATTERS TO THE JURY DURING THE PENALTY PHASE PROCEEDINGS

Mr. Pitchford relies on the arguments set forth in his brief in chief in support of this point of error, and, notwithstanding the State's remarkable claim that he made no citations to where these errors occurred in the record, on the very specific record citations therein to where such error occurred. Pitchford's Brief at 91-93. To the extent that the cases of this Court and other courts cited by the State support its broad interpretation of the scope of testimony permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), Mr. Pitchford respectfully submits this Court should adopt the interpretation of the scope of victim impact testimony consistent with the Defendant's arguments in his brief in chief.

Moreover, the victim impact testimony elicited and argued in this case was part and parcel of the egregious prosecutorial misconduct and overreaching discussed more fully in Argument III of this Reply Brief, *supra*, and even if without such associated misconduct it might be dismissed as harmless error, in the context of this case it is not, and the sentence achieved as a consequence of it must be reversed. *U.S. v. Bernard*, 299 F. 3d 467 (5th Cir. 2003); *Stringer v. State*, 500 So.2d 928 (Miss. 1986).

XIV. SENTENCING PHASE INSTRUCTION 1 VIOLATES MARSH V. KANSAS AND/OR IS DEFICIENT BECAUSE OF THE REFUSAL OF DEFENDANTS REQUESTED SENTENCING PHASE INSTRUCTIONS DS-7, 8, 13, 15, AND MITIGATING FACTOR (g) FROM DS-17

For the most part, Mr. Pitchford relies on the arguments made in his brief in chief regarding sentencing instructions in support of this claim of error and his contention there that in general, the State's restrictive view of what the jury should be instructed on in this case is completely inconsistent with the Eighth Amendment and Due Process. Pitchford's Brief at 95-99. He is also grateful to the State for correcting his scrivener's error and agrees that he is challenging the omission from the final sentencing instruction the mitigating circumstance set forth as (g) in proposed instruction DS-17, "Mr. Pitchford had mental health problems as a child that were never treated"), not the one denoted as (h) in that instruction. R. 1215.

However, the State's assertion that Defendant's proposed sentencing instruction D-15, refused by the trial court, R. 1218, is not only repetitive of the general sentencing instruction S-1 (proposed by the State as SS-1A and adopted by the trial court effectively in its entirety) but also affirmatively improper under *Rubenstein v. State*, 941 So.2d 735 (Miss. 2006) (which actually vacated Mr. Rubenstein's sentence for failure to grant an instruction almost identical to D-15) and *Flowers v. State*, 842 So.2d 531, 556-58 (2003) is to willfully misread the record in this

matter, and this Court's opinion in both of these cases.[23]

To dispose of the *Flowers* misreading first. As this Court made clear in *Rubenstein*, *Flowers* significance on this issue is *not* that it was *improper* to instruct the jury that life *without parole* was a possible sentence, but that, under the amended sentencing laws, it was *proper* to *omit* instructing it on the possibility of life *with* the possibility of parole. *Rubenstein*, 941 So.2d at 791 ¶¶ 261-62 ("Omitting the option of life **with** the possibility of parole would not have been prejudicial to the defendant, and we would have found no error." (citing *Flowers*, 842 So.2d at 558)) (emphasis in original).

The misreading of *Rubenstein* is equally egregious. The relevant sentence of proposed instruction D-15 ("If you the Jury choose to sentence Mr. Pitchford to life imprisonment without the possibility of parole, Mr. Pitchford will never be eligible for parole") is substantially identical to language in one of instructions that *Rubenstein* expressly held it was error *not* to give, 941 So.2d at 788 ¶ 244 ("D-10 states:

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[23] On the record in the instant matter, the premise that there is a duplication is simply false and cannot sustain the State's argument even at the threshold. Pitchford's instruction D-15 reads as follows: "If you the Jury chooses to sentence Mr. Pitchford to life imprisonment without the possibility of parole, Mr. Pitchford will never be eligible for parole. Further, his life sentence without possibility of probation or parole cannot be reduced or suspended." R. 1218. Contrary to the State's argument this language does not duplicate S-1 (referred by the State in its brief as SS1-A), which simply sets forth that the two possible sentences under consideration are death and life in prison without parole without making any definition or explanation of the nature of *either* sentence. R. 1205, 1206, 1213.

If you sentence defendant to life imprisonment without possibility of probation or parole, defendant will never be eligible for parole or probation."). As this Court goes on to discuss at some length in its reversal of Mr. Rubenstein's death sentence, it is essential that the Court make it clear to the jury that there is absolutely no possibility of release from prison even if a death sentence is not imposed. This Court recognizes that concerns by jurors of even the remote possibility of release could improperly influence them to impose a death sentence, and requires that the Court not permit that to happen. *Id.* at 791-93 and n. 28 especially, ¶¶ 264-65 (citing in to the records in *Wiley v. State*, 691 So.2d 959 (Miss.1997), and *West v. State*, 725 So.2d 872 (Miss.1998) (noting that a life sentence was imposed on remand with proper instructions, *West v. State*, 820 So.2d 668, 669 (Miss.2001)). [24] Moreover, as is also discussed more fully in Mr. Pitchford's brief in chief, for the same reasons the due process guarantees of the

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[24] Because the State failed (presumably because of a cite checking error, and without any intent to mislead) to make a pinpoint citation to where in *Rubenstein* it purportedly found support for its assertion that the language in D-15 is "improper," State's Brief at 88, Pitchford can only speculate on how and why the State got the holding in *Rubenstein* so wrong. Perhaps, in its enthusiasm to find support for its argument, the State adopted language from the *Rubenstein* dissent -- which sets forth the argument made by the State here as its minority view, but that was actually rejected by the majority -- and is the only place where this instruction is ever referred to as "improper," *See* 941 So.2d at 795,798 (Easley, J. dissenting). The *Rubenstein* dissent also reads *Flowers* in the way rejected by the *Rubenstein* majority (but argued by the State in the instant matter) which may also explain the State's misconstruction of *Flowers* in its argument, as well.

Constitution similarly require an instruction making it clear to jurors considering sentence that a life sentence really does mean life without possibility of release. *Simmons v. South Carolina*, 512 U.S. 154, 169-71 (1994).

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.

The Defendant relies on the arguments on this point in his brief in chief at 99-106. To the extent that the precedent of this Court supports finding no constitutional violation from the challenged matters, Mr. Pitchford respectfully submits that the precedent is inconsistent with the correct interpretation of the United States Constitution for the reasons set forth in Pitchford's brief in chief, Mr. Pitchford respectfully submits that this Court should alter or overrule that precedent and adopt the interpretation proposed by Mr. Pitchford's brief.

XVI. THE DEATH SENTENCE IN THIS MATTER IS CONSTITUTIONALLY AND/OR STATUTORILY DISPROPORTIONATE

Mr. Pitchford is puzzled about how he could have been any more specific about the ways in which his sentence here is disproportionate constitutionally and statutorily, given his own circumstances and those of his crime, and the actual sentences imposed in this case on people of equal or greater culpability to himself in this particular incident.

The co-defendant who actually killed the decedent in the robbery was given a manslaughter plea.

Pitchford's Brief at 107 and n. 54. Looked with the objectivity our sentencing scheme requires this Court to use, it is difficult to assert -- even when recognizing how tragic, unnecessary and deserving of punishment the taking of Reuben Britt's life may have been -- that the crime itself it necessarily fell within the "narrow category of the most serious crimes" for which the death penalty is a proportionate punishment, or that Mr. Pitchford, a 19 year old who panicked when his 16 year old companion unexpectedly opened fire during a robbery, was an offender "whose extreme culpability made him 'the most deserving of execution.'" *Kennedy v. Louisiana*, --- U.S. ---,---, 128 S.Ct. 264, 2650 (2008); *Roper v. Simmons*, 543 U.S. 551, 568 (2005), *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). *See also* Argument II, *supra*, (setting forth numerous jury rejections of the death penalty in crimes similar to the instant one).

This Court, too, is scrupulous about enforcing these precepts, and nearly all of the matters where it has reversed the sentence as disproportionate have, like the instant matter, been felony murders where the killing was a tragic by-product of criminal activitiy not undertaken with an intent to murder. *See, e.g*. *Reddix v. State*, 547 So.2d 792, Miss. 1989; *White v. State*, 532 So.2d 1207 (Miss.1988); *Bullock v. State*, 525 So.2d 764 (Miss. 1987); *Coleman v. State*, 378 So.2d 640 (Miss. 1979).

Mr. Pitchford's argument in the instant matter that his sentence is disproportionate, for the reasons set forth in his brief in chief and here, is not only properly preserved and argued, but is one of great merit, which requires reversal of at least the sentence imposed here.

XVII. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COURT MANDATES REVERSAL OF THE VERDICT OF GUILT AND/OR THE SENTENCE OF DEATH

Mr. Pitchford incorporates herein the materials set forth in his "Introduction" to this Reply Brief, and respectfully submits that even if none of the errors enumerated above or in his prior briefs warrants reversal in and of itself, the conviction and sentence should nonetheless be reversed for cumulative error as a denial to Mr. Pitchford of his fundamental rights, and to uphold the integrity of the justice system. *Ross v. State*, 954 So.2d 968, 1018-19 (Miss. 2007); *Flowers v. State*, 947 So.2d 910, 940 (2007) (Cobb, P.J., concurring).

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,

/s/ Alison Steiner

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APPENDIX A to Reply 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 Venire No. 30	S-2 Tr. 322	bf	26	b	"She is the one that was 15 minutes late . . ." Tr. 324
Lee, Linda Ruth Venire No. 30	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

Name	Strike No.	Race/ Sex	Age	DP attitude	Reason Given for Strike
					obviously has mental problems" Tr. 324-25
Tillmon, Christopher Lamont Venire No. 31	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 Venire No. 18	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 Venire No. 31	S-4 Tr. 322	bf	37	b	"And also, according to police officers, she is a known drug user." Tr. 325
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"[H]e had no opinion on the death penalty." Tr. 326
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He has a two year old child . . . . They both have children about the same age." Tr.326

Name	Strike No.	Race/ Sex	Age	DP attitude	Reason Given for Strike
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He has never been married. . . . They both have never been married." Tr. 326
Ward, Carlos Fitzgerald Venire No. 48	S-5 Tr. 322	bm	22	c	"He has numerous speeding violations that we are aware of." Tr. 326
Ward, Carlos Fitzgerald Venire No. 48	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

Name	Strike No.	Race/ Sex	Age	DP attitude	Reason Given for Strike
Venire No. 48					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 Venire No. 30	Tr. 239-40; 318 (denying State cause strike for this, finding that 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	no	

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
	late because has no car but "is trying real hard to fulfill her civic duty as a juror.")		venire member		
Lee, Linda Ruth Venire No. 30	Affirmatively absent. Reason not mentioned in State's earlier	Information not sought from or about all jurors (not asked on JQ's).	None of any venire member	no	mental illness

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
	motion to strike juror for cause. Tr. 318				
Tillmon, Christopher Lamont Venire No. 31	JQ R. 800	White venire members with felony convictions in family accepted by State: *Counts, Jeffrey Shann* (Juror 12, R. 1104): uncle	None of the struck juror. None of accepted comparable whites.	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
		convicted of forgery. R. 479-80 *Bernreuter, Henry George*, (tendered by State Tr. 326): son convicted of burglary; stepson convicted of forgery. R. 399-400			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
Tidwell, Patricia Anne Venire No. 18	JQ R. 788; Tr. 261	White venire members with felony 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):	By State, of struck juror on identity only. Tr. 261. None of accepted comparable whites	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
		son convicted of burglary; stepson convicted of forgery. R. 399-400			
Tidwell, Patricia Anne Venire No. 31	none	Information not sought from or about all jurors (not asked on JQ's)	None of any venire member	no	Substance dependency

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 Venire No. 48	JQR. 814	White venire members with same lack of opinion on death penalty accepted by State: *Ward, Laura Candida* (Juror 5, R. 1104) R. 818 *Tramel, Nathalie Drake* (Alternate 1, R. 1104) R. 806; Tr. 255	None of the struck juror. By State, of accepted comparable wf Tramel Tr. 255	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, Carlos Fitzgerald Venire No. 48	JQ R. 813	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.	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
		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			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		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;			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		Curry, Michael, (tendered by State Tr. 328), 5 year old son, R. 497.			
Ward, Carlos Fitzgerald Venire No. 48	JQ R. 813	Unmarried whites accepted by State: *Eskridge,Chad*, never married, R. 527 (Juror 2, R. 1104);	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
		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			

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 Venire No. 48	none	Information not sought from or about all jurors (expressly excluded from JQ questions about criminal history)	None of any venire member on subject	no	
Ward, Carlos Fitzgerald Venire No. 48	JQ R. 811	White venire members of similar age accepted by State:	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
		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);			

Name	Record References to Reason	Disparate Treatment of Non-Minority Venire Members	Voir Dire on Reason	Related to Case	Group Based Trait
		Wilbourn, Lisa, age 28, R, 835 (Alternate 2, R. 1104); *Parker, Lisa*, age 29, R. 699, (tendered by State Tr. 321)			
Ward, Carlos Fitzgerald Venire No. 48	none	White venire members accepted by State but sharing more	None of either the struck juror or accepted	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
		than one of the cited traits: *Eskridge,Chad,* similar age, unmarried, R. 527-29 (Juror 2, R. 1104); *Ward, Laura Candida,* young children, no death penalty opinion (Juror 5,	comparable whites except for by State, of accepted Alternate 1, Tramel,on d 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
		R. 1104) R. 817-18 *Tramel, Nathalie Drake*, young children, no death penalty opinion, R. 805-06; Tr. 255; (Alternate 1, R. 1104) *Parker, Lisa*, similar age, young children, R. 699-701,			

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) ; *Wilbourn, Lisa,* similar age, child same age, (Alternate 2, R. 1104) R. 835-37; *Sherman, Michael,* similar age, child same age R. 761-63; (tendered by State Tr. 321),			

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SUPREME COURT OF MISSISSIPPI

TERRY PITCHFORD,

v.

STATE OF MISSISSIPPI.

No. 2006-DP-00441-SCT

Filed: June 24, 2010

OPINION

EN BANC.

DICKINSON,, Justice, for the Court:

¶ 1. Terry Pitchford and an accomplice killed a store-owner in Grenada County during the course of an armed robbery. Pitchford was indicted, tried, and convicted of capital murder, and the jury found that he should be executed by lethal injection. He appeals, raising for our review seventeen issues. Because we find no reversible error, we affirm the conviction and sentence.

BACKGROUND FACTS AND PROCEEDINGS

¶ 2. On the morning of November 7, 2004, Walter Davis and his son entered the Crossroads Grocery,

where they discovered the body of the owner, Reuben Britt. They immediately called 911, and Grenada County Sheriff's Department Investigator Greg Conley responded.

¶ 3. During his initial investigation at the scene, Investigator Conley observed that some of Britt's wounds appeared to have been made by a projectile, and others by pellets, suggesting to Investigator Conley that two different weapons were involved. Missing from the store were a cash register, some cash, and a .38 caliber revolver loaded with "rat shot." Also during his initial investigation, Investigator Conley received information suggesting that a vehicle owned by Terry Pitchford matched the description of the car used by Britt's assailants, and that Pitchford had been part of a previous attempt to rob the Crossroads Grocery.

¶ 4. At Pitchford's home, Conley found a car matching the description of the one involved in the homicide at the Crossroad's grocery. After a search of the vehicle produced the missing .38 caliber revolver, Pitchford was taken into custody.

¶ 5. On November 7 and 8, 2004, Investigator Conley and Investigator Robert Jennings of the local district attorney's office interviewed Pitchford. During those interviews, Pitchford confessed that he and Eric Bullins had gone to the store with the intention of robbing it. Pitchford stated that Bullins had shot Britt three times with a .22 caliber pistol, and that he (Pitchford) had fired shots into the floor. Pitchford also confessed that he had attempted to rob the same store a week and a half prior to the murder on November 7. Pitchford also confessed his role in the

murders to fellow inmates Dantron Mitchell and James Hathcock.

¶ 6. On January 11, 2005, the Grenada County Grand Jury indicted Pitchford for capital murder. After he was appointed counsel, he was arraigned on February 9, 2005, and jury selection commenced on February 6, 2006. Of the 350 registered voters of Grenada County who were summoned to a special venire, 126 returned jury questionnaires and appeared upon their summonses. Of these, forty were African–American, eighty-four were Caucasian, one was Hispanic, and one did not provide race information.

¶ 7. The trial judge (without objection from either party) excused certain jurors for statutory cause and other reasons unrelated to the case. At that point, the venire stood at ninety-six, of which thirty-five were African–American, and sixty-one were white. Following voir dire by the attorneys, the trial judge (without objection from either party) struck fifty-two prospective jurors for cause and three others for reasons not disclosed in the record, leaving thirty-six white persons and five African–Americans in the venire.

¶ 8. The attorneys were allowed to exercise strikes only on the twelve lowest-numbered members of the venire. Each time a strike was exercised, the next lowest-numbered juror joined the twelve potential jurors subject to peremptory strikes. The State exercised seven peremptory strikes, and Pitchford exercised twelve. The persons who replaced the nineteen strikes, plus the original twelve, resulted in

thirty-one potential jurors subject to peremptory strikes by the attorneys.

¶ 9. Of the thirty-one potential jurors subject to peremptory strikes, Pitchford struck twelve whites and no African–Americans. Thus, there were nineteen potential jurors—fourteen of whom were whites and five of whom were African–Americans—subject to the State's peremptory strikes. Although the State was allowed twelve peremptory strikes, it exercised only seven—three whites and four African–Americans.

¶ 10. Following jury selection, the case proceeded to trial, and on February 8, 2006, the jury found Pitchford guilty of capital murder. On February 9, the case proceeded to the penalty phase, at which the jury imposed a sentence of death by lethal injection. Pitchford filed a motion for a new trial on February 17, 2006, which was denied. He timely filed his notice of appeal.

STANDARD OF REVIEW

¶ 11. We review death-penalty appeals under a heightened standard of review. As we have previously stated,

> [t]he standard for this Court's review of an appeal from a capital murder conviction and death sentence is abundantly clear. On appeal to this Court, convictions upon indictments for capital murder and sentences of death must be subjected to "heightened scrutiny."[1]

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[1] *Loden v. State,* 971 So.2d 548, 562 (Miss. 2007) (quoting *Balfour v. State,* 598 So.2d 731, 739 (Miss.1992)).

Additionally, we have stated that "what may be harmless error in a case with less at stake becomes reversible error when the penalty is death."[2] Bearing in mind our standard of review, we shall now proceed to analyze Pitchford's assignments of error in the order in which he presented them.

I. WHETHER THE JURY SELECTION PROCESS WAS CONSTITUTIONALLY INFIRM AND REQUIRES REVERSAL OF PITCHFORD'S CONVICTION AND SENTENCE OF DEATH.

¶ 12. In his first assignment of error, Pitchford makes three arguments, which we shall address in turn.

A. Whether The State Discriminated On The Basis Of Race In Its Peremptory Strikes In Violation of *Batson v. Kentucky*.

¶ 13. Citing *Batson v. Kentucky*,[3] Pitchford asserts the State exercised its peremptory strikes in a racially discriminatory manner.[4] In *Batson*, the United States Supreme Court held that the State of Kentucky was prohibited from racially discriminating through its exercise of peremptory strikes.[5] Building on *Batson*,

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[2] *Id.* (quoting *Irving v. State,* 361 So.2d 1360, 1363 (Miss.1978)).

[3] 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[4] The record of the racial make-up of the venire is not well-preserved. Much of the information upon which we must rely comes from handwritten notations on jury lists which are included in the record. Some of the notations are illegible and, although substantially similar, the information on the jury lists does not match the information recited in Pitchford's brief.

[5] *Id.* at 82–84, 106 S.Ct. 1712.

the Supreme Court later stated that the Constitution forbids striking even a single juror for a discriminatory purpose.[6] For purposes of analyzing a claim of discrimination in jury selection, *Batson* and its progeny have established a three-step inquiry for courts to follow.

¶ 14. First, the party objecting to the peremptory strike of a potential juror must make a prima facie showing that race was the criterion for the strike. Second, upon such a showing, the burden shifts to the State to articulate a race-neutral reason for excluding that particular juror. Finally, after a race-neutral explanation has been offered by the prosecution, the trial court must determine whether the objecting party has met its burden to prove that there has been purposeful discrimination in the exercise of the peremptory strike, i.e., that the reason given was a pretext for discrimination.[7]

Prima facie showing

¶ 15. As stated, a trial court faced with a *Batson* challenge must determine whether the defense[8] has made a prima facie showing that race was the criterion for the prosecution's strike. This Court has held that the required prima facie showing can be made by demonstrating that the percentage of the

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[6] *Snyder v. Louisiana,* 552 U.S. 472, 128 S.Ct. 1203, 1208, 170 L.Ed.2d 175 (2008) (internal citations omitted).

[7] *Flowers v. State,* 947 So.2d 910, 917 (Miss. 2007) (citations omitted).

[8] Although we use the defense as an example, a *Batson* challenge may be brought by the prosecution if it suspects that the defense has exercised a peremptory strike based on the race (or other protected classification) of the prospective juror.

State's peremptory strikes exercised on members of the protected class was significantly higher than the percentage of members of the protected class in the venire.[9]

¶ 16. Pitchford points out in his brief that the State used only seven of its peremptory strikes, four of which removed African–Americans from the venire. As a result, only one African–American remained on the jury of fourteen (twelve jurors and two alternates). This, Pitchford argues, is incompatible with the fact that, in 2006, African–Americans made up approximately forty percent of Grenada County's population. In that regard, the following exchange occurred at trial:

> 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.

In his motion for a new trial, Pitchford stated the following:

> 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–

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[9] *Strickland v. State,* 980 So.2d 908, 916 n. 1 (Miss.2008) citing *Flowers,* 947 So.2d at 935.

> American citizens selected from a county with nearly a 45% African–American population.

Although Pitchford's counsel made these assertions, he presented the trial judge no evidence of the racial makeup of Grenada County. And regardless of the racial makeup of Grenada County, we are persuaded that the record supports the trial court's finding of a prima facie showing of discrimination.

¶ 17. The racial makeup of the venire subject to the State's peremptory strikes [10] was fourteen whites (seventy-four percent), and five blacks (twenty-six percent). Thus, statistically speaking, [11] if all other factors were equal, the State's peremptory strikes should approximate these percentages, resulting in the state striking either one or two African–Americans. [12] However, the State used fifty-seven

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[10] We do not refer to the entire venire responding to their jury summonses, but rather to the members of the venire who were actually subject to the State's decision to keep or strike, that is, the first twelve presented to the State, plus the seven who replaced the State's seven strikes. Those nineteen veniremen were the only members of the entire venire against whom the State could possibly have discriminated. The racial makeup of the members of the venire who were never considered for peremptory strikes is not relevant to the inquiry.

