

No. 24-7351

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**In the Supreme Court of the United States**

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TERRY PITCHFORD,  
*Petitioner,*

v.

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

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

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**BRIEF FOR RESPONDENTS**

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## **CAPITAL CASE**

### **QUESTION PRESENTED**

The Court granted certiorari limited to the following question: Whether, under the standards set forth in AEDPA, 28 U.S.C. § 2254(d), the Mississippi Supreme Court unreasonably determined that petitioner waived his right to rebut the prosecutor's asserted race-neutral reasons for exercising peremptory strikes against four black jurors.

**RELATED PROCEEDINGS**

Proceedings directly related to this case that are not identified in petitioner's brief are:

*Pitchford v. Mississippi*, No. 10-8439, 563 U.S. 939 (Apr. 18, 2011) (denial of petition for writ of certiorari on direct review).

*Pitchford v. State*, No. 2010-DR-01032-SCT (Miss. S. Ct. Feb. 14, 2013) (state post-conviction review).

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## INTRODUCTION

This federal habeas case arises from petitioner Terry Pitchford's claim that the prosecutor in his capital-murder trial struck four black jurors based on race. Applying the 3-step framework adopted in *Batson v. Kentucky*, 476 U.S. 79 (1986), the trial judge rejected that claim. The Mississippi Supreme Court affirmed. At step 1, the court upheld the trial judge's ruling that petitioner made a prima facie showing of discrimination. At step 2, the court upheld the trial judge's rulings that the prosecution gave race-neutral explanations for each strike. And at step 3, the court upheld the trial judge's decision to credit those explanations and rule that petitioner failed to prove discrimination. On that last step, the state supreme court declined to consider petitioner's new arguments attacking the State's explanations as pretextual—arguments he failed to make at jury selection and first made on appeal. The court applied its settled rule—embraced by many appellate courts—that a defendant waives pretext arguments supporting a *Batson* claim when he fails to present those arguments to the trial judge.

Seeking federal habeas relief, petitioner contends that the Mississippi Supreme Court's waiver ruling is objectively unreasonable. The Fifth Circuit rejected his arguments, ruling that 28 U.S.C. § 2254(d) bars relief. This Court should affirm.

The Mississippi Supreme Court's waiver ruling is not an "unreasonable application of" this Court's clearly established precedents. 28 U.S.C. § 2254(d)(1). A state court fails that standard only when "no fairminded jurist could reach the state court's conclusion under this Court's precedents." *Brown v.*

*Davenport*, 596 U.S. 118, 135 (2022) (cleaned up). The Mississippi Supreme Court’s waiver ruling does not remotely meet that standard. This Court has never held that in assessing a *Batson* claim an appellate court must consider arguments or evidence that the defendant could have presented to the trial judge but did not. And the Mississippi Supreme Court’s waiver rule flows from this Court’s *Batson* cases. The rule ensures that *Batson* defendants—who bear the burden of showing discrimination—present arguments and evidence supporting their claims to the trial judges best equipped to evaluate them and at the time most conducive to sound, prompt rulings.

The Mississippi Supreme Court’s waiver ruling also does not rest on an “unreasonable determination of the facts.” 28 U.S.C. § 2254(d)(2). A state court’s decision fails that standard only when a “reasonable factfinder must” reject the relevant factual finding—when there is “no permissible alternative but to” find otherwise. *Rice v. Collins*, 546 U.S. 333, 341 (2006). Under Mississippi’s settled waiver rule, a reasonable factfinder could readily find, as the Mississippi Supreme Court found, that petitioner failed to raise pretext arguments at trial and thus waived those arguments. His *Batson* objection at trial rested on the State’s number of strikes and county demographics. He did not object to, rebut, or ask the trial judge to further examine any of the prosecution’s explanations for its strikes. Nor did he offer any other arguments or evidence on pretext. That came on appeal. Indeed, *petitioner* previously declared—in post-conviction proceedings that he now ignores—that he “fail[ed]” to “preserve the record” on his *Batson* claim by “fail[ing] to offer any rebuttal” to the State’s reasons. Respondents’ Appendix (RA) 2a, 38a (formatting

altered). He fortified that view with an affidavit in which his trial counsel declared that she “did not ... do anything to raise, or reserve the right to raise, before the trial court any of the evidence suggestive of pretext” that petitioner later raised on appeal. RA77a. It is not unreasonable to credit the view of the record that petitioner once resoundingly adopted.