[11] For purposes of analyzing the prima facie showing, we recognize that a cold statistical analysis will determine only whether the percentage of the State's peremptory strikes of African–Americans was significantly higher than the racial makeup of the venire. However, we fully recognize that, in the real world, there may be many legitimate reasons for the percentage imbalance. Indeed, once a statistical imbalance is established, the State is allowed to explain its reasons for each strike.

[12] 26% x 7 = 1.8.

percent of its peremptory strikes on African–Americans. Stated another way, the State used fifty-seven percent of its peremptory strikes (four out of seven) to remove African–Americans from a venire comprised of twenty-six percent African–American and seventy-four percent white. While the difference in these percentages is not so great as to constitute, as a matter of law, a prima facie finding of discrimination, it is sufficient for a trial judge—who was "on the ground" and able to observe the voir dire process, and in the exercise of sound discretion—to so find.

¶ 18. We cannot say the trial court abused its discretion in finding that Pitchford made a prima facie case of discrimination. A prima facie case, however, is nothing more than a level of suspicion the trial judge finds significant enough to merit further inquiry.

Race-neutral reasons—pretext

¶ 19. Because the trial judge was persuaded that Pitchford had demonstrated a prima facie case of discrimination, he then required the State to provide its race-neutral reason for each peremptory strike exercised on an African–American. The four black jurors struck by the State were: Carlos Fitzgerald Ward, Linda Ruth Lee, Christopher Lamont Tillmon, and Patricia Ann Tidwell. On appellate review,

> we give great deference to the trial court's findings of whether or not a peremptory challenge was race-neutral . . . . Such deference is necessary because finding that a striking party engaged in discrimination is largely a factual finding and thus should be accorded appropriate deference on appeal . . . . Indeed,

> we will not overrule a trial court on a Batson ruling unless the record indicates that the ruling was clearly erroneous or against the overwhelming weight of the evidence.[13]

Carlos Ward

¶ 20. As to its race-neutral reasons for striking Ward, the prosecutor stated:

> 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 same age as the defendant. 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.

¶ 21. In *Lockett v. State*,[14] this Court included an appendix of "illustrative examples" of race-neutral reasons upheld by other courts which includes age and marital status. The trial judge found the State's proffered race-neutral reason acceptable. We cannot say the trial judge abused his discretion.

Linda Ruth Lee

¶ 22. In stating its race-neutral reason for striking prospective juror Lee, the prosecutor stated:

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[13] *Lynch v. State,* 877 So.2d 1254, 1270 (Miss.2004) (quoting *Walker v. State,* 815 So.2d 1209, 1214 (Miss.2002)).

[14] 517 So.2d 1346, 1356–57 (Miss.1987).

> 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 . . . .

¶ 23. That a juror "obviously has mental problems" was clearly a race neutral reason. The trial judge found the State's proffered race-neutral reason acceptable. We cannot say the trial judge abused his discretion.

Christopher Lamont Tillmon

¶ 24. The State proffered the following reason for exercising a peremptory strike against Tillmon:

> S–3 is a black male, number 31. Christopher Lamont Tillmon. He has a brother who 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.

¶ 25. This Court has recognized a juror's (or family member's) criminal history to be a race-neutral reason for exercising a peremptory challenge.[15] The trial judge found the State's proffered race-neutral reason acceptable. We cannot say the trial judge abused his discretion.

Patricia Anne Tidwell

¶ 26. The State proffered the following reason for striking Tidwell:

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[15] *Lynch v. State,* 877 So.2d 1254, 1271–72 (Miss.2004).

> 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.

¶ 27. The trial judge found the State's proffered race-neutral reason acceptable. We cannot say the trial judge abused his discretion.

Pretext

¶ 28. Pitchford argues on appeal that the State's proffered race-neutral reasons were a pretext for discrimination. Pitchford points out that some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike. Although Pitchford devoted a considerable portion of his brief and oral argument before this Court to his pretext argument, he did not present these arguments to the trial court during the voir dire process or during post-trial motions.

¶ 29. This Court has held that, "[i]f the defendant fails to rebut, the trial judge must base his [or her] decision on the reasons given by the State."[16]

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[16] *Berry v. State,* 802 So.2d 1033, 1037 (Miss. 2001); *Manning v. State,* 735 So.2d 323, 339 (Miss.1999) ("It is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver."); *Woodward v. State,* 726 So.2d 524, 533 (Miss.1997) ("In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point").

¶ 30. As stated, Pitchford provided the trial court no rebuttal to the State's race-neutral reasons. We will not now fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented.

¶ 31. Pitchford also argues that the totality of the circumstances shows that the State's peremptory challenges were exercised in a discriminatory manner. Pitchford points out the fact that the State used only seven of its twelve peremptory challenges, striking four of five blacks on the panel, but only three of thirty-five whites. Pitchford points out that, even though the State had five available peremptory strikes, it failed to strike whites who shared similar characteristics to some of the blacks who were struck for cause.

¶ 32. We find this to be Pitchford's attempt to present his pretext argument in another package. As already stated with respect to each of the four African–Americans struck by the State, Pitchford failed to provide any argument concerning pretext during the *Batson* hearing.[17] We will not entertain those arguments now.

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[17] We agree with Presiding Justice Graves's argument that—in adjudicating the pretext issue—the trial judge must look at the totality of the circumstances and all of the facts. However those circumstances and facts do not include arguments not made by Pitchford's counsel.

B. Whether The Trial Court Otherwise Deprived Defendant Of A Jury Comprised As Required By The Sixth And Fourteenth Amendments.

¶ 33. As to this assignment of error, Pitchford makes two arguments: first, that the death qualification process, itself, so disproportionately impacts black jurors that it amounts to a violation of the Equal Protection Clause; and second, that the trial judge improperly removed for cause jurors who were properly qualified.

¶ 34. The State asserts that this entire line of argument is procedurally barred because Pitchford failed to raise a contemporaneous objection when the jurors were excused. Pitchford contends, however, that he preserved the issue by objecting prior to the court's releasing any of the individuals identified as *Witherspoon*-ineligible.[18] We find that Pitchford is correct, and that this issue was properly preserved for appeal.

Racial Discrimination as a result of death-qualification process.

¶ 35. At the conclusion of voir dire, the trial court excluded thirty of the thirty-five prospective black jurors for cause. The record reveals that most (and Pitchford alleges in his brief that all) were excluded because they were philosophically unable to consider imposing a sentence of death. Pitchford argues that the disproportionate exclusion of blacks for cause "creates a prima facie case that the Equal Protection

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[18] *See Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (State may not exclude jurors for cause because of general objections to the death penalty or expressed conscientious or religious scruples against its infliction).

Clause has been violated." In other words, Pitchford argues that, in general, the percentage of African–Americans who oppose the death penalty is higher than the percentage of whites.

¶ 36. This Court, addressing a similar argument, has held that "a defendant has no right to a petit jury composed in whole or in part of persons of his own race."[19] The gist of the holdings in these cases is that—in the context of the right to a trial by a jury of one's peers—one's peers are not determined by one's race, so this argument has no merit.

¶ 37. Pitchford also argues that the trial judge's questioning and exclusion of four panel members was error. Pitchford argues that *Witherspoon* does not require exclusion of prospective jurors who cannot impose the death penalty.

¶ 38. Although *Witherspoon* does not address the issue, the following clear language from a subsequent case does:

> [*Wainwright v.*] *Witt* held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " 469 U.S. [412] at 424, 105 S.Ct. [844] at 852 [83 L.Ed.2d 841] (quoting *Adams v. Texas*, supra, 448 U.S. at 45,

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[19] *Underwood v. State,* 708 So.2d 18, 28–29 (Miss.1998) (quoting *Pinkney v. State,* 538 So.2d 329, 346–47 (Miss.1988), *vacated on other grounds* by *Pinkney v. Mississippi,* 494 U.S. 1075, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990)).

> 100 S.Ct. at 2526). Under this standard, it is clear from *Witt* and *Adams*, the progeny of *Witherspoon*[,] that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause.[20]

¶ 39. Although the four jurors in question indicated on their questionnaires that they could not impose the death penalty under any circumstances, Pitchford points out that, during voir dire, defense counsel asked these prospective jurors some variation of "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," to which they answered in the affirmative. However, the trial judge later undertook voir dire of those four panel members and asked them "Can you consider the death penalty or would you not be able to consider it," to which each of the four replied that they could not consider it.

¶ 40. We find *Morgan* to be directly on point. The trial judge did not commit error by striking for cause the jurors who indicated they could not impose the death penalty.

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[20] *Morgan v. Illinois,* 504 U.S. 719, 728–29, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). *See also Grayson v. State,* 806 So.2d 241, 254 (Miss.2001) (strike for cause proper where potential juror's viewpoint on the death penalty "[w]ould prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath") quoting *Adams v. Texas,* 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

C. Whether the Trial Court Erred in Precluding the Defense From Questioning Prospective Jurors Concerning Their Ability to Consider Mitigating Evidence.

¶ 41. Pitchford next argues that the trial court improperly prevented him from asking potential jurors whether they would consider specific mitigating factors. During voir dire, the following exchange occurred:

> DEFENSE: . . . 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?
>
> STATE: 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.

¶ 42. The trial judge informed Pitchford's counsel that, while he would be allowed to ask questions as to whether the jurors would be able to consider the mitigating factors presented by the court, he would not be allowed to get into specifics. Pitchford's counsel responded, "I certainly don't intend to do that," and continued his voir dire of the jury.

¶ 43. Voir dire of a jury "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion."[21] Pitchford now argues that it was error for the trial court to

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[21] *Foster v. State,* 639 So.2d 1263, 1274 (Miss.1994) (quoting *Morgan,* 504 U.S. at 729, 112 S.Ct. 2222).

preclude his questions concerning the kinds of mitigation evidence he planned to introduce.

¶ 44. Pitchford cites no authority directly supporting this proposition. He cites *Abdul–Kabir v. Quarterman*, [22] *Penry v. Johnson*, [23] *Tennard v. Dretke*, [24] and *Smith v. Texas*, [25] each of which is inapposite. Although these cases discuss the type of mitigation evidence that may be presented to a jury and how it should be instructed for sentencing, they say nothing of the defendant's right to conduct voir dire.

¶ 45. In *Trevino v. Johnson*, [26] the United States Court of Appeals for the Fifth Circuit addressed an argument almost identical to the one presented by Pitchford. The Court stated:

> Trevino . . . argues that the trial court erred in refusing to allow him to inquire during voir dire whether three prospective jurors were able to consider youth as a potentially mitigating factor. Trevino contends that youth is a "relevant mitigating factor of great weight," *Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and that under *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the trial court's refusal to allow him to question the jurors regarding youth violated his due process rights.

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22 550 U.S. 233, 127 S.Ct. 1654, 167 L.Ed.2d 585 (2007).

23 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001).

24 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004).

25 550 U.S. 297, 127 S.Ct. 1686, 167 L.Ed.2d 632 (2007).

26 168 F.3d 173, 182–83 (5th Cir.1999).

. . .

This circuit has previously stated that *Morgan* only "involves the narrow question of whether, in a capital case, jurors must be asked whether they would automatically impose the death penalty upon conviction of the defendant." *United States v. Greer*, 968 F.2d 433, 437 n. 7 (5th Cir.1992) (internal quotation marks omitted); see also *United States v. McVeigh*, 153 F.3d 1166, 1208 (10th Cir.1998) ("[W]e have held that *Morgan* does not require a court to allow questions regarding how a juror would vote during the penalty phase if presented with specific mitigating factors. Other courts have issued similar rulings, holding that *Morgan* does not require questioning about specific mitigating or aggravating factors.") (citation omitted); *United States v. McCullah*, 76 F.3d 1087, 1113 (10th Cir.1996) (finding that *Morgan* only requires questioning during voir dire regarding whether jurors would automatically impose the death penalty, and it does not require specific questioning regarding mitigating factors), cert. denied, 520 U.S. 1213, 117 S.Ct. 1699, 137 L.Ed.2d 825 (1997); *United States v. Tipton*, 90 F.3d 861, 879 (4th Cir.1996) (finding it was not an abuse of the trial court's discretion to refuse to allow detailed questioning during voir dire concerning specific mitigating factors), cert. denied, 520 U.S. 1253, 117 S.Ct. 2414, 138 L.Ed.2d 179 (1997), and cert. denied, 520 U.S. 1253, 117 S.Ct. 2414, 138 L.Ed.2d 179 (1997), and cert. denied, 520 U.S. 1253, 117 S.Ct. 2414, 138 L.Ed.2d 179 (1997).

> After applying the AEDPA-mandated standard of review to these state-court findings and conclusions, we cannot say that Trevino has made a substantial showing of the denial of a constitutional right on this issue. We therefore decline to issue Trevino a [certificate of appealability] on this issue.[27]

¶ 46. We agree with this interpretation of *Morgan*, that is, a trial court is not required to allow questions regarding how a juror would vote during the penalty phase, if presented with specific mitigating factors. Thus, we find no merit in this assignment of error.

II. WHETHER THE TRIAL COURT DENIED DEFENDANT HIS CONSTITUTIONAL RIGHT TO PRESENT A FULL, COMPLETE AND ADEQUATELY DEVELOPED DEFENSE AND/OR TO HAVE HIS COUNSEL RENDER CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN DOING SO

¶ 47. Under this assignment of error, Pitchford argues he should have been granted continuances, and that the trial court erred in refusing to delay the sentencing proceedings so that a necessary mitigation witness could be present to testify.

A. Continuances

¶ 48. We use an abuse-of-discretion standard in reviewing a trial court's decision to grant, or refuse to

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[27] *Id.*

grant, a continuance.[28] We will reverse a trial court's decision only where manifest injustice would result.[29]

January 19, 2006, [30] *request for continuance—ineffective assistance of counsel*

¶ 49. In March, 2004, the trial court appointed Ray Baum to represent Pitchford. Ray Carter joined the defense team in June 2005. The trial, which originally was set for July 13, 2005, was rescheduled to begin on January 9, 2006, and then continued again to begin on February 6, 2006.

¶ 50. Pitchford filed a motion for yet another continuance, alleging inter alia that his attorneys needed still more time to interview members of his family who lived in California as possible mitigation witnesses. Pitchford's counsel argued they needed more time to analyze his psychiatric evaluation, which had been performed at the Mississippi State Hospital in Whitfield. On January 19, 2006, the trial court denied the motion.

¶ 51. Pitchford now argues that his failure to obtain the continuance caused his counsel to render ineffective assistance of counsel throughout the trial. He argues that "the result of the denial of the continuance comes in the cumulative effect of numerous lesser weaknesses that an attorney would have if he had not been required by erroneous trial court rulings to make Hobson's choices about how to allocate his preparation." Specifically, he claims his

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[28] *Stack v. State,* 860 So.2d 687, 691–92 (Miss.2003).

[29] *Simmons v. State,* 805 So.2d 452, 484 (Miss.2002).

[30] The transcript erroneously labels this hearing as having occurred on January 9, 2006.

failure to obtain a continuance resulted in the following instances of ineffective trial counsel: (1) his counsel was unprepared to begin his opening statement; (2) his counsel was disorganized at the guilt-phase jury-instruction conference; (3) his counsel failed to object to leading questions by the State. Pitchford also argues that, as a result of the lack of the continuance, he was unable to have his own expert analyze a court-ordered psychiatric evaluation from the Mississippi State Hospital at Whitfield, and his counsel was unable to interview witnesses from his paternal family in California. He claims these family members might have been able to contribute to his mitigation defense.

¶ 52. Pitchford was represented at trial by three attorneys: Ray Baum, Ray Charles Carter, and Alison Steiner. Carter and Steiner continue to represent Pitchford on this direct appeal. This Court has stated that "it is absurd to fantasize that [a] lawyer might effectively or ethically litigate the issue of his own ineffectiveness."[31] Also, because most of these claims of ineffective assistance of counsel necessarily will involve evidence outside the record, they are more appropriately presented in a petition for post-conviction relief.

¶ 53. So for these reasons, we decline to address Pitchford's issues involving ineffective assistance of counsel, but hold that he may bring them in a properly-filed petition for post-conviction relief. However, without foreclosing Pitchford's right to raise the issue of ineffective assistance of counsel in a

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[31] *Lynch v. State,* 951 So.2d 549, 551–52 (Miss.2007) (quoting *Read v. State,* 430 So.2d 832, 838 (Miss.1982)).

subsequent post-conviction-relief proceeding, we shall address Pitchford's claim that the trial judge abused his discretion by denying the January 19 motion for a continuance.

¶ 54. As of the trial date, Ray Baum had served as Pitchford's counsel for more than a year, and Ray Carter had been working on the case for more than eight months. In cases where counsel had even less time to prepare, we found no error on similar claims.[32] So we hold today that the trial judge did not abuse his discretion by denying Pitchford's motion for continuance.

Unavailable mitigation expert

¶ 55. Pitchford's second argument is that, even though no continuance was requested, the trial court committed plain error by failing to continue the beginning of the penalty phase. Prior to the start of the penalty phase of the trial, Pitchford retained the services of a mental-health expert, Dr. Rahn Bailey. However, Dr. Bailey, who was under subpoena for a trial in Texas, was not available to testify at the start of the penalty phase on February 8, 2006. Counsel for Pitchford contacted the trial judge and advised him of the scheduling conflict. The trial judge called the court in Texas and confirmed that Dr. Bailey was under subpoena there. The following morning, Pitchford's counsel advised the court that Dr. Bailey was available but that he would not be called to testify.

¶ 56. Pitchford now argues that "although there was no express request for a continuance made . . . the trial court was made fully aware that the Defendant

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[32] *See e.g. Ruffin v. State,* 992 So.2d 1165, 1175 (Miss.2008).

desired to present the testimony of Dr. Rahn Bailey," and the failure of the trial court to continue the trial amounted to plain error because of the prejudice that Pitchford's defense suffered from the lack Dr. Bailey's testimony.

¶ 57. This argument is frivolous and without merit. The trial court cannot be held to err on an issue not presented to it for decision.[33] Counsel not only failed to ask for a continuance, he advised the trial court that the witness was available, but would not be called to testify. A trial court has no duty to *sua sponte* second-guess decisions by defense counsel. This issue has no merit.

III. PROSECUTORIAL MISCONDUCT

¶ 58. Pitchford next claims the prosecutor engaged in misconduct that deprived him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 3, Sections 14, 26, and 28 of the Mississippi Constitution. This Court has stated that, "Where prosecutorial misconduct endangers the fairness of a trial and the impartial administration of justice, reversal must follow."[34]

¶ 59. Pitchford argues the prosecutor intentionally violated the Rules of Evidence in order to present misleading or inflammatory evidence to the jury, and made improper appeals to the jury at both the guilt and sentencing phases of the trial. Pitchford also claims the prosecutor used near-leading or misleading

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[33] *McCurdy v. State,* 511 So.2d 148, 150 (Miss.1987).

[34] *Goodin v. State,* 787 So.2d 639, 645 (Miss. 2001) (citing *Acevedo v. State,* 467 So.2d 220, 226 (Miss.1985)).

questions on its own witnesses, coached witnesses, interjected information into the responses from witnesses, and rested its arguments on facts not in evidence or inferences too attenuated from the facts which were in evidence.

¶ 60. The State argues that Pitchford did not object to these alleged improprieties at trial or in his motion for a new trial. Thus, the State argues, the claims are procedurally barred on direct appeal. While Pitchford admits no contemporaneous objections were made, he points out that his motion for a new trial included the following assignment of error:

> The Court allowed the district attorney to improperly argue during the penalty phase closing that their job was to go back there and vote for the death over defendant's objection.

¶ 61. Even had he not included this item in his motion for a new trial, Pitchford clearly objected to the prosecutor's "in the box" comments at trial. Pitchford also objected at trial to the prosecutor's comments that Walter Davis and his son may have been killed if they had arrived at the store any earlier; the prosecutor's questioning of Dominique Hogan as to the nature of her relationship with Pitchford; and the prosecutor's questioning of Pitchford's sister about the "problems he got in at school" and the time frame of his father's illness. So Pitchford properly preserved these allegations of misconduct for appeal.

¶ 62. Pitchford argues the prosecutor misrepresented the facts in closing argument by suggesting that Bullins voluntarily turned himself in and confessed, and that Pitchford was the man who fired the shots which killed the decedent. Specifically,

the prosecutor stated to the jury: "[Bullins] went to the sheriff's department the same morning of the murder and he admitted it." According to the record, however, Investigator Conley testified only that he "talked to" Bullins. While arguably inconsistent with the facts, the prosecutor's statement did not rise to the level necessary to "[endanger] the fairness of [the] trial and the impartial administration of justice," as required by *Goodin*.[35] Thus, this assignment of error has no merit.

¶ 63. Pitchford also complains that the prosecutor improperly stated during closing arguments that

[Pitchford and Bullins] both shot [Britt]. 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.

¶ 64. Pitchford claims because the statement—he "probably" had the .22—has no evidentiary basis in the record, this constitutes improper vouching for snitch witnesses. But the trial judge properly instructed the jury as to accomplice liability, and we find the prosecutor's statement was not outside his theory of accomplice liability. So this allegation of misconduct has no merit.

¶ 65. Pitchford next points out that the prosecutor stepped outside the bounds of evidence when he argued that the gun found in Pitchford's car was Britt's gun. But Marvin Fullwood testified that he had given Britt that exact gun approximately two years

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[35] 787 So.2d at 645.

before the trial. Also, Investigator Conley testified that he had recovered the same gun from Pitchford's car, so the prosecutor's statement was not outside the bounds of evidence, and this allegation of misconduct has no merit.

¶ 66. Pitchford argues he is entitled to a reversal of his conviction because the prosecutor proclaimed to the jury during closing argument that Pitchford was a "habitual liar." Pitchford argues the statement impermissibly spoke to his general character and was an indirect comment on his failure to testify, violating his Fifth–Amendment rights. In its brief, the State responds:

> During his closing argument, Pitchford . . . attacked the prosecution witnesses extensively as liars and [offered] testimony they could not be trusted or relied upon. The defense attack on the honesty of the prosecution witnesses invited the response tendered by the prosecution and was not error.

The State's "if Pitchford did it, we can do it" argument has no merit.

¶ 67. First, regardless of whether either party "opened the door," Pitchford's counsel had every right to attack and question the credibility of witnesses who had testified for the prosecution. Pitchford did not testify at trial, and had he not given statements to police on November 7 and 8, 2004, Pitchford's argument might indeed have merit. However, because his statements to police were before the jury, the prosecutor's attack on Pitchford's credibility was not inappropriate.

¶ 68. Pitchford argues the prosecutor should not have alluded to the possibility that Pitchford might have killed Walter Davis and his son, had they arrived on the scene right after the murder while Pitchford was still in the store. Pitchford characterizes this speculation as an attempt to incite prejudice and fear in the jury.

¶ 69. According to the record, the following exchange took place during closing argument:

> Mr. Evans: The Davis's walked in there at 7:27. We would of had two more dead people—
>
> Mr. Carter: Your Honor, I object to that.
>
> Mr. Evans: —if he had walked in there earlier.
>
> Mr. Carter: Your Honor, how can—he cannot say that.
>
> Mr. Evans: Your Honor, that is something that the jury can clearly see from the facts.
>
> The Court: He can make things that are reasonable inferences and has a right to comment on the evidence as he sees a reasonable inference to be. And it's up to the jury to determine the facts. So I'll overrule the objection.

¶ 70. This Court has held that the closing arguments may include inferences drawn from the evidence presented. [36] However, the fact that a particular inference may be drawn from the evidence does not *per se* suggest that the inferences properly may be presented to the jury. *Rubenstein* does not stand for the proposition that a prosecutor may present

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[36] *Rubenstein v. State,* 941 So.2d 735, 779 (Miss.2006).

inappropriate inferences, even those that fairly may be drawn from the evidence.

¶ 71. While one fairly might infer from the evidence in this case that—had they arrived earlier—Walter Davis and his son might have been killed, that inference certainly is not admissible in the prosecution of Pitchford for the murder of Reuben Britt. After-the-fact speculation as to whether Pitchford might or might not have committed additional murders is no evidence whatsoever in the prosecution of this case. The trial judge should have sustained the objection to the prosecutor's inappropriate statement. However, in the context of this case, with the overwhelming evidence of guilt presented to the jury, we find this inappropriate statement, and the trial judge's incorrect ruling, to be harmless error. This Court will deem harmless an error where "the same result would have been reached had [it] not existed."[37]

¶ 72. Pitchford complains that, during the penalty phase, the prosecutor asked Dominique Hogan, the mother of Pitchford's child: "Isn't it a fact that y'all were doing a lot of fighting?" Hogan answered in the negative. The prosecutor then asked, "Were y'all going with other people at the time?" Again, Hogan answered in the negative. Pitchford's counsel objected, stating the prosecution had no basis for asking such questions. The trial judge required the prosecutor to demonstrate a good-faith basis for asking the questions. The prosecutor produced Pitchford's psychological evaluation, which provided

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[37] *Tate v. State,* 912 So.2d 919, 926 (Miss. 2005) (quoting *Burnside v. State,* 882 So.2d 212, 216 (Miss.2004)).

the good-faith basis for the question. Because the prosecutor demonstrated a good-faith basis for the questions, and further, because Pitchford shows no endangerment of the trial's fairness as required by *Goodin*,[38] this allegation of misconduct has no merit.

¶ 73. The prosecutor cross-examined Pitchford's sister and mother about Pitchford's behavior as a child and youth. Pitchford complains that, during the cross-examination they testified to prior bad acts. However, his sister testified on direct that she would receive phone calls from teachers when he "got in trouble" at school. Furthermore, his mother testified that, after his father's death, Pitchford "started having problems at school." Both witnesses opened the door as to the nature of the problems Pitchford had at school, so this allegation of misconduct has no merit.

¶ 74. Pitchford claims that the prosecutor—when questioning his sister about their father's death—made inappropriate, inflammatory remarks, as follows:

> 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

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[38] 787 So.2d at 645.

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> Mr. Carter: Your Honor, that is an absolutely improper question and he knows it.
>
> The Court: I'll overrule the objection . . . .
>
> Q: 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.

¶ 75. Pitchford cites numerous cases in support of his argument that these statements had an inflammatory effect. The crux of their holdings can be summed up as follows:

> There can be no graver proceeding than when a human being is put on trial for his or her life. The right to a fair trial includes the right to a verdict based on the evidence and not extraneous prejudicial happenings in and around the courtroom.[39]

¶ 76. The State responds to this issue minimally, arguing only that Pitchford's objection at trial was too general. We find the prosecutor's question was an improper attempt to incite the jurors' emotions and anger. It had no proper basis, and the objection to the question should have been sustained. However, we find the answer to the question was both obvious and already known to the jurors. Thus, we find the error was harmless.

¶ 77. Pitchford next claims the prosecutor instructed the jury to consider the "heinous atrocious, and cruel"

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[39] *Fuselier v. State,* 468 So.2d 45, 53 (Miss. 1985).

aggravator during the sentencing phase without the proper limiting instruction or evidentiary support. Mississippi Code Section 99–19–101(5)(h) allows the heinous, atrocious, or cruel nature of the crime to be considered as an aggravating circumstance.[40] The complained-of language during the prosecution's closing is as follows:

> 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 on 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 that the death penalty is for, somebody that could commit a crime like that.

The prosecutor made this statement in the course of describing the events surrounding the crime, as they happened. Immediately prior to these statements, the prosecutor described Pitchford's previously-thwarted attempt to rob the store, and immediately following these statements, he discussed testimony which had revealed that the decedent had pleaded for mercy before being killed. We find the prosecutor's statement was not a call for the jury to consider the heinous, atrocious, and cruel nature of the crime as an aggravating factor, but rather was part of the "story" of the crime as the State perceived it. So this allegation of misconduct has no merit.

¶ 78. Pitchford claims the prosecutor instructed the jury that they were "in the box" to give Pitchford the death penalty. Pitchford mischaracterizes the

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[40] Miss.Code Ann. § 99–19–105(5)(h) (Rev. 2007).

prosecutor's statements during closing argument. The complained-of exchange is as follows:

> I am not going to mince words with you up here. I am going to tell you just like I told you on voir dire. I am asking for the death penalty because the ultimate crime deserves the ultimate punishment. That is what we have got here.
>
> I am not going to sit up here and quote the Bible . . . . I think it is absurd to sit up here and try to confuse y'all with that. Y'all know what you are here for. The law is clear in this state. The death penalty is an appropriate punishment.
>
> If you'll remember, when y'all were sitting out here, I asked everybody in the panel—
>
> Mr. Carter: Your Honor, I object. They are not here to give death. They are here to deliberate and go back there and make a decision on life without possibility of parole or death. They are not here for death . . . . To say that is improper.
>
> The Court: Mr. Evans did not make that comment. So I'll allow him to proceed with his argument. Overrule the objection.
>
> . . . .
>
> As I told y'all when y'all were sitting out here, the important question that I asked y'all about that was this. And if any of y'all had answered this differently, you would not be here because this is a case where the death penalty is an appropriate punishment. If the law authorizes imposition of the death penalty and the facts justify it, could you give the death penalty? And the only ones that answered that they couldn't

> are gone. They are not here today. The law authorizes it because the judge has instructed you that the law authorizes it. The facts justify it because you have heard the facts. You have heard the testimony. You've seen the evidence . . . . The facts justify the death penalty in this case.

These closing remarks, read in context, clearly demonstrate that the prosecutor did not instruct the jury that they were there only to give the death penalty. Instead, he used his closing argument to persuade the jurors that—from the prospective of the State—the facts and the law together justified imposition of the death penalty, and each of the jurors had indicated that, in an appropriate case, they could impose the death penalty. So this allegation of prosecutorial misconduct has no merit.

¶ 79. Pitchford next claims the prosecutors "skirted their ethical obligations to see that the defendant [was] accorded procedural justice," and he claims such prosecutorial misconduct is incurably prejudicial and requires reversal of his sentence. However, as previously stated, given the overwhelming evidence of guilt, the statements we find inappropriate were harmless. Thus, this issue has no merit.

IV. IMPROPER DISPLAYS OF EMOTION FROM NONTESTIFYING AUDIENCE MEMBERS

¶ 80. Pitchford's next assignment of error is that the jury was improperly influenced by displays of emotion from the victim's family. He claims two incidents served to prejudice his defense.

¶ 81. The first incident occurred following the State's direct examination of James Hathcock. Pitchford's

counsel approached the bench and objected, claiming "family members are in the back of the courtroom crying out loud, loud enough for everybody in the courtroom to hear." The trial judge stated, "There have been no outbursts of any kind . . . . I have heard some sniffling going on . . . ," which he compared to sniffling as if one had a cold. Pitchford's counsel concluded the discussion with: "Well, Your Honor, we would just ask if it becomes any worse than it is that the Court excuse the jury temporarily and just tell the family that they should control it to the extent they can."

¶ 82. The second incident occurred during the penalty phase of the trial. Defense counsel approached the bench and informed the trial judge that some members of the audience were talking during questioning. Specifically, defense counsel claimed that—after he objected to a question as improper—someone in the audience said "no, it is not." The trial judge said he did not hear anything but nevertheless admonished members of the audience to refrain from commenting or making any noise.

¶ 83. Pitchford also makes a vague argument, citing no specifics, that the State made inflammatory appeals to the passion of the jury. We find the incidents—to the extent they are documented in the record—were minor. Furthermore, Pitchford failed to request a curative instruction to the jury. [41] Accordingly, we find no error with this issue.

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[41] *See e.g., Bell v. State,* 631 So.2d 817 (Miss. 1994) (no prejudice after mother of victim shouted "He cold blooded killed my child" and judge gave curative instruction).

V. PERMITTING THE JURY TO HEAR INFORMANT TESTIMONY

¶ 84. Pitchford's next argues the trial court improperly allowed the testimony of James Hathcock and Dantron Mitchell, both of whom had been incarcerated with Pitchford. Alternatively, he argues that the trial court erred by failing to give a requested cautionary instruction concerning informant testimony.

¶ 85. Hathcock and Mitchell both testified that Pitchford had confessed his role in the murder. They also denied receiving any promises or hope of reward in exchange for their testimony, although charges against Hathcock eventually were dropped.[42]

Testimony

¶ 86. Pitchford argues the testimony of the jailhouse "snitches" should have been excluded because "evidence from these witnesses was so unprobative and so prejudicial that Miss. R. Evid. 403[43] require [d]

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[42] Q: Do you know what happened to those charges or that case? You got any idea what happened on that?

A: I was told it was dropped.

Q: Okay. Who told you that?

A: Justin. The guy. It was him I was with. He stole $3,000 from his daddy. He gave me 500 of it to shut my mouth and like an idiot, I took.

Q: That was dropped you said.

A: Yes, sir.

[43] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Miss. R. Evid. 403.

its exclusion." The State responds that Pitchford waived this issue because he failed to raise it in the trial court. Pitchford responds that he did raise the issue in the trial court by way of his pretrial motion to exclude the testimony as unreliable under this Court's holdings in *McNeal v. State*,[44] and *Dedeaux v. State*.[45] Pitchford states "the weighing process required by Rule 403 is no different from that required under *McNeal / Dedeaux*."[46] We disagree.

¶ 87. The "reliability of testimony" is unrelated to Rule 403's balancing test. A completely true statement may be excluded under Rule 403 if "its probative value is substantially outweighed by the danger of unfair prejudice." Although Pitchford did raise in the trial court the issue of reliability, he did not raise a Rule 403 objection. Thus, the issue is procedurally barred.[47]

Cautionary instruction

¶ 88. Pitchford next argues that the trial court erred by refusing to issue a cautionary instruction. He requested the following instruction:

> I instruct you that the law looks with suspicion and distrust on the testimony of a witness who has acted as an informant for the government.

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[44] 551 So.2d 151 (Miss.1989).

[45] 125 Miss. 326, 87 So. 664 (1921).

[46] *McNeal* and *Dedeaux,* while commenting on the unreliable nature of informant testimony, particularly testimony given in exchange for a reduced sentence, do not provide for a weighing process.

[47] *Walker v. State,* 913 So.2d 198, 227 (Miss. 2005) (a trial court will not be held in error on a matter not presented to it for decision).

> The law requires the jury to weigh testimony of an informant with great care and with caution and with suspicion.

Although the trial court did not give the instruction requested by Pitchford, it did give the following instruction:

> The Court instructs the jury that the law looks with great suspicion and distrust on the testimony of an alleged accomplice or informant. The law requires the jury weigh the testimony of an alleged accomplice or informant with great care, caution and suspicion.

Pitchford also requested, but was denied, the following instruction:

> The Court instructs the jury that the testimony of an informant who provides evidence against a defendant for pay (or other benefit), must be examined and weighed by the jury with greater care than an ordinary witness. You the jury must determine whether the informant's testimony has been affected by interest or prejudice against the defendant.

¶ 89. Pitchford argues the instruction given was deficient because it lumped accomplice and informant testimony together and "ignored evidence before it that at least one informant had received a benefit." Indeed, this Court has not viewed informant testimony favorably. [48] However, this Court has upheld the denial of a cautionary instruction based partly on the fact that an informant did not receive

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[48] *Gray v. State,* 728 So.2d 36, 72 (Miss. 1998).

any preferential treatment for his testimony.[49] Still, where the informant did receive a benefit, the jury should be instructed to regard such testimony with "caution and suspicion."[50]

¶ 90. This Court has stated, "jury instructions are within the sound discretion of the trial court."[51] A court may refuse an instruction if it "is covered fairly elsewhere in the instructions."[52]

¶ 91. We find *Moore* inapplicable to the facts of this case and, thus, no cautionary instruction was necessary. Mitchell and Hathcock both testified that they were not promised, and did not receive, any favorable treatment in exchange for their testimony.[53] Pitchford argues that Hathcock did receive a benefit, because his charges were dropped at a later date, although there was no evidence that this was because of his testimony.

¶ 92. In any case, as required by *Moore*,[54] the trial court granted a cautionary instruction that advised the jury to view informant testimony with caution and suspicion. Thus, we find no error.

VI. FAILURE TO GRANT A MISTRIAL AFTER WITNESS TESTIFIED TO

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[49] *Rubenstein v. State,* 941 So.2d 735, 767 (Miss.2006); *Manning v. State,* 735 So.2d 323, 335 (Miss.1999).

[50] *Moore v. State,* 787 So.2d 1282, 1287–88 (Miss.2001).

[51] *Rubenstein v. State,* 941 So.2d 735, 787 (Miss.2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001)).

[52] *Thorson v. State,* 895 So.2d 85 (Miss.2004) (citing *Heidel v. State,* 587 So.2d 835, 842 (Miss.1991)).

[53] *Rubenstein,* 941 So.2d at 767.

[54] 787 So.2d at 1286–288.

INADMISSABLE AND PREJUDICIAL MATTERS

¶ 93. Pitchford's next assignment of error is that the trial court should have declared a mistrial after a State witness improperly testified to prejudicial and improper matters during cross-examination. As Pitchford's counsel was cross-examining James Hathcock, who had testified that Pitchford had confessed the crime to him in jail, the following occurred:

> Q: Are you and Pitchford good friends? Were y'all good friends?
>
> A: We lived close to each other for a little while.
>
> Q: Did y'all become real good friends where you would tell him your secrets?
>
> A: Not really.
>
> Q: Okay. And yet you want us to believe that he felt comfortable enough with you to tell you that he killed somebody.
>
> A: Well, he was selling me dope.

¶ 94. After this exchange, the jury was excused and Pitchford immediately moved for a mistrial, which the trial court refused to grant. The State previously had disclosed to the defense the fact that Pitchford had sold drugs to Hathcock. The trial judge instructed the jury to totally disregard the statement and made each juror affirm that he or she would disregard it.

¶ 95. A 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."[55] This Court reviews a trial court's decision on a motion for a mistrial under an abuse-of-discretion standard.[56]

¶ 96. The witness's statement was clearly improper. However, the trial court took immediate and appropriate steps to cure any prejudicial effect. Furthermore, "it is presumed that jurors follow the instructions of the court. To presume otherwise would be to render the jury system inoperable."[57] Thus, we conclude that the trial court did not abuse its discretion by failing to grant a mistrial.[58]

VII. FAILURE TO SUPPRESS EVIDENCE OBTAINED THROUGH A WARRANTLESS SEARCH OF DEFENDANT'S AUTOMOBILE

¶ 97. Pitchford argues the .38 caliber revolver used in the shooting and later discovered in his car should have been suppressed as the product of an illegal search. After receiving information that Pitchford had been involved in a previous attempt to rob the store, Investigator Conley went to Pitchford's home, where, in the driveway, he spotted a vehicle matching the description of a vehicle seen by witnesses at the store prior to the robbery. A tag search revealed that the car was titled to Pitchford and his mother, Shirley Jackson.

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[55] *Parks v. State,* 930 So.2d 383, 386 (Miss. 2006).

[56] *Id.*

[57] *Chase v. State,* 645 So.2d 829, 853 (Miss. 1994) (quoting *Johnson v. State,* 475 So.2d 1136, 1142 (Miss.1985)).

[58] *See, e.g., Yarbrough v. State,* 911 So.2d 951, 956–58 (Miss.2005).

¶ 98. Conley asked for permission to search the vehicle. Pitchford consented orally, but refused to sign a consent form, while Jackson signed the consent form. Conley (the only witness to testify at the suppression hearing) testified that, after Jackson had signed the consent form, Pitchford stated "momma, it's something in the car. It's something in the car." Investigator Conley testified that Pitchford never withdrew his oral consent.

¶ 99. Investigator Conley searched the vehicle and discovered the revolver. Pitchford moved the trial court to suppress the evidence, claiming he did not consent, and that the search was illegal. The trial court denied Pitchford's motion to suppress, finding that Conley had consent to search the vehicle and, alternatively, that Investigator Conley properly could have executed a warrantless search because of exigent circumstances.

¶ 100. Pitchford admits that he initially consented to the search. However, he claims he withdrew his consent. As evidence of the withdrawal, he points to the following trial testimony from Investigator Conley: "Pitchford was—when I went to search the car he started getting kind of angry, so I had him detained and moved to the side of the house." This testimony came during the trial, but was not provided during the suppression hearing. Also, Pitchford did not offer any proof concerning his demeanor during the search, as described by Investigator Conley, nor did he inform the trial judge that Investigator Conley had him detained and moved to the side of the house. We will not hold the trial judge in error for failure to suppress evidence based on testimony and evidence not given at the suppression hearing.

¶ 101. Both the United States and Mississippi Constitutions guarantee citizens the right to be secure in their persons, houses, and possessions against unreasonable and warrantless searches and seizures. [59] "While the warrant clauses of these provisions express the general rule that law enforcement must procure a warrant based on probable cause before engaging in a search, the rule has several exceptions. . . . Voluntary consent eliminates the warrant requirement."[60]

¶ 102. Pitchford argues that, because the search was conducted over his objection, the evidence should be suppressed. He cites *Georgia v. Randolph*,[61] in which in the United States Supreme Court held that a warrantless search of a shared dwelling, over the express refusal of consent by a physically present resident, cannot be justified as reasonable as to him, based on consent given to police by another resident. However, because we find Pitchford consented to the search and never withdrew his consent, we need not explore the issue addressed in *Randolph*.

¶ 103. We find this issue has no merit.

VIII. FAILURE TO SUPPRESS STATEMENTS GIVEN TO LAW ENFORCEMENT AFTER DEFENDANT'S ARREST

¶ 104. In his eighth assignment of error, Pitchford asserts that the trial court should have suppressed five statements he made to police officers after his

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[59] U.S. Const. amend. IV; Miss. Const. art. 3, § 23.

[60] *Moore v. State,* 933 So.2d 910 (Miss.2006) (citing *Morris v. State,* 777 So.2d 16, 26 (Miss. 2000)).

[61] 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006).

arrest because the statements were taken in violation of his Fifth, Sixth, and Fourteenth Amendment rights.

¶ 105. Following a pretrial hearing, the trial court denied Pitchford's motion to suppress the statements, stating: "The Court finds not only beyond a reasonable doubt but beyond any doubt whatsoever that these statements were freely and voluntarily given." Pitchford renewed his objection to the introduction of his statements during trial, and the trial court again overruled the objection.

¶ 106. A criminal "defendant may waive effectuation of [the right to remain silent and the right to the presence of an attorney], provided the waiver is made voluntarily, knowingly and intelligently."[62] A criminal defendant who challenges the voluntariness of the waiver has a due process right to a reliable judicial review of whether the confession was, in fact, voluntarily given.[63]

¶ 107. The trial court's duty is quite clear on this issue. A trial judge must review the totality of the circumstances, and make a factual determination of whether the defendant intelligently, knowingly, and voluntary waived his or her rights.[64] Furthermore, the court must determine whether, under the totality of the circumstances, the accused was adequately

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[62] *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[63] *Powell v. State,* 540 So.2d 13 (Miss.1989) (citing *Jackson v. Denno,* 378 U.S. 368, 377, 84 S.Ct. 1774, 1781, 12 L.Ed.2d 908, 915 (1964)).

[64] *McGowan v. State,* 706 So.2d 231, 235 (Miss.1997) (quoting *Neal v. State,* 451 So.2d 743, 756 (Miss.1984)).

warned.[65] The long-standing rule in this state is that the burden of proving the voluntariness of the confession is on the State.[66]

¶ 108. The officers who interrogated Pitchford testified he was offered no reward, and he was not threatened or coerced, and that his statement was voluntarily given. Such testimony creates a prima facie case of voluntariness.[67] However, when the defendant produces evidence that his waiver and confession were not voluntary, the State must produce evidence to directly rebut the defendant's claims.[68]

¶ 109. The standard of review for such a determination has been stated by this Court:

> Findings by a trial judge that a defendant confessed voluntarily, and that such confession is admissible are findings of fact. Such findings are treated as findings of fact made by a trial judge sitting without a jury as in any other context. As long as the trial judge applies the correct legal standards, his [or her] decision will not be reversed on appeal unless it is manifestly in error, or is contrary to the overwhelming weight of the evidence.[69]

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[65] *Layne v. State,* 542 So.2d 237, 239 (Miss. 1989) (citing *Jones v. State,* 461 So.2d 686, 696–97 (Miss.1984) and *Edwards v. Arizona,* 451 U.S. 477, 486, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 387 (1981)).

[66] *Lee v. State,* 236 Miss. 716, 112 So.2d 254, 256 (1959).

[67] *Id.* at 255–256.

[68] *Id.* at 256.

[69] *Davis v. State,* 551 So.2d 165, 169 (Miss. 1989) (citing *Frost v. State,* 483 So.2d 1345, 1350 (Miss.1986)).

¶ 110. Pitchford admits that the State obtained a written *Miranda* waiver prior to his first statement. However, he insists he gave no waiver prior to his next three statements. This Court has said:

> Invocation of the right to counsel is a rigid, prophylactic rule which prohibits further questioning until an attorney is made available or the defendant knowingly and voluntarily waives his [or her] right. On the other hand, invocation of the right to silence concerns whether an officer scrupulously honors a defendant's right to cease questioning for a reasonable time, after which questioning may resume if the defendant knowingly and voluntarily waives this right.[70]

¶ 111. At the hearing on the motion to suppress, Investigator Conley provided the following testimony concerning the three statements he took from Pitchford on November 7, 2004:

> Q: I want to hand you back Exhibit 5 for identification and ask if you can tell the Court what this is.
>
> A: This is a *Miranda* Rights form.
>
> Q: Is that the same rights form that you used to advise this defendant, Terry Pitchford, of his rights?
>
> A. Yes, sir.

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[70] *Chamberlin v. State,* 989 So.2d 320, 334 (Miss.2008) (citing *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), and *Neal v. State,* 451 So.2d 743, 755 (Miss.1984)).