Those points end this case. This Court limited its grant of certiorari to the question—reformulated by the Court—whether the Mississippi Supreme Court’s waiver ruling comports with AEDPA. The Court did not agree to decide the merits of petitioner’s *Batson* claim. Yet petitioner’s lead argument in this Court is that the state courts violated *Batson*. Br.18-29. And he closes by urging this Court to grant him ultimate habeas relief—to vacate his conviction and order release or retrial. Br.50-52. Both arguments fail. Even a favorable answer to the question presented would entitle petitioner at most to have the state supreme court reassess his *Batson* claim based on his pretext arguments. More critically, even with his belated arguments, petitioner has not shown a *Batson* violation. The record refutes his claim and shows that the prosecution exercised its strikes on legitimate, race-neutral grounds.

## STATEMENT

### A. Legal Background

1. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that prosecutors may not exercise peremptory strikes based on race. *See* U.S. Const. amend. XIV, § 1. *Batson* adopted a 3-step framework for enforcing that rule. At step 1, the defendant must make a “prima facie” showing that the prosecution struck a potential juror based on race. 476 U.S. at 96.

If the defendant makes that showing, at step 2 the prosecution must present “a neutral explanation” for the challenged strike. *Id.* at 97. At step 3, the trial court must “determine if the defendant has established purposeful discrimination.” *Id.* at 98. That “ultimate burden” “rests with, and never shifts from,” the defendant. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). A trial court’s ruling on discriminatory intent is “a finding of fact” reviewed on appeal for clear error. *Batson*, 476 U.S. at 98 n.21; see *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008).

This Court has “decline[d]” “to formulate particular procedures to be followed upon a defendant’s timely objection to” a peremptory strike. 476 U.S. at 99. The Court has emphasized that a trial court must make its step-3 determination “in light of the parties’ submissions.” *Snyder*, 552 U.S. at 477. But the Court has left lower courts to “develop rules” to implement *Batson*. *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

This Court has accordingly recognized that “in general” the “timeliness” of a *Batson* claim is “govern[ed]” by “local rules.” *Ford v. Georgia*, 498 U.S. 411, 423 (1991). So “a state court may 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.” *Ibid.* Such a rule, as this Court has observed, would be “sensible,” *id.* at 422—especially because *Batson* “encourages” “prompt rulings” on objections to peremptory strikes “without substantial disruption of the jury selection process,” *Johnson v. California*, 545 U.S. 162, 172-73 (2005).

2. Mississippi has adopted “procedures” to implement *Batson*. 476 U.S. at 99. In Mississippi a

*Batson* objection must be made “prior to the impanelling of the jury.” *Thomas v. State*, 517 So. 2d 1285, 1287-88 (Miss. 1987); see Miss. R. Crim. P. 18.4(e) & cmt. This “well established” “contemporaneous objection rule” “prevent[s] defendants from ‘sandbagging’ the prosecution by waiting until the trial has concluded unsatisfactorily before insisting on an explanation for jury strikes that by then the prosecutor may have largely forgotten.” *Thomas*, 517 So. 2d at 1286-87.

To the same end, Mississippi has established rules governing a defendant’s rebuttal of the prosecutor’s explanations for a challenged strike. “If the State gives a racially neutral explanation” at step 2, “the defendant can rebut the explanation.” *Berry v. State*, 802 So. 2d 1033, 1037 (Miss. 2001). That rebuttal is critical to preserving arguments supporting a *Batson* claim: “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.” *Manning v. State*, 735 So. 2d 323, 339 (Miss. 1999). Mississippi appellate courts thus “may not reverse” a trial court’s rejection of a *Batson* claim based on pretext arguments that the defendant failed to timely raise to the trial court. *Woodward v. State*, 726 So. 2d 524, 533 (Miss. 1997).