. . .

Q: Did you advise him of all the rights on that form?

A: Yes, sir.

Q: Did it appear to you that he understood those rights?

A: Yes, sir.

Q: Why did it appear to you that he understood those rights?

A: Because he told me he did.

Q: And once you advised him of those rights, did he, in fact, sign that form and the waiver stating that he did not wish to have an attorney and he wanted to discuss the case with you?

A: Yes, sir.

. . .

Q: I believe he made three statements to you that day; is that correct?

A: Yes, sir.

Q: And on each of those taped statements before you started interviewing him did you go back into the fact of asking him if he understood the rights that you had previously advised him?

A: Yes, sir.

Q: And on each occasion did he tell you that he did?

A: Yes, sir.

Q: Did it appear to you that he did?

A: Yes, sir.

> Q: On any of those statements did you use any pressure or coercion to get him to talk to you?
>
> A: No, sir.
>
> Q: Did you hold out any hope of reward or make him any promises?
>
> A: No, sir.

¶ 112. In light of Officer Conley's testimony, we cannot say the trial court's findings as to these statements were in error or contrary to the overwhelming weight of the evidence, as required by *Davis*.[71] Pitchford argues that, because the officers did not obtain a written waiver before Statements 2 and 3, there was no voluntary waiver. However, he cites no authority supporting this proposition. The record supports the trial court's findings that, under the totality of the circumstances, Pitchford voluntarily and intelligently waived his privilege against self-incrimination under *Layne*.[72]

¶ 113. Pitchford argues that, when he gave the first three statements on November 7, Investigator Conley made several false representations regarding the evidence against him. He admits that misrepresentations, in and of themselves, do not render his statements involuntary. However, he contends that such misrepresentations were components of improper psychological coercion leading up to the two statements he gave on November 8, 2004.

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[71] 551 So.2d at 169.

[72] 542 So.2d at 239.

¶ 114. On November 8, Robert Jennings was scheduled to give Pitchford a polygraph exam. Jennings testified that, "after a short period of time, [Pitchford] agreed to take a polygraph test. So after Investigator Conley left out of the room, I, again, went back through the same rights. I put a checkmark by each one marking [sic] sure that he understood it." Pitchford argues that, because he did not sign the waiver portion of the *Miranda* form, the waiver of his rights was not voluntary and intelligent. Jennings testified that, after advising Pitchford of his *Miranda* rights and reading the waiver and consent form to him, Pitchford "started crying and he stated that he had been up all night praying." Jennings reminded him that he was there to take a polygraph test, and said "if you lie to us, we are going to know whether or not you are lying about any of this." At that point, Pitchford began to tell Jennings the chain of events that occurred the morning Britt was murdered.

¶ 115. Officer Conley stepped into the room, at which point Pitchford "quit talking." Conley asked Pitchford, "do you understand what your rights are," and Pitchford said "yes." Conley then asked, "is it your own free will to make a statement?" Pitchford again responded "yes."

¶ 116. Jennings testified that, when Conley walked into the room, Pitchford reverted to his previous story. He said, "It was kind of obvious that maybe he was not going to talk freely in front of Conley." After Conley stepped back out of the room, Pitchford "told the entire chain of events, which we started from a week and a half prior to right on up to the actual morning of the actual murder and robbery."

¶ 117. Jennings testified that neither he nor Conley made threats to Pitchford or held out any hope of reward in order to entice him to give the statements. He also testified that Pitchford clearly understood his *Miranda* rights, and there was no indication that he did not freely and voluntarily waive those rights.

¶ 118. Pitchford asserts that Jennings and Conley created the " 'perfect storm' of unconstitutional psychological coercion" by threatening to give Pitchford a polygraph exam, misrepresenting the reliability of the polygraph test, and telling Pitchford that anything said was just between the two of them (i.e., Pitchford and Jennings). However, the record reveals that Pitchford volunteered to take the polygraph exam, and Jennings testified that he did not threaten Pitchford through misrepresentations of the polygraph's accuracy, but simply indicated to him that the purpose of a polygraph exam—which he agreed to take—was to determine truthfulness. Finally, Jennings admitted telling Pitchford that his confession was "between you and I," but only "after he had given the entire statement."

¶ 119. Based on this record, we cannot say that the trial court's ruling regarding these two November 8 statements was against the overwhelming weight of the evidence. The court said:

> [I]t's the understanding of the Court that the fifth statement was a continuation of the fourth statement. It was just a situation where Officer Conley was no longer in the room. I think it could have very easily been called statement four. For whatever reason they were transcribed at different times and considered

> five different statements. But nevertheless, he was properly Mirandised, Mirandised [sic] before the statement was given.

¶ 120. The trial judge applied the correct legal standards, his decision was not manifestly in error, and this issue has no merit.

IX. ADMISSION OF EVIDENCE CONCERNING PRIOR BAD ACTS

¶ 121. Pitchford next argues the State improperly introduced evidence of a prior crime. Pitchford was indicted for two crimes: (1) capital murder of Rubin Britt in the course of armed robbery, and (2) conspiracy to commit a crime arising out of his previously thwarted attempt to rob Britt's store. The charges were not consolidated into a multicount indictment, nor were they consolidated into a single trial.

¶ 122. Citing Mississippi Rules of Evidence 404(b) and 403, Pitchford moved to exclude this evidence. The Court allowed Pitchford's counsel to reserve his objection. During a bench conference at trial, the prosecutor requested a Rule 403 balancing test. The trial court ruled as follows:

> As I understand from the motions last week, approximately a week before this alleged crime occurred there was a plan where Mr. Pitchford and others were present intending to go in and rob the . . . Crossroads Grocery. And somehow that plan was thwarted. And a week later the exact same crime was allegedly committed. That seems to me to be under the heading of plans, preparation, motive and the—and admissible as evidence. And so the Court finds

> that to be highly probative. And the probative value would substantially outweigh any prejudice. So that is testimony the Court will allow.

¶ 123. Pitchford concedes that evidence of other crimes may be admissible under Rule 404(b) in order to show intent, preparation, plan, or knowledge, or where necessary to tell the complete story so as not to confuse the jury. However, Pitchford disputes the trial court's ruling that the probative value of the evidence outweighed its prejudicial effect.

¶ 124. The two evidentiary rules at issue are as follows:

> **Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. *It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident*.[73]

and

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[74]

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[73] Miss. R. Evid 404(b) (emphasis added).

[74] Miss. R. Evid. 403.

¶ 125. As an initial matter, we note that this Court has, in previous cases, erroneously implied that Rule 404(b) exceptions are not subject to Rule 403 analysis.[75] Today, we clarify those cases and hold that Rule 404(b) exceptions are, indeed, subject to a Rule 403 balancing test.

¶ 126. The trial court found the evidence admissible under Rule 404(b). Furthermore, the trial court conducted a Rule 403 balancing test, and found "the probative value would substantially outweigh any prejudice."

¶ 127. A trial court "must exercise sound discretion in determining whether the proffered evidence is relevant under Miss. R. Evid. 401 and even if relevant, whether such relevant evidence is admissible applying the Miss. R. Evid. 403 criteria." [76] Furthermore, this Court has held "that the admission of evidence is well within the sound discretion of the trial court, subject to reversal on appeal only if there be an abuse of that discretion."[77]

¶ 128. We cannot say the trial court abused its discretion in admitting the evidence under Rules 404(b) and 403. The trial judge should have stated that he found the evidence was admissible because "the probative value [was] not substantially

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[75] *See Jenkins v. State,* 507 So.2d 89, 92 (Miss.1987), and its progeny, *Burns v. State,* 729 So.2d 203, 222 (Miss.1998) (quoting *Parker v. State,* 606 So.2d 1132, 1136–37 (Miss. 1992), *overruled on other grounds by Goff v. State,* 14 So.3d 625 (Miss.2009)).

[76] *Eckman v. Moore,* 876 So.2d 975, 985 (Miss.2004).

[77] *Id.* at 984 (citations omitted).

outweighed by the danger of unfair prejudice,"[78] rather than "the probative value would substantially outweigh any prejudice." But even though the trial judge did not utter the "magic words" of Rule 403, he clearly performed a Rule 403 analysis and thus did not abuse his discretion in admitting the evidence,[79] and this assignment of error has no merit.

X. EXPERT TESTIMONY

¶ 129. Pitchford's next assignment of error is that the trial court erroneously allowed the jury to hear opinions from Dr. Steven Hayne, who was tendered by the State—without objection—as an expert in the field of forensic pathology. Dr. Hayne performed the autopsy on Reuben Britt and testified he had been shot up to three times with a hand gun containing rat shot, and five times with small-caliber rounds, consistent with a .22 caliber weapon. Dr. Hayne also testified that it would not be inconsistent with the decedent's wounds for him to have been shot one to four times with the .38 caliber weapon recovered from Pitchford.

¶ 130. Relying on *Edmonds v. State*,[80] Pitchford argues Dr. Hayne's testimony concerning the gunshot wound was outside his area of expertise. In *Edmonds*, Dr. Hayne provided opinions outside his area of expertise when he testified that the trigger of the murder weapon was likely pulled by two persons, rather than one.[81]

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78 Miss. R. Evid. 403.

79 *See, e.g., Tate v. State,* 20 So.3d 623, 639 (Miss.2009).

80 955 So.2d 787 (Miss.2007).

81 *Id.* at 792.

¶ 131. The issue before us today is distinguishable from *Edmonds*. Dr. Hayne is clearly qualified to provide opinions as to the nature and number of wounds, and whether those wounds are consistent with a .22 caliber cartridge or a .38 caliber ratshot cartridge. Such testimony falls squarely within the expertise of a forensic pathologist.[82] We find this issue has no merit.

¶ 132. The second argument Pitchford advances concerning Dr. Hayne is that he should not have been allowed to testify at all because the State failed to show he was "qualified as an expert by knowledge, skill, experience, training, or education." Pitchford argues that Dr. Hayne's testimony should have been excluded because he incorrectly testified that he was "the state pathologist for the Department of Public Safety Medical Examiner's Office." Pitchford also argues, based on a newspaper article, that the number of autopsies performed each year by Dr. Hayne "established that the methods he employed were not in conformity with the accepted methods of the profession."

¶ 133. Pitchford made no objection to these concerns at trial, and so they are procedurally barred. And even if they weren't, this Court recently addressed a nearly identical argument in *Wilson v. State*[83] and stated:

> Wilson argues that the record reveals Dr. Hayne testified that his position was that of "Chief State Pathologist for the Department of

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[82] *See, e.g. Holland v. State,* 705 So.2d 307, 341 (Miss.1997) ("Thus, in Mississippi, a forensic pathologist may testify as to what produced the injuries in this case. . . .").

[83] 21 So.3d 572, 588–89 (Miss.2009).

> Public Safety" for the State of Mississippi. Wilson correctly points to the fact that there is no such position in Mississippi. According to Wilson, this fact coupled with the criticism Dr. Hayne has received from this Court, should lend itself under heightened-scrutiny review to a finding by this Court that Wilson's due process rights were violated by Dr. Hayne's testimony.
>
> . . .
>
> We agree with the State that Wilson cites no authority, other than newspaper articles, to support his proposition that we should set aside Wilson's death sentence merely because Dr. Hayne testified in this case. Thus, this Court is not duty-bound to discuss this issue based on a procedural bar. However, procedural bar notwithstanding, we look briefly to this issue.
>
> . . .
>
> . . . Taken to its logical end, Wilson's argument would mean that this Court should adopt a per se rule that testimony by Dr. Hayne in any case renders the verdict in that case invalid. This argument is simply untenable. Any new evidence that could be developed for the purpose of impeaching Dr. Hayne's findings should be presented in later post-conviction-relief proceedings.

¶ 134. We find no merit in Pitchford's challenge to Dr. Hayne's qualifications or his testimony in this case.

XI. JURY INSTRUCTIONS

¶ 135. Pitchford's eleventh assignment of error is that the trial court erroneously excluded several of his jury instructions and included several of the State's jury instructions. This Court has stated, "jury instructions are within the sound discretion of the trial court."[84]

¶ 136. Pitchford claims instructions D–9 and D–10—both of which were cautionary instructions concerning informant testimony—were erroneously excluded. We have discussed these instructions in Issue V *supra*.

¶ 137. Pitchford also complains that the trial court refused his proposed instruction, D–30. However, the record reveals that Pitchford's counsel withdrew the instruction. We will not hold the trial court in error for failing to give a withdrawn instruction.

¶ 138. Pitchford complains that the State's proposed instructions S–1, S–2A, and S–3—which were given to the jury as Instructions 2, 3, and 4—failed to give any guidance to the jury as to what it should do if it failed to find any of the requisite elements of capital murder and armed robbery beyond a reasonable doubt. Instructions 2 and 4 both clearly stated that the jury could not find Pitchford guilty if it did not find that he had committed every element of the crimes beyond a reasonable doubt. Instruction 3 also provided that, in order for the jury to find Pitchford guilty, it had to consider the evidence and find beyond a reasonable doubt that he had committed the elements of the crime of robbery. The instructions at issue clearly required the jury to find Pitchford guilty of each

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[84] *Rubenstein v. State,* 941 So.2d 735, 787 (Miss.2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001)).

element of the crime, beyond a reasonable doubt, so this assignment of error has no merit.

¶ 139. Pitchford next complains that the trial court improperly rejected his proposed instruction D–18, which is as follows:

> I instruct you that the law looks with suspicion and distrust on the testimony of an alleged accomplice. The law requires the jury to weigh the testimony of an alleged accomplice with great care and with caution and suspicion.

¶ 140. Jury Instruction 6, which was presented to the jury, is as follows:

> The Court instructs the jury that the law looks with suspicion and distrust on the testimony of an alleged accomplice or informant. The law requires the jury to weight the testimony of an alleged accomplice or informant with great care, caution and suspicion.

Pitchford complains that Instruction 6 included both accomplices and informants in the same instruction. While it is true that "[a] defendant is entitled to have his theory of the case presented in the jury instructions,"[85] the entitlement is limited. The court may refuse an instruction if it "is covered fairly elsewhere in the instructions."[86] The trial court was within its discretion in denying D–18 as being "fairly included elsewhere," so this assignment of error has no merit.

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[85] *Thorson v. State,* 895 So.2d 85, 107 (Miss. 2004) (citing *Heidel v. State,* 587 So.2d 835, 842 (Miss.1991)).

[86] *Id.*

¶ 141. Pitchford also complains that his instruction D–34 was improperly denied by the trial court. D–34, as proposed, is as follows:

> Each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

¶ 142. The trial court denied this instruction as repetitive, saying, "I think this is like the third time too that I have had this instruction . . . maybe not the exact wording, but it's very close to others that I've already looked at." The judge continued: "The S-instructions [sic] already telling them what they must prove. And unless the state has proved all those elements then, beyond a reasonable doubt, they can't convict on—based on other instructions already given."

¶ 143. Pitchford argues that the instruction was necessary because *Sandstrom v. Montana*[87] requires that the jury not "make more than one leap from what is proven beyond a reasonable doubt to what is inferred." However, the Supreme Court clearly laid out the issue in *Sandstrom*:

> The question presented is whether, in a case in which intent is an element of the crime charged, the jury instruction, "the law

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87 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

> presumes that a person intends the ordinary consequences of his voluntary acts," violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.[88]

¶ 144. Unlike the issue in *Sandstrom*, no legal presumptions operate against Pitchford. So *Sandstrom* is inapplicable and this assignment of error has no merit.

XII. MITIGATION–PHASE ARGUMENTS AND EVIDENCE

¶ 145. Pitchford's next assignment of error is that the trial court improperly disallowed mitigation evidence that would have allowed him to avoid the death penalty. Pitchford points to three instances.

Effect of Pitchford's death on his child

¶ 146. The defense attempted to solicit testimony from Dominique Hogan, the mother of Pitchford's two-year-old son, about the effect Pitchford's death would have on the child. The trial court sustained the State's objection to the evidence.

¶ 147. This Court has held that "[e]vidence of a criminal defendant's death and the effect it would have on the life of his family is not relevant and is properly excluded since such evidence does not impact on the defendant's character, the record, or the circumstances of the crime." [89] Pitchford cites

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[88] *Id.* at 512, 99 S.Ct. 2450.

[89] *Jordan v. State,* 786 So.2d 987, 1020 (Miss. 2001) (citing *Wilcher v. State,* 697 So.2d 1123, 1133–34 (Miss.1997)).

expansive language in *Tennard v. Dretke*[90] for the proposition that the exclusion of this testimony violated his rights under the Eighth Amendment. *Tennard* held "[a] State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death."[91]

¶ 148. However, as we held in *Jordan*, how the death of a defendant will impact others is simply not relevant as mitigating evidence, and nothing in *Tennard* contradicts this. This argument has no merit, and the trial judge committed no error by excluding this irrelevant testimony.

Videotape

¶ 149. Pitchford also wanted to produce a "day-in-the-life" video of himself and his son interacting. However, the jail where Pitchford was incarcerated awaiting trial refused to allow Pitchford to produce the video, as it was against jail policy. Pitchford filed an ex-parte, pretrial motion asking the Court to order the Sheriff to allow Pitchford to produce the video. The trial judge refused to grant the motion, stating at the hearing, "I'm not going to override the policy of the jail. If they want to voluntarily let you in and film that and then—I'd consider it at the appropriate time whether I would admit something like that . . . . But I'm not going to start micro-managing the jail and tell them how to they need to operate it."

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[90] 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)

[91] *Id.* at 285, 124 S.Ct. 2562 (citations omitted) (emphasis added).

¶ 150. Pitchford argues now that "it was reversible error for the trial court to prevent this evidence from being obtained." However, Pitchford cites no authority for the proposition that the trial judge was required to compel its production. Pitchford was advised by the court that if he was able to make such a video, it would rule on the admissibility of such evidence at the proper time. As Pitchford has presented no relevant authority in support of his argument, it is dismissed.[92]

Family's reaction to father's death

¶ 151. Pitchford's next argument is that the trial court erred by refusing to permit him to put into context the mitigation evidence about how he reacted to his father's illness and death. He wanted to introduce information about how the family unit as a whole reacted by eliciting testimony from his brother and mother. The proffered testimony from Pitchford's brother, which the trial court refused to allow, was as follows:

> Q: Okay. How old were you when your dad died?
>
> A: Ten years old.
>
> Q: What effect—how did it make you feel?
>
> A: I was just—I was lacking somebody in my life.
>
> STATE: Objection, Your Honor. Your Honor, that has nothing to do with what we are here for today. I have tried not to object but this trial is not on what sentence their father should get. It is on what sentence this defendant should

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92 *Brawner v. State,* 947 So.2d 254, 269 (Miss. 2006).

get. I would ask that any mitigation relate to this defendant and not something—

DEFENSE: It is going to relate, Your Honor. It is going to directly towards the defendant.

STATE: He also asked how this witness felt, which has absolutely nothing to do with the defendant.

THE COURT: I'll sustain.

¶ 152. The proposed testimony from Pitchford's mother, which the trial court refused to allow, was as follows:

Q: And you remember when Terry's father died; is that correct?

A: Yes.

Q: And how did that affect Terry? Before you answer that Miss Jackson, what kind of relationship did Terry and his dad have?

A: They had a real close relationship. Terry's a twin. And he had—it was the last twin, the kids that he had. His daddy was 57 years old, and he was so proud of those twin boys that he had had. He always said that there is nowhere in the world that I can go that I can't take my boys. And when he was diagnosed with kidney cancer, Dr. Armstrong sent him to Oxford, Mississippi. And he told me—

STATE: Your Honor, I object. What her and her husband—

DEFENSE: Your Honor—

STATE: —talked about is not relevant

DEFENSE: —mitigation—

> STATE: May I finish my objection, Your Honor? What her and her husband talked about is not relevant on mitigation for this defendant.
>
> . . .
>
> COURT: Well, I think you just at this point need to restate your question. And I mean—she was getting into an issue of how—what Dr. Armstrong said and how it affected her and Mr. Jackson.
>
> DEFENSE: Yes, sir. I understand that. I don't think I asked that.

¶ 153. Because the testimony did not relate to "defendant's character, the record, or the circumstances of the crime,"[93] the trial court properly excluded it.

XIII. PRESENTATION OF IMPROPER MATTERS TO JURY DURING PENALTY PHASE

¶ 154. Pitchford's next assignment of error is that the trial court erred by allowing improper evidence during the penalty phase of the trial. He points to three instances of purported error.

Victim-impact testimony

¶ 155. Pitchford's first argument is a general allegation, without a citation to the record, that the court permitted the jury to hear victim-impact testimony beyond the scope allowed by the law. *Payne v. Tennessee* abolished the per se rule against victim-impact testimony, subject to the limitation that "[i]n the event that evidence is introduced that is so unduly

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93 *Jordan,* 786 So.2d at 1020.

prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." [94] Pitchford also cites *Randall v. State* [95] for the proposition that members of the victim's family were permitted to give evidence about the decedent beyond that which "was relevant to the crime charged." After reviewing testimony of Nettie Britt (the decedent's wife) and Kim Lindley (his daughter), we find nothing to support Pitchford's argument.

Hearsay

¶ 156. During the course of her testimony, Nettie Britt was allowed, over objection by the defense,[96] to read a letter[97] written by her great-niece. Pitchford argues that this violated his Sixth Amendment right to confront a witness against him under *Crawford v. Washington*.[98]

¶ 157. The United States Supreme Court has not yet ruled on whether *Crawford* extends to the sentencing phase of a trial. While we are aware of federal authority that the Sixth Amendment does not apply

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[94] 501 U.S. 808, 825, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

[95] 806 So.2d 185, 225 (Miss.2001).

[96] MR. CARTER: Your Honor, I want to object to the reading of this letter. It essentially lets somebody else testify who is not even here. And based on that and based on the fact that I haven't even seen the letter, I don't know if anything is in there that is objectionable. . . .

[Mr. Carter was then allowed to read the letter]

[97] The letter contained an affectionate description of her memories of "Uncle Bubba" (Reuben Britt).

[98] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

at sentencing proceedings,[99] this Court's precedent holds otherwise.[100]

¶ 158. The Confrontation Clause of the Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[101] Article 3, Section 26 of the Mississippi Constitution also provides that, "In all

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[99] The Fifth Circuit concluded that the Sixth Amendment does not apply, even in capital cases. *U.S. v. Fields,* 483 F.3d 313, 324–339 (5th Cir.2007) ("we conclude that the Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority's selection decision"); *U.S. v. Mitchell,* 484 F.3d 762, 776 (5th Cir.2007) (citing *United States v. Navarro,* 169 F.3d 228, 236 (5th Cir.1999)) ("[T]here is no Confrontation Clause right at sentencing. . . .").

Other federal appellate courts considering this matter have reached the same conclusion. *See e.g., United States v. Stone,* 432 F.3d 651, 654 (6th Cir.2005) ("Because *Crawford* was concerned only with testimonial evidence introduced at trial, *Crawford* does not change our long-settled rule that the confrontation clause does not apply in sentencing proceedings"); *United States v. Luciano,* 414 F.3d 174, 178–80 (1st Cir.2005) ("Nothing in *Crawford* requires us to alter our previous conclusion that there is no Sixth Amendment Confrontation Clause right at sentencing."); *United States v. Martinez,* 413 F.3d 239, 242–43 (2d Cir.2005) ("[*Crawford*] provides no basis to question prior Supreme Court decisions that expressly approved the consideration of out-of-court statements at sentencing.").

[100] *See Lanier v. State,* 533 So.2d 473, 488 (Miss.1988) (state and federal constitutions guarantee a defendant the right to confront witnesses against him during the sentencing phase of a trial); *see also Wilson v. State,* 21 So.3d 572, 586–87 (Miss.2009).

[101] U.S. Const. amend. VI.

criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him."

¶ 159. In *Lanier*, the defendant was found guilty of capital murder.[102] During the sentencing phase, the trial court allowed the prosecution to cross-examine a defense witness with a letter written by two doctors from the Mississippi State Hospital at Whitfield.[103] The prosecutor was not impeaching the witness with the letter, but rather was using the letter to "suggest that others (more competent that the witness) disagreed with the witness' conclusion—for the purpose of disproving the witnesses conclusion."[104] The letter was neither entered into evidence nor discussed during the guilt phase of the trial.[105]

¶ 160. On appeal, Lanier alleged that the use of the letter was a violation of the Confrontation Clause of the Sixth Amendment.[106] This Court held "[t]he right of a criminal defendant . . . to cross examine the witnesses against him is at the heart of the confrontation clause."[107] The Court further held that

> the manner in which the State utilized the Whitfield letter afforded Lanier no opportunity to cross-examine the conclusions of the several doctors. The letter as previously noted was obviously violative of our hearsay rules. But, over and about the fact that the letter was in

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102 *Lanier,* 533 So.2d at 476.

103 *Id.* at 486.

104 *Id.* at 487.

105 *Id.*

106 *Id.*

107 *Id.* at 488.

> the present case was inadmissible hearsay, the confrontation clause acts so as to even restrict proof which under our evidence rules would be classified as 'admissible hearsay.'[108]

¶ 161. In this case, the trial court erred in allowing Nellie Britt to read the letter written by her great-niece. Just as in *Lanier*, Pitchford had no opportunity to cross-examine the author of the letter. However, after carefully reviewing the contents of the letter, in light of the totality of the evidence presented during the sentencing phase, we conclude that the error was harmless.

State arguments

¶ 162. Pitchford's third argument is that the trial court improperly allowed the State to make a statement. After the State had finished its case during the penalty phase, the following occurred as the defense attempted to make an opening statement:

> MR. CARTER: I want to make an opening before I do it. It should only take two or three minutes. It is perfectly fine for Mr. Evans to put his witness on the stand. I am not waiving mine.
>
> MR. EVANS: I am not waiving mine.
>
> MR. CARTER: I have a right to do it. It will only take me two or three minutes before I call a witness.

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[108] *Id.* (citing *Lafave* and *Israel, Criminal Procedure* § 23.3(d,877) (1985)).

MR. EVANS: I am not waiving anything. It is my understanding that nobody asked for an opening statement.

MR. CARTER: I am asking for one.

THE COURT: I'll give you two minutes.

MR. EVANS: I'd like to do mine when he gets through then, Your Honor.

MR. CARTER: You waived it.

MR. EVANS: No, I haven't. I wasn't given an opportunity.

. . .

THE COURT: If you give one, you are going to give it before he goes forward with his. After the defense gives an opening statement—well, I mean what I'm saying is procedurally the State goes first on opening statements. So if the defense wants to make an opening, then the State wants to. Then you can.

MR. CARTER: Let me just say for the record that we object to Mr. Evans at this point making an opening statement as he has already called witnesses and put on his case and did not make one. Now, he has a right to make a closing statement, just as I do. But he does not have a right to make an opening statement after he called all witnesses and rested.

THE COURT: Well, it's my opinion that, that when neither side asked for an opening statement when this Court proceeded, I considered that it was waived. I've never seen opening statements at this phase of the trial.

> MR. CARTER: I do them in every case, Your Honor.
>
> THE COURT: Well, I have never seen it.
>
> MR. EVANS: I've never seen it either.
>
> THE COURT: So I considered it waived. But in fairness to the prosecution, if the defense wishes to make one, then I think the prosecution has a right to make one.

¶ 163. Pitchford argues that this was error and an abuse of discretion, citing *McFadden v. Mississippi State Board of Medical Licensure*.[109] In *McFadden*, which involved an appeal from an administrative hearing, this Court stated:

> Dr. McFadden also suggests that because there were no opening arguments in this case this somehow contributed to the alleged denial of his due process rights. First, it should be noted Dr. McFadden made no contemporaneous objection to the Board's decision to waive opening statements. Second, opening statements are often waived in cases where there is already a general understanding of the issues to be addressed. Therefore, we conclude this argument is without merit.[110]

We find *McFadden* inapposite to this matter. As Pitchford has presented no relevant authority in support of his argument, it is dismissed.[111]

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109 735 So.2d 145, 160 (Miss.1999).

110 *Id.*

111 *Brawner v. State,* 947 So.2d 254, 269 (Miss.2006).

XIV. WHETHER THE SENTENCING PHASE INSTRUCTIONS WERE DEFICIENT.

¶ 164. Pitchford's fourteenth assignment of error is that Sentencing Instruction 1 did not expressly inform the jury that, even though it might find the aggravating factors outweighed the mitigating circumstances, it could nevertheless sentence him to life. He claims the trial court should not have refused his proposed instruction DS–7, which stated:

> You may find that death is not warranted even if there are one or more aggravating circumstances and not a single mitigating circumstance. You are not required to find any mitigating circumstances in order to return a sentence of life imprisonment. Nor does the finding of an aggravating circumstance, require that you return a sentence of death. You, as a juror, always have the option to sentence Pitchford to life imprisonment, whatever findings you may make.

¶ 165. As stated above, "jury instructions are within the sound discretion of the trial court."[112] On review, jury instructions should be read together, taken as a whole, and no one instruction should be taken out of context.[113] A defendant is entitled to have his theory of the case presented in the jury instructions.[114] But the entitlement is limited, and the court may refuse

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[112] *Rubenstein v. State,* 941 So.2d 735, 787 (Miss.2006) (citing *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001)).

[113] *Thorson,* 895 So.2d at 107 (citing *Heidel v. State,* 587 So.2d 835, 842 (Miss.1991)).

[114] *Id.*

an instruction if it "incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence."[115]

¶ 166. Sentencing Instruction 1 reads, in pertinent part:

> [T]o return the death penalty, you must find the mitigating circumstances—those which tend to warrant the less severe penalty of life imprisonment without parole—do not outweigh the aggravating circumstances—which tend to warrant the death penalty . . . . If none of the aggravating circumstances are found to exist, the death penalty may not be imposed . . . . If one or both of the . . . aggravating circumstances are found to exist beyond a reasonable doubt, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances . . . . If you find from the evidence that one or more of the . . . elements of mitigation exists, then you must consider whether it (or they) outweigh(s) or overcome(s) any aggravating circumstances you previously found. In the event that you find that the mitigating circumstance[s] do not outweigh or overcome the aggravating circumstance, you may impose the death sentence. Should you find the mitigating circumstance(s) outweigh or overcome the aggravating circumstances, you shall not impose the death sentence.

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115 *Id.*

¶ 167. The instruction does not require the jury to impose the death penalty, even should it find the aggravating factors outweighed the mitigating circumstances. The instruction merely informs the jury that, should it find "the mitigating circumstance[s] do not outweigh or overcome the aggravating circumstance, [it] may impose the death sentence." The trial court's use of the term "may"—while not the strongest language to make the point—was sufficient to convey to the jury that it was not required to impose the death penalty, even should it find the aggravating factors outweighed those submitted in mitigation.

¶ 168. Furthermore, this Court has specifically held, "a defendant is not entitled to an instruction that the jury may return a life sentence even if the aggravating circumstances outweigh the mitigating circumstances or if they do not find any mitigating circumstances."[116] Based on the trial court's instruction and our precedent, we find this argument has no merit.

¶ 169. Pitchford also asserts that the trial court erred in failing to give four of his proposed sentencing instructions, which are as follows:

> DS–8: The Court instructs you, the jury, that if you cannot, within a reasonable amount of time, agree as to punishment, the Court will dismiss you and impose a sentence of

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[116] *King v. State,* 960 So.2d 413, 442 (Miss. 2007) (citing *Holland v. State,* 705 So.2d 307, 354 (Miss.1997), *Hansen v. State,* 592 So.2d 114, 150 (Miss.1991), *Goodin v. State,* 787 So.2d 639, 657 (Miss.2001), *Foster v. State,* 639 So.2d 1263, 1301 (Miss.1994)).

> imprisonment for life without the benefit of parole.
>
> DS–13: I have previously read to you the aggravating circumstances which the law permits you to consider. These are the only aggravating circumstances you may consider. However before you may consider any of these factors you must find that factor is established by evidence beyond a reasonable doubt.
>
> DS–15: If you the Jury chooses [sic] to sentence Mr. Pitchford to life imprisonment without the possibility of parole, Mr. Pitchford will never be eligible for parole. Further, his life sentence without possibility of probation or parole cannot be reduced or suspended.

¶ 170. The Supreme Court of the United States has said, "as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement."[117] The Court also pointed out that:

> while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to

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[117] *Kansas v. Marsh,* 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

> impermissibly, much less automatically, impose death.[118]

¶ 171. Pitchford correctly argues that DS–8 complies with the letter of Mississippi Code Section 99–19–103.[119] Still, the trial court was within its discretion to deny the instruction, reasoning, "[t]his would indicate to the jury that a certain deadline was going to be set for them and after that they couldn't—that the case would be taken away from them." We will not hold the trial court in error for refusing the instruction.

¶ 172. The trial court refused DS–13 as cumulative, stating,

> [The jury] has already been instructed that they are cautioned not to be swayed by, among other things, prejudice . . . . [The jury instruction] also tells them what factors they have to use. And so I don't think they need to be told what factors they don't have to use since they have already been told which factors they do have to use.

¶ 173. The trial court was within its discretion to deny DS–13 as "covered fairly elsewhere" under *Thorson*.[120]

¶ 174. As to DS–15, the trial court held: "S–1A already tells them that it's either life without parole or death penalty. So [the jury] is aware of that. And I don't see that DS–15 needs to be given. It's already been, been given once." Pitchford nevertheless argues that, without a more specific instruction, the jury was

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118 *Id.*

119 *See* Miss.Code Ann. § 99–19–103 (Rev. 2007).

120 895 So.2d at 107.

left to speculate as to whether he actually would be sentenced to spend the remainder of his natural life behind bars.

¶ 175. This Court has said a trial court's "failure to include the statutorily required sentencing option of life without the possibility of parole constitutes reversible error."[121] Here, however, the trial court clearly included an instruction that Pitchford could be sentenced to "life imprisonment without parole." Thus, we find the trial court was within its discretion to deny DS–15, as it was "fairly covered elsewhere" under *Thorson*.

¶ 176. Pitchford complains that two critical instructions—one regarding a verdict of life without parole, and the other concerning what the jury was to do in the event it was unable to agree unanimously on a sentence—were on a separate page from the instructions concerning a possible death sentence. He claims this possibly suggested to the jury that death was the preferred sentence.

¶ 177. The trial court, responding to this argument, evaluated the form of the instructions and found that, "[i]t is not in the least bit suggestive they are to do one over the other." We agree, and find no merit to this argument.

¶ 178. Finally, Pitchford argues that the trial court erred in failing to allow the mitigating factor—"Mr. Pitchford had mental health problems as a child that were never treated"—to be considered by the jury. When presented with this argument, the trial court stated, "The fact is we don't have any doctor that has

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121 *Rubenstein,* 941 So.2d at 793 (emphasis added).

testified to that. We don't have anything in the record that at all supports that Pitchford had any mental health problems."

¶ 179. We will not hold the trial court in error for refusing to submit a mitigating factor to the jury which was not grounded in the evidence. Thus, this issue has no merit.

XV. WHETHER THE DEATH PENALTY VIOLATES THE CONSTITUTION OF THE UNITED STATES.

¶ 180. Pitchford next argues that his death sentence must be vacated because it violates the Constitution of the United States.

Baze v. Rees

¶ 181. Pitchford first argues that his execution by lethal injection would be in violation of the Eighth Amendment prohibition against cruel and unusual punishment, based on *Baze v. Rees*.[122] This argument repeatedly has been rejected by this Court. As we recently stated in *Goff v. State*:

> On April 16, 2008, the United States Supreme Court decided *Baze v. Rees*, upholding the State of Kentucky's lethal-injection protocol as not being violative of the Eighth Amendment. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). In so doing, Chief Justice Roberts's plurality opinion announced the standard which we must use to determine whether our method of execution violates the Eighth Amendment. *Id.* The Supreme Court's

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[122] 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008).

plurality found that cruel and unusual punishment occurs where lethal injection as an execution method presents a "substantial" or "objectively intolerable risk of serious harm" in light of "feasible, readily implemented" alternative procedures. *Id.* at 1531, 1532. However, the analysis was focused on the manner of lethal injection, and did not question the validity of lethal injection or the constitutionality of the death penalty as such. *Id.* at 1537. The *Baze* Court held: Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States . . . [which] if administered as intended . . . will result in a painless death. The risks of maladministration . . . such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel—cannot be remotely characterized as "objectively intolerable." Kentucky's decision to adhere to its protocol despite these asserted risks, while adopting safeguards to protect against them, cannot be viewed as probative of the wanton infliction of pain under the Eighth Amendment. *Baze*, 128 S.Ct. at 1537.

For "the disposition of other cases uncertain," Justice Roberts clearly stated that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets [the 'substantial risk'] standard." *Id.* at 1537 (emphasis added).

If differences exist between Mississippi's execution protocols and those used in

> Kentucky, then, the inquiry is whether Mississippi's lethal-injection protocol meets Constitutional muster in light of this recent Supreme Court decision. The Fifth Circuit, when considering inmate Dale Leo Bishop's Eighth–Amendment challenge to Mississippi's lethal-injection procedures, recently announced that "Mississippi's lethal injection protocol appears to be substantially similar to Kentucky's protocol that was examined in *Baze*." *Walker v. Epps*, 287 Fed.Appx. 371, 376 (5th Cir.2008). We agree with the Fifth Circuit's analysis, and hold that Bennett's Eighth Amendment challenge to the lethal injection protocol in Mississippi is without merit.[123]

¶ 182. Based on our reasoning in *Goff*, we hold this argument has no merit.

Failure to Include Aggravating Circumstances in Indictment

¶ 183. The indictment against Pitchford stated that

> on or about the 7th day of November 2004, in Grenada County, Mississippi 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, without authority of law and with or without the deliberate design to effect death, kill and murder Reuben Britt, a human being, while engaged in the felony crime

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[123] *Goff v. State,* 14 So.3d 625, 665–66 (Miss. 2009) (quoting *Bennett v. State,* 990 So.2d 155, 160–61 (Miss.2008)).

> of ARMED ROBBERY, as set forth in section 97–3–79 of MISS. CODE ANN. and in violation of section 97–3–19(2)(e) MISS. CODE ANN. as amended, and against the peace and dignity of the State of Mississippi.

¶ 184. Relying on *Apprendi v. New Jersey*[124] and *Ring v. Arizona*, [125] Pitchford argues that the indictment failed to charge all elements necessary to impose the death penalty. This Court repeatedly has held that "these cases have no application to Mississippi's capital murder sentencing scheme."[126] As this Court recently stated:

> This Court repeatedly has rejected this type of argument. We have held that *Apprendi* and *Ring* address issues wholly distinct from the present one, and in fact do not address indictments at all. The purpose of an indictment is to furnish the defendant with notice and a reasonable description of the charges against him so that he may prepare his defense. An indictment is required only to have a clear and concise statement of the elements of the crime with which the defendant is charged.
>
> Under Mississippi law, the underlying felony that elevates the crime to capital murder must be identified in the indictment along with the section and subsection of the statute under which the defendant is being charged. In addition, "[o]ur death penalty statute clearly

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124 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

125 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

126 *Hodges v. State,* 912 So.2d 730, 775 (Miss. 2005).

> states the only aggravating circumstances which may be relied upon by the prosecution in seeking the ultimate punishment."
>
> When Goff was charged with capital murder, he was put on notice that the death penalty might result, what aggravating factors might be used, and the mens rea standard that was required.[127]

¶ 185. Pitchford argues this Court's previous holdings are clearly erroneous in light of *Kansas v. Marsh*[128] because, according to Pitchford:

> [O]n 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.

¶ 186. We find *Marsh* doesn't apply and this argument has no merit.

Dual use of robbery as capitalizer and aggravator

¶ 187. Pitchford next urges this Court to revisit its prior holdings allowing the use of an underlying felony to both elevate the crime to capital murder and to act as an aggravating circumstance. [129] After reviewing the matter, we find no compelling reason to

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127 *Goff,* 14 So.3d at 665 (citations omitted)

128 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

129 *See e.g. Ross v. State,* 954 So.2d 968, 1014 (Miss.2007) ("The use of the underlying felony as an aggravator was not error.").

reverse our position on this matter and, thus, we decline to do so.

Enmund** And **Tison

¶ 188. Pitchford's final assignment of error on this issue is that the verdict returned against him violates the holding in *Enmund v. Florida*[130] and *Tison v. Arizona*.[131] These cases hold that the death penalty may not be imposed on a defendant who aids and abets, but who did not commit the murder, unless the defendant attempted to commit the murder, intended that the murder take place, or understood that lethal force would, or might, be used in the commission of the underlying felony.

¶ 189. The jury unanimously found that Pitchford actually killed Reuben Britt, attempted to kill Reuben Britt, intended the killing of Reuben Britt, and contemplated that lethal force would be employed. Pitchford argues that the testimony showing he personally killed, attempted to kill, or intended to kill Reuben Britt was admitted in error, namely the testimony discussed in Issues V and IX, *supra*. As previously discussed, however, we found no error with respect to those issues and so this argument has no merit.

XVI. WHETHER THE DEATH SENTENCE IN THIS CASE IS CONSTITUTIONALLY OR STATUTORILY DISPROPORTIONATE.

¶ 190. This Court is required by statute to perform a proportionality review when reviewing the

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130 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

131 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

imposition of a death sentence. Mississippi Code Section 99–19–105(3) states:

> (3) With regard to the sentence, the court shall determine:
>
> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 99–19–101;
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant . . . .[132]

¶ 191. Pitchford submits neither argument nor evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. After reviewing the record in this appeal, we cannot say the record establishes that Pitchford's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.[133]

¶ 192. Furthermore, we find there was sufficient evidence to support the jury's finding of the statutory aggravating circumstance enumerated by Mississippi Code Section 99–19–101(d) ("The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to

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132 Miss.Code Ann. § 99–19–105(3) (Rev. 2007).

133 *See* Miss.Code Ann. § 99–19–105(3)(a) (Rev.2007).

commit, or flight after committing or attempting to commit, any robbery . . .").

¶ 193. Pitchford argues that the death penalty would be disproportionate in this case. He argues that, under the evidence to support 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." He also argues that the death penalty would be disproportionate in this case because Pitchford's accomplice, Eric Bullins, who was sixteen years old at the time of the crime, accepted a plea of manslaughter and is serving a sentence of forty years.

¶ 194. Taking at face value Pitchford's claim that he fired the .38 weapon loaded with rat shot at Reuben Britt only after Bullins fired the "lethal" shots from the .22 weapon, we nevertheless find Pitchford's argument without merit. After comparing the facts of this case with factually similar cases in which the death penalty has been imposed, we find the death sentence in this case is neither excessive nor disproportionate. This Court has upheld the sentence of death for murder committed in the course of a robbery.[134] In *Bishop v. State*,[135] this Court found:

> The record shows that, after Gentry had been hit in the head with the hammer for the first

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[134] *See, e.g., Doss v. State,* 709 So.2d 369, 401 (Miss.1996) (holding conviction and sentence appropriate where a grocery store clerk was shot and killed during the course of a robbery); *Cabello v. State,* 471 So.2d 332, 350 (Miss.1985).

[135] 812 So.2d 934 (Miss.2002).

> time, Bishop chased after him and brought him back. When Bishop saw Gentry hit with the hammer he knew deadly force was being used. When he ran Gentry down and held Gentry as he was being struck by Jessie, he became more of a principal in the crime. A jury could have easily found that Bishop killed, intended to kill, or at least contemplated that deadly force would be used. This case is not like a robbery where someone is killed on impulse. Bishop took an active role in the killing.[136]

¶ 195. This Court further found that Bishop's involvement was enough to justify the death penalty, even if the actual killer did not receive it.[137] Similarly, even accepting as true Pitchford's version of the robbery, he took an active role in the killing when he shot Reuben Britt with the .38 pistol. Bullins's successful plea negotiation does not make the death penalty in this case constitutionally or statutorily disproportionate.

XVII. WHETHER THE CUMULATIVE EFFECT OF THE ERRORS OF THE TRIAL COURT MANDATES REVERSAL.

¶ 196. Pitchford argues that the cumulative effect of errors mandates reversal. This Court may reverse a conviction and/or sentence based upon the cumulative effect of errors that independently would not require reversal.[138] After a thorough review of the record and

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136 *Id.* at 948–49.

137 *Id.*

138 *Jenkins v. State,* 607 So.2d 1171, 1183–84 (Miss.1992); *Hansen v. State,* 592 So.2d 114, 153 (Miss.1991).

briefs, we do not find the cumulative effect of the individual errors denied Pitchford a fundamentally fair trial, so this issue has no merit.

CONCLUSION

¶ 197. We affirm the conviction and sentence in this case.

¶ 198. **CONVICTION OF CAPITAL MURDER AND SENTENCE OF DEATH BY LETHAL INJECTION, AFFIRMED.**

WALLER, C.J., CARLSON, P.J., RANDOLPH, LAMAR, CHANDLER AND PIERCE, JJ., CONCUR. GRAVES, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, J.

GRAVES, Presiding Justice, Dissenting:

¶ 199. "[V]oir dire [often] has become an exercise in finding race-neutral reasons to justify racially motivated strikes. As Justice Marshall predicted, '[m]erely allowing defendants the opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.' " *Howell v. State*, 860 So.2d 704, 766 (Miss.2003) (Graves, J., dissenting) (quoting *Batson v. Kentucky*, 476 U.S. 79, 105, 106 S.Ct. 1712, 1727, 90 L.Ed.2d 69 (1986) (Marshall, J., concurring)). In the instant case, peremptory challenges were used to exclude African–Americans from the jury. Therefore, I disagree with the majority's finding that the State did not discriminate on the basis of race during jury selection. Because I would reverse the trial court pursuant to *Batson*, I respectfully dissent.

¶ 200. Under *Batson*, a party who objects to a peremptory strike must establish a prima facie case of purposeful discrimination as follows:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group . . . and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." . . . Finally, the defendant must show that these facts and any other relevant

> circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Batson, 476 U.S. at 96, 106 S.Ct. 1712 (citations omitted). However, as this Court has acknowledged, this test was somewhat modified by the U.S. Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

> In that case the Supreme Court held that Powers, a white, had standing to challenge the exclusion of black jurors on the grounds that the equal protection right of the juror to serve was protected by *Batson*. *Powers*, 499 U.S. at 406, 111 S.Ct. 1364. Essentially, this means that step three above becomes the pivotal inquiry to determine a prima facie case, as this Court recognized in *Davis v. State*, 660 So.2d 1228, 1240 (Miss.1995), cert. denied, 517 U.S. 1192, 116 S.Ct. 1684, 134 L.Ed.2d 785 (1996). Specifically, the pivotal question is whether the opponent of the strike has met the burden of showing that proponent has engaged in a pattern of strikes based on race or gender, or in other words "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Batson*, 476 U.S. at 94, 106 S.Ct. 1712.

Randall v. State, 716 So.2d 584, 587 (Miss.1998). Pursuant to the third step, "[t]his Court has examined the number of strikes on a particular class, the ultimate ethnic or gender makeup of the jury, the nature of questions asked during the voir dire, and the

overall demeanor of the attorney." *Id.* (citing *Coleman v. State*, 697 So.2d 777, 786 (Miss.1997); *Davis*, 660 So.2d at 1263 (Banks, J., concurring); *Mack v. State*, 650 So.2d 1289, 1299 (Miss.1994), *cert. denied*, 516 U.S. 880, 116 S.Ct. 214, 133 L.Ed.2d 146 (1995)). "Additionally, '[t]he [opponent of the strike] may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate.' " *Id.* (citing *Batson*, 476 U.S. at 80, 106 S.Ct. at 1714).

¶ 201. Once the defendant has established a prima facie case of discrimination, the burden shifts to the State to provide a race-neutral reason for each strike. *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. The trial court then makes a determination of whether the defendant has established purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712. The Fifth Circuit Court of Appeals has explained this portion of the test as follows:

> The "shifting burden" described in the *Batson* framework is one of production only. The ultimate burden of persuasion always lies with the party making the claim of purposeful discrimination. At the second stage of the *Batson* framework where the party accused of discrimination must articulate a race-neutral explanation for the peremptory challenges—the issue is merely the facial validity of the explanation. "Unless a discriminatory intent is inherent in the . . . explanation, the reason offered will be deemed race neutral."

U.S. v. Bentley–Smith, 2 F.3d 1368, 1373 (5th Cir.1993) (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S.Ct. 1859, 114 L.Ed.2d 395, 396 (1991)).

With regard to the third stage of the *Batson* framework, where the trial court must determine whether the defendant has established purposeful discrimination, the Fifth Circuit said:

> In a typical peremptory challenge inquiry, the decisive question will normally be whether a proffered race-neutral explanation should be believed. *See United States v. Johnson*, 941 F.2d 1102, 1108 (10th Cir.1991). There will seldom be any evidence that the claimant can introduce—beyond arguing that the explanations are not believable or pointing out that similar claims can be made about non-excluded jurors who are not minorities.

Bentley–Smith, 2 F.3d at 1373–74.

¶ 202. This Court has held that, in reviewing a *Batson* claim, we will not overrule a trial court unless the record indicates the decision was clearly erroneous or contrary to the overwhelming weight of the evidence. *Flowers v. State*, 947 So.2d 910, 917 (Miss.2007). *See also Thorson v. State*, 721 So.2d 590, 593 (Miss.1998).

¶ 203. This Court has specified five indicia of pretext for use in analyzing a proffered race-neutral reason for peremptory strikes:

> (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 to 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) (citations omitted).

¶ 204. In the instant case, Pitchford objected as follows:

> We would object on the grounds of *Batson v. 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.

¶ 205. The State used four of seven peremptory strikes against African–Americans on the venire. Thus, only one African–American out of fourteen jurors, including alternates, was seated on Pitchford's jury in Grenada County. Based on this, the trial court correctly found that Pitchford had established a prima facie case for racial discrimination and required the State to provide race-neutral reasons for the strikes.[139] The State then offered these reasons:

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[139] Since the prosecutor offered an explanation for the peremptory challenges and the trial court ruled on the ultimate question of intentional discrimination, the issue of whether Pitchford made a prima facie showing of discrimination is moot. *Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395, 396 (1991) (citing *United States Postal Serv. Bd. of*

MR. EVANS (District Attorney): 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

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Governors v. Aikens, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983)).

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 phases. 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.

¶ 206. When the jury was seated, counsel for Pitchford renewed the *Batson* objection and stated:

MS. STEINER [defense counsel]: 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 [defense counsel]: 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.

¶ 207. On appeal, Pitchford asserts that the State's race-neutral reasons are pretextual for each of the four African–American jurors who were struck. Further, Pitchford asserts that the State accepted white venire members who shared the characteristics of the jurors who were struck.

Linda Ruth Lee

¶ 208. The State said that Lee was struck because she was fifteen minutes late, "has mental problems," and police had made numerous calls to her house, according to Police Captain Carver Conley. However, Conley was not called to testify. Further, the State did not introduce any evidence to prove the claims of her having "mental problems" or of police having numerous calls to her house. The State also failed to define "mental problems" as it pertains to Lee's alleged inability to serve as a juror. With regard to Lee being fifteen minutes late, the record establishes that several jurors were late returning from lunch during voir dire. The trial court inquired why Lee was the last of the late jurors to return and she indicated that she had to walk to the courthouse. During the challenges for cause, the State tried unsuccessfully to get the trial court to strike Lee for cause for being fifteen minutes late. In denying the State's request, the trial court said:

> 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.

¶ 209. There is nothing in the record to support the State's proffered race-neutral reasons for striking Lee. Further, the trial court specifically found that Lee being fifteen minutes late returning to the courthouse in what was apparently inclement weather was an insufficient reason to strike her. The characteristics cited are unrelated to the facts of the case. The majority states, "[t]hat a juror 'obviously has mental problems' was clearly a race neutral reason." (Maj. Op. at ¶ 23). I note that these alleged "mental problems" were not sufficiently obvious to compel the trial court to strike Lee for cause. The State never brought up any "mental problems" or police calls prior to or during voir dire. The State did not individually voir dire Lee or ask any specific questions related to these reasons. The State also did not disclose any of this information obtained outside of the voir dire process prior to the *Batson* hearing. In *Mack v. State*, 650 So.2d 1289, 1299 (Miss.1994), this Court indicated that the prosecutor may not withhold such information. "That is not to say, however, that the prosecutor may, with impunity, withhold information concerning a prospective juror which impacts upon the juror's ability to be fair and impartial." *Id.* This Court also said:

> The failure to *voir dire* usually comes in to [sic] play when the prosecutor expresses some suspicion or uncertainty about the true situation involving the juror, such as when he "believes" that the juror is related to a criminal, or has been involved in some activities which might engender a negative attitude toward the defendant. This factor is closely related to the lack of an evidentiary basis. Here, the fact that

> Mitchell was unemployed was reflected in the jury questionnaire. The prosecutor was not acting on a mere suspicion. Still, voir dire on this issue may have revealed an explanation for this status which would not have been consistent with assumptions regarding the stability and community values of the unemployed. The failure to conduct voir dire must weigh against the State in an evaluation of the bona fides of the proffered reason.

Mack, 650 So.2d at 1298.

¶ 210. Because Pitchford has met the burden of establishing pretext based on the indicia set out previously herein, I would find that the trial judge's acceptance of the State's race-neutral reason for striking Lee is clearly erroneous. Further, as stated by the majority, the U.S. Supreme Court reiterated in *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), that the Constitution prohibits striking even a single juror for a discriminatory purpose. Therefore, Pitchford's conviction should be reversed and remanded for a new trial. Nevertheless, I will briefly discuss the remaining jurors.

Christopher Lamont Tillmon

¶ 211. The State said that Tillmon was struck because he said on his jury questionnaire that he had a brother who had been convicted of manslaughter. While this is an acceptable race-neutral reason, the questionnaire also indicated that Tillmon is an employed college graduate who previously worked for a correctional facility, and who strongly favored the death penalty. Further, the record indicates that the State did not voir dire Tillmon on this reason. Also,

white venire members with family members who had felony, albeit nonhomicide, convictions were accepted by the State.

Patricia Anne Tidwell

¶ 212. The State said that Patricia Anne Tidwell was struck because her brother was convicted of sexual battery and was charged in a shooting case. The State also said that Tidwell is a known drug user. While Tidwell's questionnaire did indicate her brother had been convicted of sexual battery, the State offered no evidence of Tidwell's brother being charged in a shooting case or of Tidwell being a known drug user. The record indicates that the State did not individually voir dire Tidwell or ask any specific questions regarding any of these reasons. The record also indicates that white venire members with family members who had been convicted of crimes were not challenged.

Carlos Ward

¶ 213. The State said that Carlos Ward was struck because he had no opinion on the death penalty, had a two-year-old child, had never been married, and had numerous speeding violations. Specifically, the State said that Ward was "too closely related to the defendant" because of shared characteristics. However, the record indicates that the State accepted numerous white venire members sharing the characteristics given as the basis for the challenge. The record also indicates that the State did not individually voir dire Ward on any of the proffered reasons. With regard to his opinion on the death penalty, Ward did not indicate during voir dire that he had any issue with it, but merely circled no opinion,

which was the middle of five choices on the jury questionnaire The jury questionnaire specifically excludes traffic violations, and the State introduced no evidence of any speeding violations. There is also nothing in the record to establish that the State sought information regarding traffic violations on other jurors. Further, Ward indicated he was employed and had finished two years of college at the time he completed the questionnaire.

¶ 214. Although the record before this Court establishes that the trial court's decision accepting the State's race-neutral reasons for excluding African–Americans from the jury was clearly erroneous, the majority states that it "cannot say the trial judge abused his discretion" with regard to each juror. (Maj. Op. at ¶¶ 21, 23, 25, 27). Rather than address the merits of this issue, the majority discusses moot aspects of the issue, as stated previously herein, and then cites various cases for the erroneous proposition that Pitchford somehow waived his *Batson* objection by not rebutting the State's proffered race-neutral reasons.

¶ 215. The majority finds that "[a]lthough the appellant devoted a considerable portion of his brief and oral argument before this Court to his pretext argument, he did not present these arguments to the trial court during the voir dire process or during post-trial motions." (Maj. Op. at ¶ 28). Further, the majority finds since the "appellant provided the trial court no rebuttal to the state's race-neutral reasons" that "[w]e will not now fault the trial judge with failing to discern whether the state's race-neutral reasons were overcome by rebuttal evidence and argument never presented." (Maj. Op. at ¶ 30).

Finally, the majority dismisses Pitchford's argument regarding the totality of the facts as an "attempt to present his pretext argument in another package" and finds that Pitchford "failed to provide any argument concerning pretext during the *Batson* hearing." I disagree for several reasons.

¶ 216. Black's Law Dictionary defines pretext as: "Ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense . . . ." *Black's Law Dictionary* 1187 (6th ed.1990). Based on the very definition of pretext, Pitchford made a pretext argument by virtue of his *Batson* objection. When Pitchford attempted to reassert his objection, the trial court correctly found that the objection was already on the record.

¶ 217. To reiterate, "[o]nce the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson*, 476 U.S. at 97, 106 S.Ct. 1712. "The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.* at 98, 106 S.Ct. 1712. In other words, once Pitchford made a prima facie showing, the burden shifted to the State to rebut the prima facie showing with a race-neutral explanation as to each juror. *Id.* at 97–98, 106 S.Ct. 1712. Pitchford may rebut the State's evidence, but there is no requirement under *Batson* that Pitchford must then rebut the rebuttal before the trial court. Pursuant to *Batson*, once the State offered race-neutral reasons to rebut the prima facie showing, the trial court then made a determination that Pitchford had not established

purposeful discrimination. This Court is reviewing the trial court's decision to determine whether it is clearly erroneous or contrary to the overwhelming weight of the evidence. *Flowers v. State*, 947 So.2d 910, 917 (Miss.2007).

¶ 218. I do not dispute the language in the cases cited by the majority regarding the basis for the trial court's decision. However, the suggestion that this Court cannot review the trial court's decision under the totality of the relevant facts is contrary to the applicable law. An analysis of the cases cited by the majority for the waiver proposition is illuminating. The majority quotes *Manning v. State*, 735 So.2d 323, 339 (Miss.1999), for the following: "It is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver." (Maj. Op. at ¶ 29 n. 16). *Manning* cites *Mack v. State*, 650 So.2d 1289, 1297 (Miss.1994), which cites *Whitsey v. State*, 796 S.W.2d 707 (Tex.Crim.App.1989), for this proposition. However, *Whitsey*, which is not binding authority on this Court, makes no such finding.

¶ 219. The trial and hearing on the motion for new trial in *Whitsey* occurred prior to the *Batson* decision. *Whitsey*, 796 S.W.2d at 710. Following the *Batson* decision, the Texas Fourteenth Court of Appeals remanded for a *Batson* hearing. The trial court found that the defendant did not rebut the State's explanations, did not prove by a preponderance of evidence that the State had engaged in purposeful discrimination, and was not denied the equal protection of the law by the prosecutor's use of his peremptory challenges. *Id.* at 712. The Fourteenth Court of Appeals affirmed. *Id.* On appeal, the Court of

Criminal Appeals of Texas reversed, finding that the defendant had established that the prosecutor had exercised peremptory challenges based solely on race and that the defendant had been denied due process in the jury selection process. *Whitsey*, 796 S.W.2d at 716.

¶ 220. In the instant case, the majority also cites *Woodward v. State*, 726 So.2d 524, 533 (Miss.1997), for the following: "In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point." (See Maj. Op. at ¶ 29 n. 16). *Woodward* is quoting *Sudduth v. State*, 562 So.2d 67, 71 (Miss.1990), which cites *Davis v. State*, 551 So.2d 165, 172 (Miss.1989), for this holding. However, *Davis* is relying on the inapplicable, pre-*Batson* cases of *Jones v. State*, 306 So.2d 57, 58 (Miss.1975), and *Pennington v. State*, 437 So.2d 37, 39 (Miss.1983). Both *Jones* and *Pennington* involved issues regarding a trial court's refusal to permit the appellant to make an offer of proof to preserve testimony. *Jones*, 306 So.2d at 58; *Pennington*, 437 So.2d at 39. *Woodward* also cites *Bush v. State*, 585 So.2d 1262, 1268 (Miss.1991), which says the defendant "is allowed to rebut the reasons" offered by the State. *Bush*, 585 So.2d at 1268.

¶ 221. Pitchford preserved the issue for appeal by making a *Batson* objection. The trial court properly found that he had established a prima facie case and required the State to provide race-neutral reasons. The trial court then made its determination, and Pitchford appeals that determination. Pitchford is not attempting to present an issue that was not first presented to the trial court. The majority cites no authority to establish that Pitchford should be

precluded from relying on evidence contained in the record and presented to the trial court during voir dire, as opposed to extraneous evidence. Therefore, Pitchford has not waived this issue.

¶ 222. Further, an issue concerning a defendant's right to a fair trial and a prospective juror's right not to be excluded on account of race cannot be ignored pursuant to a procedural bar. The United States Supreme Court has recognized the significance of this issue. In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the Court said:

> We hold that the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.

Id. at 409, 111 S.Ct. 1364. The Court further said: "The jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors. *Batson*, 476 U.S. at 86, 106 S.Ct. at 1717. The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee." *Id.* at 411, 111 S.Ct. 1364. "Both the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom." *Id.* at 413, 111 S.Ct. 1364.

> The statutory prohibition on discrimination in the selection of jurors, 18 U.S.C. § 243, enacted pursuant to the Fourteenth Amendment's Enabling Clause, makes race neutrality in jury selection a visible, and inevitable, measure of the judicial system's own commitment to the commands of the Constitution. The courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in that prohibition.

Id. at 416, 111 S.Ct. 1364.

¶ 223. For the reasons stated herein, I would find that the trial court's decision was clearly erroneous. Because I would reverse the trial court pursuant to *Batson*, I respectfully dissent.

KITCHENS, J., JOINS THIS OPINION.

APPENDIX

DEATH CASES AFFIRMED BY THIS COURT

Goff v. State, 14 So.3d 625 (Miss.2009).

Wilson v. State, 21 So.3d 572 (Miss.2009).

Chamberlin v. State, 989 So.2d 320 (Miss.2008).

Loden v. State, 971 So.2d 548 (Miss.2007).

King v. State, 960 So.2d 413 (Miss.2007).

Bennett v. State, 933 So.2d 930 (Miss.2006).

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* Case was originally affirmed in this Court but on remand from U.S. Supreme Court, case was remanded by this Court for a new sentencing hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI
GREENVILLE DIVISION

TERRY PITCHFORD,
PETITIONER

v.

BURL CAIN, MDOC Commissioner; and LYNN FITCH, Attorney General for the state of Mississippi,
RESPONDENTS

No. 4:18-CV-000002-MPM

Filed: 12/12/23

MEMORANDUM OPINION AND ORDER

Petitioner Terry Pitchford, a state inmate under sentence of death, seeks habeas corpus relief under 28 U.S.C. § 2254. After filing his amended federal habeas petition, Pitchford moved for partial summary judgment as to his *Batson* [1] claim. In turn, Respondents moved for cross-summary judgment. [2]

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[1] *See Batson v. Kentucky*, 476 U.S. 79 (1986).

[2] Respondents filed their motion for cross-summary judgment in the same document as their response to Petitioner's motion for partial summary judgment. *See* Doc. # 211. The Local Rules, however, provide that "[a] response to a motion may not include a counter-motion in the same document. Any motion must be an item docketed separately from a response." L.U. Civ. R. 7(b)(3)(C). The Court will overlook this procedural defect this

The parties have filed their respective responses and replies, and the matter is now ripe for resolution. Having reviewed the submissions and arguments of the parties, as well as the applicable authority, the Court finds that Pitchford's motion should be granted and, consequently, that his petition for a writ of habeas corpus should be granted *as to this claim*.

Relevant Factual and Procedural Background

On the morning of November 7, 2004, Pitchford and a friend, Eric Bullins, went to the Crossroads Grocery store with the intention of robbery. *Pitchford v. State*, 45 So. 3d 216, 222 (Miss. 2010). The intended robbery, however, resulted in the murder of store owner Reuben Britt. *Id.* Bullins, Pitchford's accomplice, shot Britt three times with a .22 caliber pistol, while Pitchford fired shots into the floor. *Id.*

On January 11, 2005, a grand jury in Grenada County, Mississippi, indicted nineteen-year-old Pitchford for capital murder, and the case proceeded to trial with jury selection beginning on February 6, 2006. *Id.* at 223. At the start of voir dire, the jury pool included 126 individuals: forty (40) black, eighty-four (84) white, one Hispanic, and one who did not provide race information. *Id.* The trial judge began by excusing certain jurors for statutory cause and other reasons unrelated to the case, without objection from either party. *Id.*

This left a panel of ninety-six (96), with thirty-five (35) black and sixty-one (61) white members. *Id.* Following voir dire by the attorneys, the trial judge,

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time for purposes of efficiency, but the parties are advised to follow the Local Rules going forward.

again without objection from either party, struck fifty-two (52) prospective jurors for cause and three others for undisclosed reasons, leaving a total of forty-one (41) venire members, of which thirty-six (36) were white and five were black. *Id.* Of note, thirty (30) black venire members were excused for cause primarily because of their views on the death penalty, leaving merely five black members in the jury pool. *See* Doc. # 207-1, at 150-153.

The attorneys were then permitted to exercise strikes "only on the twelve lowest-numbered members of the venire," and then, each time someone was stricken, "the next lowest-numbered juror joined the twelve potential jurors subject to preemptory strikes." *Id.* During this process, the State exercised seven strikes, while Pitchford used twelve, resulting in thirty-one (31) potential jurors subject to preemptory strikes. *Id.* Of these thirty-one, Pitchford struck twelve white members, leaving nineteen members subject to preemptory strikes by the State: five black and fourteen white. *Id.* The State exercised seven of the twelve strikes it was permitted, striking three whites and four blacks. *Id.*

Following the selection process, Pitchford's jury of fourteen (twelve jurors with two alternates) consisted of thirteen whites and one black. *Id.* at 226. The case proceeded to trial on February 8, 2006, at which the jury found Pitchford guilty of capital murder. *Id* at 223. Then, on February 9, 2006, during the penalty phase, the jury imposed a sentence of death by lethal injection. *Id.*

Through counsel, Pitchford filed a direct appeal challenging his conviction and sentence, arguing that

the State discriminated on the basis of race in its preemptory strikes in violation of *Batson v. Kentucky*.[3] *Id.* at 224. The Mississippi Supreme Court affirmed Pitchford's conviction and sentence on June 24, 2010. *Id.* at 216. In its decision, the state supreme court rejected Pitchford's claim on the basis that he failed to rebut the prosecution's race-neutral reasons for its preemptory strikes of black venire members. *Id.* at 227.

Pitchford, through appointed counsel, filed an amended petition for federal habeas corpus relief pursuant to 28 U.S.C.§ 2254 in this Court on February 13, 2023. Doc. # 203. In his amended petition, Pitchford asserts twenty-six grounds for relief, including a *Batson* claim. *See Id.* at 18-35. Then on June 12, 2023, Pitchford moved for partial summary judgment on his *Batson* claim. Doc. #s 207, 208. On August 3, 2023, Respondents filed their response to Pitchford's motion along with a cross-motion for summary judgment. Doc. #s 211, 212. Pitchford filed his reply in support of his motion and response in opposition to Respondents' motion on September 5, 2023. Doc. # 215. The matter is now ripe for resolution.

Legal Standard

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

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[3] Pitchford raised seventeen issues on direct appeal, but the *Batson* claim is the only claim that will be discussed herein. *See Pitchford*, 45 So.3d at 224-260.

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). However, Rule 56 "applies only to the extent that it does not conflict with the habeas rules." *Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke* 542 U.S. 274 (2004); *see also* Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts. Thus, "[i]f some aspect of the summary judgment process conflicts with the habeas process, then the habeas process controls." *See Ndudzi v. Castro*, 2020 WL 3317107 at *10 (W.D. Tex. June 18, 2020)(citations omitted).

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which governs this case, a federal court cannot grant federal habeas relief on any claim that the state court adjudicated on the merits unless that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established United States Supreme Court precedent; or (2) resulted in a decision based on an unreasonable determination of facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(1) and (2); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). A state court's factual determinations "carry a presumption of correctness" such that, "to rebut them, the petitioner must present clear and convincing evidence to the contrary." *Smith*, 311 F.3d at 667 (citing 28 U.S.C. § 2254(e)(1)). To be sure, this "standard is demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (granting writ on *Batson* grounds). Further, "[d]eference does not by

definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

Discussion

Pitchford argues that the State used its preemptory strikes in a racially discriminatory manner. The Mississippi Supreme Court considered and ultimately rejected this same argument during Pitchford's direct appeal. In *Batson*, the Supreme Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is entitled to secure." *Batson*, 476 U.S. at 86.

Offering guidance to courts addressing these claims, the Supreme Court has held:

> A defendant's Batson challenge to a preemptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a preemptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor,

> but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

Rice v. Collins, 546 U.S. 333, 338 (2006)(internal citations omitted). A trial court's *Batson* finding is "'a pure issue of fact' that is accorded great deference and will not be overturned unless clearly erroneous." *Murphy v. Dretke*, 416 F.3d 427, 432 (5th Cir. 2005); *see also Cockrell*, 537 U.S. at 340.

I. Prima Facie Showing

As a preliminary matter, the opponent of the strike (in this instance, the defendant Pitchford) must show that the use of preemptory challenges raised an inference that the prosecutor was purposefully excluding members of his race from serving on the jury. *Batson*, 476 U.S. at 96 (This holding has since been extended to members of any race. *See Powers v. Ohio*, 499 U.S. 400 (1991)). That the strikes disproportionately impact jurors of one race is insufficient; the defendant must show a discriminatory intent motivated the strikes. *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991). A defendant can make a prima facie showing by establishing either a pattern or practice of strikes against black jurors or by showing that jurors of different races were questioned differently. *Batson*, 476 U.S. at 97.

As briefly mentioned above, the State utilized four of its preemptory strikes to remove black members from the jury, tendering only one black juror. After the State struck the fourth black potential juror, Pitchford's counsel made the following objection:

> MS. STEINER (Pitchford's counsel): 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 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.

Doc. # 207-1 at 157-159. Upon Pitchford's objection, the trial court immediately asked the State to provide race-neutral reasons for its preemptory strikes of the four black potential jurors. *Id.* As such, the trial court implicitly found that Pitchford made a prima facie showing that race was the basis for the strikes.

In addressing whether Pitchford had made a prima facie showing, the Mississippi Supreme Court considered an argument made by Pitchford *after* the

trial court asked the State for race-neutral reasons as support for a prima facie showing—namely, the alleged racial makeup of Grenada County and the disparity between it and the venire. *Pitchford*, 45 So. 3d at 225-226. Specifically, the state appellate court noted Pitchford's argument that "in 2006, African-Americans made up approximately forty percent of Grenada County's population." *Id.* at 225. The state appellate court noted, however, that Pitchford presented no evidence of the racial makeup of Grenada County to the trial court. *Id.* But, "regardless of the racial makeup of Grenada County," the Mississippi Supreme Court was "persuaded that the record support[ed] the trial court's finding of a prima facie showing of discrimination." *Id.*

The Mississippi Supreme Court's analysis on this point is a bit confusing. As the argument about the racial makeup of the county was not made until *after* the *Batson* objection had been overruled and the jury selected, it could not have formed the basis of the trial court's finding that a prima facie showing had been made. More relevant to the inquiry is the argument made by Pitchford upon raising the objection: that the State had struck four out of five black potential jurors, tendering only one black juror to serve. Confusion aside, neither party disputes the state courts' conclusion(s) that Pitchford made a prima facie showing that race was the basis for the preemptory strikes at issue. Moreover, the Court finds that the State's pattern of striking *all* but one black juror sufficiently demonstrated a prima facie showing under *Batson*.

II. Race-Neutral Reasons

After Pitchford raised his *Batson* objection, the trial court promptly requested race-neutral reasons for each of the four strikes it used on black venire members. *See* Doc. # 207-1 at 158-159. As the burden is always on the defendant to prove discrimination, the prosecution's proffered race-neutral explanation "need not be persuasive; it must only be based on some factor other than the juror's race." *Walker v. Epps*, 2012 WL 1033467, at * 22 (S.D. Miss. Mar. 27, 2012) (citing *Hernandez*, 500 U.S. at 360). At this juncture, the trial court need only consider "the facial validity of the prosecutor's explanation." *Hernandez*, 500 U.S. at 360. Thus, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* The prosecutor, however, must do more than simply deny that he had a discriminatory motive. *Batson*, 476 U.S. at 98. Even if the prosecutor's reasons are "frivolous or utterly nonsensical," the analysis does not end, but merely proceeds to the third step. *Johnson v. California*, 545 U.S. 162,171 (2005) (citation omitted).

Linda Ruth Lee

As to Ms. Lee, the State proffered as follows:

> 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.

Doc. # 207-1 at 159-160. Without further inquiry, the trial court responded " [t]hat would be race neutral as to – as to that juror." *Id.* at 160. The Mississippi

Supreme Court found the allegation that Lee "obviously has mental problems" a sufficient race-neutral reason such that the trial court did not abuse its discretion. *Pitchford*, 45 So. 3d at 227.

Christopher Lamont Tillmon

> The State then provided the following explanation for its strike of Mr. Tillmon:
>
> 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.

Doc. # 207-1 at 160. The trial court then questioned a bit further, asking the brother's name, to which the prosecutor responded that he did not "even remember his brother" but that, on the jury questionnaire, Tillmon "said that he had a brother convicted of manslaughter." *Id.* The trial court concluded "I find that to be race neutral." *Id.* The Mississippi Supreme Court noted that it had "recognized a juror's (or family member's) criminal history to be race-neutral reason for exercising a preemptory challenge" and found no error in the trial court's acceptance of the reason. *Pitchford*, 45 So. 3d at 227 (citations omitted).

Patricia Ann Tidwell

> As to Tidwell, the State submitted the following reason:
>
> 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.

Doc. # 207-1 at 160. The trial court then expounded, "[d]uring 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." *Id.* The Mississippi Supreme Court could not say that the trial judge abused his discretion is finding this proffered race-neutral reason acceptable. *Pitchford*, 45 So. 3d at 227.

Carlos Ward

> Lastly, the State presented the following race-neutral explanation for striking Ward:
>
> We have several reasons. One, he had no opinion on the death penalty. He has a two-year-old child. He has never 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 same age as the defendant. 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.

Doc. # 207-1 at 160-161. The trial court did not probe further, finding the State's explanation "to be race neutral as well." *Id.* at 161. The Mississippi Supreme Court reasoned that it had previously "included an appendix of 'illustrative examples' of race-neutral reasons upheld by other courts which includes age and marital status" and found no error in the trial court's

acceptance of this reason as race-neutral. *Pitchford*, 45 So. 3d at 226 (citation omitted).

The parties understandably spend little time addressing this step in their briefs as the explanations offered by the State were, *on their face*, race-neutral. The State averred that it struck Lee because she had mental problems; Tillmon because his brother had been convicted of manslaughter; Tidwell because her brother had a sexual battery conviction and pending charge involving a shooting; and, lastly, Ward because he possessed too many similar characteristics with Pitchford. Whether the proffered reasons were true (factually accurate) or even the actual motives for the State's strikes matters not *at this stage*. A careful review of the record, even considering the totality of the circumstances, does not evince an unequivocal inherent discriminatory intent in the explanations proffered by the State. *See United States v. Bentley-Smith*, 2 F.3d 1368, 1373 (1993) (quoting *Hernandez*, 476 U.S. at 360). Thus, the Court concludes there was no error in the state courts' acceptance of the State's race-neutral reasons for striking Lee, Tillmon, Tidwell and Ward. This, however, does not end the inquiry.

III. Purposeful Discrimination

Once the prosecution articulates acceptable race-neutral reasons for its preemptory strikes, the trial court is tasked with determining whether the defendant has sustained his burden of proving purposeful discrimination. *See Batson*, 476 U.S. at 98. During this final step, Mississippi law requires the opponent of the strike to demonstrate that the State's articulated race-neutral reasons are mere pretext for

discrimination. *See, e.g.*, *Mack v. State*, 650 So.2d 1289, 1297 (1994) (holding that the defendant's failure to raise the argument of pretext before the trial court constitutes waiver of the claim). In assessing the proffered race-neutral reasons, Mississippi courts consider the following "five indicia of pretext":

> (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 to 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)(citations omitted). The Mississippi Supreme Court has further held that "[i]f the defendant fails to rebut, the trial judge must base his decision on the reasons given by the State." *Berry v. State*, 802 So.2d 1033, 1037 (Miss. 2001).[4]

As detailed above, when Pitchford raised his *Batson* challenge, the trial court asked the prosecution for its race-neutral reasons for striking potential jurors Lee, Tillmon, Tidwell, and Ward. The State then provided reasons for striking those four individuals, all of which the trial court deemed race-neutral. The trial

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[4] *See also Manning v. State*, 735 So.2d 323, 339 (Miss. 1999) (It is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver."); *Woodward v. State*, 726 So.2d 524, 533 (Miss. 1997) ("In the absence of an actual proffer of evidence by the defendant to rebut the State's neutral explanations, this Court may not reverse on this point.").

court then full-stop ended its *Batson* analysis. More specifically, after the State provided its justification for striking Ward, the trial court responded, "[t]he court finds that to be race neutral as well. So now we will go back and have the defense starting at 37." Doc. # 207-1 at 161. Rather than turning to Pitchford and allowing him the opportunity to rebut the reasons articulated by the State, the trial court immediately continued with the juror selection conference.

On direct appeal, Pitchford argued that some of the reasons articulated by the State for its strikes of the black potential jurors were also true of white potential jurors whom the State did not strike. *Pitchford*, 45 So.3d at 227. Pitchford further pointed out that the State struck four of five blacks on the panel, but only three of thirty-five whites on the panel. *Id.* Additionally, Pitchford noted that, although it had preemptory strikes available to use, it failed to strike white panel members who shared similar characteristics to some of the black members who were struck for cause. *Id.* Thus, Pitchford believed the "the totality of the circumstances" demonstrated that the State used its preemptory strikes in a discriminatory manner. *Id.*

In its analysis, the Mississippi Supreme Court gave this step short shrift. The state appellate court reasoned, "[Pitchford] did not present these arguments to the trial court during the voir dire process or during post-trial motions." *Id.* The Mississippi Supreme Court then explained it could "not now fault the trial judge with failing to discern whether the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented." *Id.* The state appellate court thus

concluded that, because "Pitchford failed to provide any argument concerning pretext during the *Batson* hearing[,]" it "[would] not entertain those arguments now." *Id.* at 228.

The majority in *Pitchford* implicitly found that Pitchford waived any argument regarding pretext because, it found, he did not advance a pretext argument before the trial court. This Court views the record a bit differently. Although the trial court failed to provide Pitchford an opportunity to rebut the State's explanations at the time they were made, Pitchford did raise his *Batson* challenge again after jury selection had been completed. Just seconds after the trial court read aloud the names of those selected for jury service, the following bench conference exchange occurred:

> 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 Court finds there to be no Batson violation

> 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 (Pitchford's counsel): 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.

Doc. # 207-1 at 166-167. This exchange evinces an attempt by Pitchford's counsel to argue pretext that was thwarted, although likely unintentionally so, by the trial court's abrupt conclusion that there had been no *Batson* violation. But, even if the state appellate court disagreed with that view, at the very least it is clear that Pitchford wanted to make sure his *Batson* objection *in toto* was preserved for appeal.

At the time of Pitchford's trial, *Batson* was well-settled law that the trial court was bound to uphold and apply. Yet, it *seemingly* failed to conduct the third *Batson* inquiry. It bears repeating the following sequence of events: first, Pitchford raised his *Batson* challenge; then, the trial court implicitly found a prima facie showing had been made by requesting race-neutral reasons from the state; the State articulated its reasons for striking Lee, Tillmon, Tidwell and Ward; the trial court deemed all

explanations as sufficiently race-neutral; and that was it. One could certainly argue that the trial court implicitly found that Pitchford failed to prove purposeful discrimination (the third *Batson* inquiry) when it later, *after* the jury was selected and announced, declared there to be no *Batson* violation. But this Court cannot ignore the notion that Pitchford was seemingly given no chance to rebut the State's explanations and prove purposeful discrimination.

As set forth above, the majority in *Pitchford* declined to address his arguments regarding pretext on appeal because the arguments were not presented to the trial court, essentially concluding Pitchford had waived the issue. There is no authority from the United States Supreme Court requiring a defendant to rebut the race-neutral reasons offered by the State. It is true that Fifth Circuit precedent provides that when a defendant fails to object to the prosecutor's explanation, he acquiesces in the explanation and the reviewing court may accept the trial court's acceptance of the prosecutor's reason as race-neutral. *See Haynes v. Quarterman*, 526 F.3d 189, 200 (5th Cir. 2008)(court can accept prosecutor's race-neutral explanation if the explanation is facially valid and the defendant does not object). But Pitchford *did* object to the explanations provided when he raised the issue again and confirmed it was on the record. Perhaps Pitchford's counsel should have been more assertive, but the Court will not fault them for failing to present specific arguments on pretext when the trial court appeared to have been resolute in its brusque determination that no violation had occurred. Simply put, there was no waiver by Pitchford.

The Court finds Justice Graves' dissenting opinion in *Pitchford* persuasive. The majority declined to address Pitchford's arguments regarding pretext. Justice Graves, however, correctly determining that the issue was not waived, conducted a comprehensive pretext analysis. *See Pitchford*, 45 So.3d at 260-268.

The State struck Lee because she was fifteen minutes late, had "mental problems", and the police had made numerous calls to her house according to Captain Carver Conley. *See* Doc.# 207-1 at 159-160. Justice Graves noted that Conley was not called to testify nor did the State introduce any evidence as to Lee's alleged mental problems. *Pitchford*, 45 So.3d at 264. A potential juror's alleged mental health or police calls to their residence was never brought up as an issue prior to or during voir dire. *Id.* Further, the State did not individually voir dire Lee nor did it ask any specific questions related to these reasons. *Id.* As such, nothing *in the record* supported the State's race-neutral reasons for striking Lee. Moreover, Lee was late because she had no transportation and had to walk from her home to the courthouse. Doc. # 207-1 at 75. The State attempted to strike her for cause on the basis that she was late, but the trial court declined, noting that "she is trying real hard to be here and fulfill her civic duty as a juror." *Id.* at 153.

The State struck Tillmon because he revealed on his jury questionnaire that his brother had been convicted of manslaughter. Doc. # 207-1 at 160. Tillmon, however, also indicated that he was an employed college graduate, previously worked at a correctional facility, and strongly favored the death penalty. *Pitchford*, 45 So.3d at 265. The State failed to voir dire Tillmon regarding the disclosure about this

brother. *Id.* As to Tidwell, the State struck her because her brother had been convicted of sexual battery and had a pending charge in a shooting case, and because she was allegedly a known drug user. *Id.* No evidence was presented as to her brother being charged in a shooting case nor as to her being a known drug user. *Id.* Further, the State did not individually voir dire her nor ask any specific questions regarding these reasons. *Id.*

Moreover, white venire members with criminal convictions were tendered without challenge by the State. *Id.* Pitchford names two similarly-situated white jurors who were not stricken. Doc. # 208 at 20. One such venire member had disclosed that his uncle was a convicted felon (crime undisclosed), and the other had a son and stepson both convicted of felonies, burglary and forgery, in particular. *Id.* Respondents contend that the nature of the crimes committed by the juror's family members differ greatly and that accounts for the reason Tillmon was struck but the others were tendered. *See* Doc. # 212 at 21. While that may be true as to the juror who disclosed family members' burglary and forgery convictions, the other juror did not disclose the nature of his uncle's conviction. Yet, the State chose not to voir dire that juror as to the nature of the crime to be certain it was not similar in nature to the crime of which Pitchford was charged.

As to Ward, the State posited that his circumstances were too similar to that of Pitchford: he had a young child; he had never been married; and he was approximately the same age as Pitchford. The State also opined that Ward expressed no opinion on the death penalty and had a number of speeding

violations. As with the three potential jurors above, the State did not individually voir dire Ward as to these stated reasons. *Pitchford*, 45 So.3d at 266. To the extent that a history of speeding violations is relevant, which the Court finds unlikely, the juror questionnaire included no questions about speeding violations and the State otherwise presented no evidence of such. *See id.* Further, nothing in the record indicates that the State sought information about traffic violations on other jurors. *Id.* The Court also notes Pitchford cites a number of potential white jurors who either had young children, were unmarried, or were of a similar age. Doc. # 208 at 16. He further points to a number of white potential jurors who shared more than one of these identified traits. *Id.* at 17. Respondents make much of the fact that those identified by Pitchford did not possess *all* of the identified characteristics. Pitchford, however, "is not required to identify an *identical* white juror for the side-by-side comparison to be suggestive of discriminatory intent. *Flowers v. Mississippi*, 588 U.S. ---, 139 S.Ct. 2228, 2249 (2019) (citing *Miller-El II*, 545 U.S. at 241, n. 6)(emphasis in original).

The Court makes no finding as to whether it ultimately agrees with Justice Graves' analysis as to each juror stricken. The Court does, however, agree that *Batson* requires that the analysis be performed. In fact, there can be no question that such an analysis must be completed prior to concluding that *Batson* has not been violated. Simply put, no state court—whether it be the majority in the Mississippi Supreme Court or the trial court—conducted a full three-step *Batson* inquiry on the State's use of its preemptory strikes of Lee, Tillmon, Tidwell and Ward.

The trial court, seemingly eager to proceed to the case itself, quickly deemed the reasons as race-neutral and moved on. The trial court's actions, perhaps understandable (and relatable to this Court), are error, nonetheless. This is equally true of the majority's declination to address the merits of Pitchford's arguments regarding pretext on appeal. To be sure, even if Pitchford had waived the issue, which the Court finds he did not, the Fifth Circuit has suggested that a defendant's failure to rebut the State's race-neutral reasons does not constitute waiver of a comparative analysis in capital cases. *See Reed v. Quarterman*, 555 F.3d 364, 372-75 (5th Cir. 2009). Thus, at a bare minimum, the Mississippi Supreme Court should have performed such an analysis, and its failure to do so was erroneous.

The Court now briefly addresses the Curtis Flowers case history, and Pitchford's reliance on it. In 1996, Curtis Flowers allegedly murdered four people in Winona, Mississippi. *Flowers v. Mississippi*, 588 U.S. ____, 139 S.Ct. 2228, 2234 (2019). Flowers was tried six separate times before a jury for murder; and each of those times, he was prosecuted by District Attorney Doug Evans, the same prosecutor in Pitchford's case. *Id.* Flowers was convicted in each of the first three trials, but the Mississippi Supreme Court reversed each conviction. *Id.* at 2235. Those convictions were reversed for the following reasons: the first due to "numerous instances of prosecutorial misconduct", *see Flowers v. State*, 773 So.2d 309, 327 (2000); the second for prosecutorial misconduct (of note, the trial court found a *Batson* violation when the prosecutor struck a black juror and seated that juror); and third, because the prosecutor had discriminated against black

prospective jurors during jury selection in contravention of *Batson*, *see Flowers v. State*, 947 So.2d 910, 935 (2007). *Id.*

During Flowers' third trial, the prosecutor exercised all fifteen of his preemptory strikes on black venire members. *Flowers*, 947 So.2d at 935. One black juror was seated *but* that was after the State had utilized all of its allotted preemptory strikes. *Id.* In reversing Flowers' third conviction, the Mississippi Supreme Court determined that the circumstances "present[ed] [it] with as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge." *Id.* It further concluded that "the State engaged in racially discriminatory practices during the jury selection process" and the case "evince[d] an effort by the State to exclude African Americans from jury service." *Id.* at 937, 939.

Flowers' fourth and fifth trials ended in mistrials due to hung juries. *Flowers*, 139 S.Ct. at 2235. Flowers was convicted in his sixth, and final, trial. *Id.* During that trial, the prosecutor struck five out of six potential jurors, leaving only one black juror to serve. *Id.* The Mississippi Supreme Court rejected Flowers' *Batson* challenge on appeal. *See Flowers v. State*, 158 So.3d 1009 (2014). The United States Supreme Court, however, granted certiorari, reversed, and remanded on *Batson* grounds. *Flowers*, 139 S.Ct. at 2251.

In reversing the state appellate court, the Supreme Court looked to the history of the apparent discriminatory practices by the State in its prosecution of Flowers, as well as the circumstances of the sixth trial itself. *Id.* "In the six trials combined, the State struck 41 of 42 black prospective jurors it

could have struck." *Id.* The State struck all but one black juror in the sixth trial, thus accepting one black juror, even though it had more preemptory strikes available. *Id.* at 2246. The Supreme Court reasoned that it had previously, in another case, "skeptically viewed the State's decision to accept one black juror, explaining that a prosecutor might do so in an attempt to obscure the otherwise consistent pattern of opposition to seating black jurors." *Id.* (citing *Miller-El II*, 545 U.S. at 250) (internal quotations omitted).

Pitchford relies heavily on *Flowers* in arguing the state courts erred in finding no *Batson* violation. At the time of Pitchford's trial, the State had brought Flowers to trial three times, but only one of those times resulted in a reversal on *Batson* grounds, and that reversal did not come until *after* Pitchford's trial. *See Flowers*, 947 So.2d 910. Thus, at the time of Pitchford's trial, the troubling case history as set forth above by the same district attorney in the same judicial district did not exist as we know it today. Yet, by the time Pitchford's appeal, including his *Batson* argument, made it to the Mississippi Supreme Court, the history in *Flowers*—the reversal on *Batson* grounds after the third trial in particular—was undoubtedly well-known. *See Pitchford*, 45 So.3d 216. As such, the Court believes the *Flowers* case was, at the very least, informative, and should have been examined in the state appellate court's consideration of Pitchford's *Batson* argument. To be clear, the Court *does* not find that the *Flowers* case was dispositive of the issue. The Court merely believes that it should have been included in a "totality of the circumstances" analysis of the issue. *See Chamberlin v. Fisher*, 885 F.3d 832, 843 (5th Cir.2018) (citing *Batson*, *Miller-El*

II, and *Snyder v. Louisiana*, 552 U.S. 472 (2008), and noting that the "totality of the circumstances" must be considered in analyzing a *Batson* claim).

In sum, the Court believes that the state courts' rejection of Pitchford's *Batson* claim was contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C.§ 2254(d)(1) & (2). Thus, the Court finds that Pitchford has demonstrated that he is entitled to federal habeas relief on his *Batson* claim.

Conclusion

Based on the foregoing discussion, the Court finds that Pitchford's motion [207] for partial summary judgment should be **GRANTED**, and that Respondents' cross-motion [211] for partial summary judgment should be **DENIED**. Accordingly, Pitchford's petition for a writ of habeas corpus *as to this claim* is **GRANTED**. Pitchford's capital murder conviction and death sentence are hereby vacated, and the matter is remanded to the State of Mississippi for further proceedings not inconsistent with this opinion. The State of Mississippi must afford Pitchford a new trial within 180 days of the date of this order, otherwise it must release Pitchford from custody.

SO ORDERED, this the 12th day December, 2023.

/s/ Michael P. Mills
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
MISSISSIPPI
GREENVILLE DIVISION

TERRY PITCHFORD,

Petitioner,

v.

BURL CAIN, MDOC Commissioner; and LYNN FITCH, Attorney General for the State of Mississippi,

Respondents.

No. 4:18-CV-00002-MPM

Filed: 12/12/23

FINAL JUDGMENT

In accordance with the Memorandum Opinion and Order entered today, Pitchford's motion [207] for partial summary judgment is **GRANTED,** and Respondents' cross-motion [211] for partial summary judgment is **DENIED.** Pitchford's petition for a writ of habeas corpus is **GRANTED** as to the *Batson* claim

only. Accordingly, Pitchford's capital murder conviction and death sentence are vacated, and the matter is remanded to the State of Mississippi for further proceedings not inconsistent with this opinion. The State of Mississippi must afford Pitchford a new trial within 180 days from the date of this order, otherwise it must release Pitchford from custody.

SO ORDERED, this the 12th day of December, 2023.

/s/ Michael P. Mills
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF MISSISSIPPI

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-70009

TERRY PITCHFORD,

Petitioner-Appellee,

versus

BURL CAIN, *Commissioner, Mississippi Department of Corrections*; LYNN FITCH, *Attorney General for the State of Mississippi*,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi
USDC No. 4:18-CV-2

Filed: January 28, 2025

ON PETITION FOR REHEARING

Before HAYNES, WILLETT, and DUNCAN, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-70009

TERRY PITCHFORD,

Petitioner-Appellee,

v.

BURL CAIN, *Commissioner, Mississippi Department of Corrections*; LYNN FITCH, *Attorney General for the State of Mississippi*,

Respondents-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

USDC No. 4:18-CV-2

Filed: January 17, 2025

OPINION

Before HAYNES, WILLETT, and DUNCAN, *Circuit Judges*.

STUART KYLE DUNCAN, *Circuit Judge*: [*]

The district court granted Terry Pitchford a writ of habeas corpus based on the claim that the prosecutor in his capital murder trial struck four potential jurors in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). On appeal, the State of Mississippi argues that the district court failed to defer to the Mississippi Supreme Court's decision that Pitchford waived his *Batson* claims by failing to challenge the State's race-neutral reasons for the strikes. Concluding the state court did not err in applying *Batson,* we reverse and remand.

I.

A Mississippi jury convicted Pitchford of capital murder in 2006 for participating in an armed robbery during which the store owner, Reuben Britt, was shot to death by Pitchford's accomplice. *Pitchford v. State,* 45 So. 3d 216, 222–23 (Miss. 2010). Pitchford confessed to his role in the crime. *Id.* at 223.

Because Pitchford's habeas claim concerns juror selection, we recount the relevant parts of *voir dire.* The trial court, without objection, narrowed the pool of potential jurors to 36 white potential jurors and five black potential jurors. *Ibid.* Pitchford used all 12 of his peremptory strikes on white potential jurors, while the State used three peremptory strikes on white potential jurors and four on black potential jurors. *Ibid.* Pitchford's counsel objected to the strikes of potential black jurors under *Batson.* Counsel argued

[*] We GRANT Pitchford's motion to clarify and issue this corrected opinion.

that "this is already a disproportionally white jury for the population of this county," and that the strikes were "a pattern of disproportionately challenging African-American jurors."

The court ruled that Pitchford made a *prima facie* showing of discrimination and required the State to give race-neutral reasons for the strikes. *Pitchford,* 45 So.3d at 226. The State provided these reasons: (1) Carlos Ward had "no opinion" on the death penalty, had several speeding violations, and shared similarities with Pitchford such as age and marital status; (2) Linda Lee had "mental problems" (according to the police chief), police had been dispatched repeatedly to her home, and she was late returning to *voir dire;* (3) Christopher Tillmon had a brother convicted of a similar offense (manslaughter); and (4) Patricia Tidwell was a known drug user, and her brother had been convicted of battery in the same court and was currently facing charges in a shooting case in that county. *Id.* at 226–27.

The court accepted these reasons and proceeded with juror selection. *Id.* at 227; Pitchford's counsel did not object or make further argument challenging the State's reasons for the strikes.

After the jury was selected, Pitchford's counsel—Ms. Steiner and Mr. Baum—asked to approach the bench and the following colloquy occurred:

> MS. STEINER: At some point the defense is going to want to reserve both its *Batson*

objection and a straight for Tenth Amendment [sic] racial discrimination.[1]

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

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[1] The latter half of this sentence appears to have been erroneously transcribed. However, that does not affect our analysis.

> 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 jury ultimately found Pitchford guilty and subsequently sentenced him to death. *Pitchford,* 45 So. 3d at 223.

Pitchford appealed his conviction and sentence to the Mississippi Supreme Court. With respect to his *Batson* challenge, Pitchford argued that a comparative juror analysis revealed the State's proffered race-neutral reasons to be pretextual. *See id.* at 227 (recounting Pitchford's argument "that some of the reasons the State proffered for its strikes of blacks were also true of whites the State did not strike"). The Mississippi Supreme Court ruled, however, that Pitchford "did not present these arguments to the trial court during the voir dire process or during post-trial motions." *Ibid.* Accordingly, the court concluded no *Batson* violation had occurred because "Pitchford provided the trial court no rebuttal to the State's race-neutral reasons." *Ibid.*[2]

After exhausting his state court remedies, Pitchford filed this habeas corpus petition in federal district

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[2] Pitchford also argued that "the totality of the circumstances show[ed] that the State's peremptory challenges were exercised in a discriminatory manner." *Pitchford,* 45 So. 3d at 227. But the Mississippi Supreme Court ruled this was simply Pitchford's "pretext argument in another package" and rejected it for the same reasons. *Ibid.*

court, again raising his *Batson* claim. The district court granted Pitchford a writ of habeas corpus.

The district court reasoned that the state trial court "*seemingly* failed to conduct the third *Batson* inquiry," in which a court determines whether the defendant proved the State's purposeful discrimination in striking jurors. *Pitchford v. Cain,* 706 F. Supp. 3d 614, 624 (N.D. Miss. 2023); *see Batson,* 476 U.S. at 97–98, 106 S.Ct. 1712. The court did acknowledge, though, that the trial court may have "implicitly" done so. *Ibid.* The court also disagreed with the Mississippi Supreme Court that Pitchford "waived" the pretext issue by failing to argue it at *voir dire. Id.* at 623. To the contrary, the court found that Pitchford's counsel objected to the prosecutor's reasons at the subsequent bench conference. *Id.* at 624. The court then noted that it found the dissenting Justice's pretext analysis "persuasive" but "ma[de] no finding as to whether it ultimately agree[d] with" it. *Id.* at 625–26; *see Pitchford,* 45 So. 3d at 264–66 (Graves, P.J., dissenting). Finally, the court added that the Mississippi Supreme Court should have also "examined" the history of *Batson* violations by Pitchford's prosecutor in the *Flowers* litigation. *Id.* at 627; *see Flowers v. Mississippi,* 588 U.S. 284, 139 S.Ct. 2228, 204 L.Ed.2d 638 (2019). While not "dispositive," the *Flowers* litigation would have been "at the very least, informative." *Ibid.*

Based on this reasoning, the district court ruled that "the state courts' rejection of Pitchford's *Batson* claim was contrary to or an unreasonable application of clearly established federal law." *Ibid.* It ordered the State to release or retry Pitchford within 180 days. *Id.* at 628.

The State timely appealed, and the district court stayed its judgment pending appeal.

II.

"In an appeal from a district court's grant of habeas relief, we review the court's findings of fact for clear error and its conclusions of law *de novo." Russell v. Denmark,* 68 F.4th 252, 261 (5th Cir. 2023).

III.

Because this case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA), the district court was authorized to grant Pitchford a writ of habeas corpus only if the Mississippi Supreme Court's[3] "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2).

This standard demands much more than state court error. *See Burt v. Titlow,* 571 U.S. 12, 18, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013) (holding that a state court decision "is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance" (quoting *Wood v. Allen,* 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010))). "[E]ven 'clear error' will not suffice."

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[3] Under AEDPA, federal courts review the last state court decision that adjudicated the petitioner's claim on the merits. *See Brown v. Davenport,* 596 U.S. 118, 141–42, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022); *Woodfox v. Cain,* 772 F.3d 358, 369 (5th Cir. 2014). Here, that is the Mississippi Supreme Court's adjudication of Pitchford's *Batson* claim.

White v. Woodall, 572 U.S. 415, 419, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014) (quoting *Lockyer v. Andrade,* 538 U.S. 63, 75–76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003)). Rather, the state court must have made an "objectively unreasonable" application of a Supreme Court "holding[ ]." *Ibid.* (citations omitted). That is, its decision must be " 'so lacking in justification' that the error is 'beyond any possibility for fairminded disagreement.' " *Russell,* 68 F.4th at 261–62 (quoting *Harrington v. Richter,* 562 U.S. 86, 103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)). Absent that kind of "extreme malfunction[ ]" in the state system, *Brown,* 596 U.S. at 133, 142 S.Ct. 1510, the writ "shall not be granted." 28 U.S.C. § 2254(d).

On appeal, the State argues that the district court erred in granting the writ for several reasons. We consider each in turn.

A.

First, the State argues the district court erred in finding the trial court skipped *Batson's* third step. We agree.

Under the familiar *Batson* framework, (1) a defendant must make a *prima facie* showing that a prosecutor made racially discriminatory strikes; (2) if he does, the State must then present race-neutral reasons for the strikes; and (3) the trial court must then determine whether the defendant has proved purposeful discrimination. *See Miller-El v. Dretke,* 545 U.S. 231, 239, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) ("*Miller-El II")* (citing *Batson,* 476 U.S. at 97, 98 n.20, 98, 106 S.Ct. 1712). "[T]he ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Rice*

v. Collins, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (quoting *Purkett v. Elem,* 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)); *see also United States v. Bentley-Smith,* 2 F.3d 1368, 1373 (5th Cir. 1993) (same).

We agree with the State that the trial court did not omit *Batson's* third step. In finding otherwise, the district court appeared to reason that *Batson* required the trial court to make explicit findings concerning the validity of the State's proferred race-neutral reasons. No Supreme Court holding demands that, however.

To the contrary, the Supreme Court has left *Batson*'s implementation up to the discretion of trial courts. *Batson* itself "decline[d] . . . to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." 476 U.S. at 99, 106 S.Ct. 1712; *see also Ford v. Georgia,* 498 U.S. 411, 423, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991) (explaining that *Batson* "left it to the trial courts, with their wide 'variety of jury selection practices,' to implement *Batson* in the first instance" (citing *Batson,* 476 U.S. at 99 n.24, 106 S.Ct. 1712)). In line with that, the Supreme Court has never held that a court properly performs *Batson*'s third step only by making explicit findings on pretext and discrimination.

Indeed, our own precedent has "explicitly rejected [the] requirement" that courts "make explicit factual findings during *Batson*'s third step." *United States v. Ongaga,* 820 F.3d 152, 166 (5th Cir. 2016) (citing *United States v. Thompson,* 735 F.3d 291, 300–01 (5th Cir. 2013)).[4] Rather, a court "may make 'implicit'

[4] *See also United States v. Perry,* 35 F.4th 293, 331 (5th Cir. 2022) (rejecting argument that "the trial court erred by

findings while performing the *Batson* analysis." *Ibid.* (quoting *McDaniel,* 436 F. App'x at 405 (unpublished) (collecting cases)). The district court itself suggested this is exactly what occurred here. "One could certainly argue," the court remarked, that the trial court "implicitly found" no discrimination when, at the subsequent bench conference, the trial court announced that it "finds there to be no *Batson* violation" and that "jury selection was appropriate."[5]

Accordingly, we conclude that the trial court did not erroneously omit *Batson's* third step. It follows *a fortiori* that, by affirming the trial court's application of *Batson,* the Mississippi Supreme Court's decision was not for that reason "contrary to" or an "unreasonable application" of *Batson.*

B.

The State next argues the district court erred by finding that Pitchford did not "waive" his pretext argument. As noted, the Mississippi Supreme Court

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failing to explicitly reach" step three and recognizing as sufficient "an implicit finding . . . that the Government's explanation was credible"); *United States v. McDaniel,* 436 F. App'x 399, 405–06 (5th Cir. 2011) (per curiam) ("[A] district court will not be reversed for failing to explicitly detail its findings at each step in the *Batson* analysis, if we are convinced that the necessary determinations were 'implicitly' made.").

[5] The district court nonetheless suggested that "Pitchford was seemingly given no chance to rebut the State's explanations and prove purposeful discrimination." The record does not reflect that, however. The district court never cut off any request by Pitchford's counsel to object to the State's proffered race-neutral reasons and, in fact, the court allowed defense counsel to clarify their objections during a subsequent bench conference they themselves requested.

refused to consider Pitchford's pretext arguments on the ground that Pitchford "did not present these arguments to the trial court during the *voir dire* process or during posttrial motions." *Pitchford,* 45 So. 3d at 227. We again agree with the State.

The Supreme Court has held that state courts may adopt rules concerning when *Batson* challenges may be raised. *See, e.g., Ford,* 498 U.S. at 423, 111 S.Ct. 850 (holding "a state court may" "[u]ndoubtedly . . . adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected"). Moreover, we have specifically held that a defendant's failure to challenge a prosecutor's race-neutral explanation constitutes waiver. *See, e.g., United States v. Arce,* 997 F.2d 1123, 1127 (5th Cir. 1993) ("By failing to dispute the prosecutor's short-term employment [*Batson*] explanation in the district court, defendants have waived their right to object to it on appeal.").[6]

Here, the Mississippi Supreme Court relied on an analogous rule in refusing to consider Pitchford's unraised pretext arguments. *See Pitchford,* 45 So. 3d at 227 (relying on rule that, "[i]f the defendant fails to rebut [the State's race-neutral reasons], the trial judge must base his [or her] decision on the reasons given by the State" (quoting *Berry v. State,* 802 So. 2d 1033, 1037 (Miss. 2001))). The court also cited another of its decisions, *Manning v. State,* 735 So. 2d 323, 339

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[6] *See also United States v. Ceja,* 387 F. App'x 441, 443 (5th Cir. 2010) (per curiam) ("[A] defendant waives objection to a peremptory challenge by failing to dispute the prosecutor's explanations." (quotation omitted)).

(Miss. 1999) (quotation omitted), which held that "[i]t is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court. The failure to do so constitutes waiver."

The district court did not rule that relying on such waiver principles was an unreasonable application of (or even inconsistent with) *Batson*. Nor could it have: no Supreme Court holding supports that view. The court instead ruled that the Mississippi Supreme Court erred in its waiver analysis because Pitchford sufficiently objected at the bench conference. But even assuming the district court was correct, that would not entitle Pitchford to habeas relief. It is well-settled that even an erroneous state ruling is not enough to overcome AEDPA's relitigation bar.[7]

In any case, the Mississippi Supreme Court's waiver ruling was correct. At the bench conference, Pitchford objected, not on the basis of pretext or comparative juror analysis, but only on the ground that the county was 40% black. That was not remotely sufficient to raise an objection to the State's race-neutral reasons. *See, e.g., Arce,* 997 F.2d at 1127 (explaining that "a defendant waives objection to a peremptory challenge by failing to dispute the prosecutor's explanations"

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[7] *See, e.g., White,* 572 U.S. at 419, 134 S.Ct. 1697 (Under AEDPA, "an unreasonable application of [Supreme Court] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." (cleaned up)); *Williams v. Taylor,* 529 U.S. 362, 365, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (Under AEDPA, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law.").

(citing *United States v. Rudas,* 905 F.2d 38, 41 (2d Cir. 1990))).[8]

Accordingly, the district court erred in concluding that Pitchford was entitled to habeas relief on this ground.

C.

The State next argues that the district court erred by suggesting the Mississippi courts were obliged to consider the "totality" of the facts bearing on Pitchford's pretext claims, including the facts in the *Flowers* litigation. We agree with the State that the Mississippi courts did not err by refusing to consider such facts, which were not argued by Pitchford during *voir dire* or post-trial.

Pitchford directs us to no Supreme Court holding that supports the district court's approach, and our own precedent squarely rejects it. As we have explained, "it is not clearly established that habeas courts *must,* of their own accord, uncover and resolve all facts and circumstances that may bear on whether a peremptory strike was racially motivated when the strike's challenger has not identified those facts and circumstances." *Ramey v. Lumpkin,* 7 F.4th 271, 280 (5th Cir. 2021). Nor is there "any *requirement* that a

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[8] *Wright v. Harris County,* 536 F.3d 436, 438 (5th Cir. 2008) (explaining that in *Arce,* "the government offered two reasons for its strike, but defendants contested only one of them," and so, "[b]y failing to dispute the prosecutor's . . . explanation in the district court, defendants have waived their right to object to it on appeal"); *Haynes v. Quarterman,* 526 F.3d 189, 200 (5th Cir. 2008) (explaining that a defendant may "acquiesce" in proffered race-neutral reasons "[b]y failing to dispute the Government's explanations" for them (quoting *Arce,* 997 F.2d at 1127)).

state court conduct a comparative juror analysis at all, let alone *sua sponte." Chamberlin v. Fisher,* 885 F.3d 832, 838 (5th Cir. 2018) (en banc).[9] Accordingly, we have held that a state decision rejecting a *Batson* claim is not unreasonable for failing to "consider[ ] the full panoply of facts and circumstances," when the petitioner "did not direct the state courts to what he [later] assert[ed] are [the] relevant facts and circumstances." *Ramey,* 7 F.4th at 280.

Nor were the Mississippi courts required to consider the relevance of the *Flowers* litigation. To begin with, Pitchford never raised this argument at *voir dire* and so cannot rely on it now to impugn the state courts' application of *Batson.* Furthermore, the Supreme Court's *Flowers* decision could not have informed the analysis, because it was issued in 2019—nine years after the Mississippi Supreme Court rejected Pitchford's *Batson* claim. *See Williams,* 529 U.S. at 390, 120 S.Ct. 1495 ("The threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established *at the time his*

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[9] In a Rule 28(j) letter filed after oral argument, Pitchford cites cases supposedly standing for the proposition that a litigant does not forfeit a comparative juror analysis by failing to raise it at trial. *See, e.g., Reed v. Quarterman,* 555 F.3d 364, 372–73 (5th Cir. 2009); *Woodward v. Epps,* 580 F.3d 318, 338 (5th Cir. 2009). To the extent any of those cases support that notion, however, they predate our en banc decision in *Chamberlin,* which held that a state court need not conduct a comparative juror analysis where, as here, a litigant fails to raise the argument at trial. *See, e.g., Chamberlin,* 885 F.3d at 838–39 (holding there is no "new procedural rule that state courts must conduct comparative juror analysis when evaluating a *Batson* claim") (quoting *McDaniels v. Kirkland,* 813 F.3d 770, 783 (9th Cir. 2015) (Ikuta, J., concurring)).

state-court conviction became final." (emphasis added)). Moreover, to the extent the district court thought the Mississippi courts should have considered the relevance of *state*-court decisions in *Flowers,* those are irrelevant under AEDPA. *See, e.g., Kernan v. Cuero,* 583 U.S. 1, 8, 138 S.Ct. 4, 199 L.Ed.2d 236 (2017) (per curiam) (holding "state-court decisions" do "not constitute 'clearly established Federal law, as determined by the Supreme Court' ").

In sum, the Mississippi Supreme Court did not err by failing to consider evidence of pretext or evidence from the *Flowers* litigation in rejecting Pitchford's *Batson* claim. *A fortiori,* the court's decision was not "contrary to" or an "unreasonable application" of *Batson.*

D.

Finally, to the extent the district court relied on 28 U.S.C. § 2254(d)(2) in granting habeas relief, it erred.[10]

In a *Batson* case, a habeas petitioner can prevail under § 2254(d)(2) by showing that "the trial court's determination of the prosecutor's neutrality with respect to race was objectively unreasonable and has been rebutted by clear and convincing evidence to the contrary." *Hoffman v. Cain,* 752 F.3d 430, 448–49 (5th Cir. 2014). "[W]e presume the [state] court's factual findings to be sound unless [the movant] rebuts the 'presumption of correctness by clear and convincing evidence.' " *Miller-El II,* 545 U.S. at 240, 125 S.Ct.

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[10] Although the district court cited (d)(2) in passing, it is unclear whether the court actually relied on that subsection in granting habeas.

2317 (quoting 28 U.S.C. 2254(e)(1)). "A state trial court's finding of the absence of discriminatory intent is 'a pure issue of fact' that is accorded great deference. . . ." *Murphy v. Dretke,* 416 F.3d 427, 432 (5th Cir. 2005) (quoting *Hernandez v. New York,* 500 U.S. 352, 364–65, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). And, as explained above, a court is not required to make factual findings on the record during *Batson* step three. *See Perry,* 35 F.4th at 331 (explaining that "an implicit finding by a trial court that the [prosecution's] explanation was credible" is sufficient).

As discussed, the state trial court completed all three steps of *Batson.* The judge ruled that Pitchford made a *prima facie* showing of discrimination, the State provided race-neutral reasons, and the only objection Pitchford eventually raised was that one of the 14 jurors was black "whereas this county is approximately . . . 40 percent[.]" *See Pitchford,* 45 So. 3d at 225–26. The trial judge heard that information, found that "all the reasons" given by the State "were race neutral," and stated that "the Court finds there to be no *Batson* violation." The judge therefore ruled that Pitchford did not "prove the existence of purposeful discrimination." *Batson,* 476 U.S. at 93, 106 S.Ct. 1712 (quotation omitted).

All the judge had available to weigh against the State's race-neutral reasons was Pitchford's conclusory argument that 40% of the county was black and his contention that *Miller-El II* "reversed a conviction" where the prosecution "left either one or two black jurors on the venire." *See Miller-El II,* 545 U.S. at 231, 125 S.Ct. 2317. It was not clearly unreasonable for the judge to find that such bare

assertions failed to overcome the State's race-neutral reasons.

As for the Mississippi Supreme Court, it acted reasonably in not considering Pitchford's pretext arguments because its " '[p]recedent mandates that [it] not entertain arguments made for the first time on appeal as the case must be decided on the facts contained in the record and not on assertions in the briefs.' " *In re Adoption of Minor Child,* 931 So. 2d 566, 579 (Miss. 2006) (quoting *Chantey Music Pub., Inc. v. Malaco, Inc.,* 915 So. 2d 1052, 1060 (Miss. 2005)); *see also Manning,* 735 So. 2d at 339 (holding that "[i]t is incumbent upon a defendant claiming that proffered reasons are pretextual to raise the argument before the trial court" and that "[t]he failure to do so constitutes waiver" (quotation omitted)).

In sum, we conclude that Pitchford was not entitled to habeas corpus relief under 28 U.S.C. § 2254(d)(2) based on his *Batson* claim.

IV.

We REVERSE the judgment granting Pitchford a writ of habeas corpus and REMAND to the district court for proceedings not inconsistent with this opinion.