## **B. Factual And Procedural Background**

1. On November 7, 2004, petitioner and Eric Bullins robbed the Crossroads Grocery store in Grenada County, Mississippi. JA573-75. Petitioner shot store owner Reuben Britt with a .38-caliber revolver loaded with “rat shot.” JA574, 626, 656. Bullins shot Britt with a .22-caliber pistol, killing him. JA574. Petitioner and Bullins stole money and a

cash register. *Ibid.* Petitioner was soon arrested. *Ibid.* He confessed to his role in the murder to police and to two fellow inmates. JA574-75.

Petitioner was indicted for capital murder. JA575. The circuit court summoned a special venire and sent juror questionnaires, prepared by the defense, to summoned jurors. *Ibid.*; RA197a-208a, 209a-10a. Each questionnaire was 4 pages long and had 30 numbered sections. *See* JA733-39 (reproducing R.351-54). Most sections asked multiple questions or sought multiple pieces of information. In full, each questionnaire sought as many as 70+ pieces of information, including race information. *See ibid.*

Of the 350 persons summoned, 126 appeared for jury selection. JA575. Of those 126, 84 were white, 40 were black, 1 was Hispanic, and 1 did not provide race information. *Ibid.* The trial judge excused (without objection) 30 of the 126 for statutory cause or other reasons unrelated to the case. *Ibid.*; *see* JA7-10 (excusing for “medical” and other “hardship” reasons). That left 96 potential jurors—either 60 white and 36 black, or 61 white and 35 black. JA575, 577 n.4; Br.7.

The trial judge and the parties then conducted voir dire of those 96 venire members. JA16-152. The judge first examined them about their ability to be fair and impartial, to apply the law, and to serve. JA17-86. He then recessed for lunch. JA86.

The venire members all returned to the courtroom soon after lunch, except one—Linda Lee. JA87. After waiting “a few minutes” for Ms. Lee, the judge said: “I am ready to proceed. Miss Lee will be dealt with accordingly. I think if everybody else could be back on time she could have as well.” *Ibid.* The prosecutor then began his voir dire, but was interrupted when

Ms. Lee returned. JA87-88. The judge asked: “Miss Lee, can you explain why you are like about 15 minutes later than everybody?” JA88. Ms. Lee said: “I have to walk up here.” *Ibid.*

The prosecution’s voir dire, conducted by District Attorney Doug Evans, focused on jurors’ ability to apply the law, including whether they could impose the death penalty. JA87-109. The prosecutor posed questions to the full venire, then followed up with individual jurors only when their responses to a venire-wide question (such as a juror’s signal that he or she would not consider the death penalty) raised concerns about their ability to apply the law. The one exception was when he asked potential juror Patricia Tidwell, “are you related to David Tidwell?” JA109. She replied, “That’s my cousin.” *Ibid.*

The defense, through attorney Ray Carter, then conducted its voir dire, focusing on jurors’ openness to a life-without-parole sentence. JA109-43.

After voir dire, the trial judge excused over 50 potential jurors for cause and for other reasons, again without objection. JA575. After the judge ruled on many of those jurors, JA153-58, defense counsel Alison Steiner spoke for the first time during jury selection to challenge three potential jurors for cause: one based on “his announced opinion” about the case, his relationship with an assistant DA, and medical issues, JA158-59; a second because his son was engaged to a relative of the victim, JA159-60; and a third because she had three children and would have difficulties being sequestered, JA160. When the judge questioned the third challenge, Ms. Steiner elaborated: the juror “had an age range that when she talked about carpool, if you have a 13-year-old and 7-

year-old, you have two very different car pool routes.” JA160. The judge struck the first and second jurors for cause but not the third. JA159-60.

Ms. Steiner then moved “to have the death penalty quashed” because several jurors had been struck “solely because” they “expressed an inability to consider the death penalty”—which, she claimed, “disproportionately” removed “minorities” from the venire. JA161-62. She recognized that precedent foreclosed the motion. JA162. The judge denied it for that reason. JA162-63.

The prosecutor made one challenge for cause. He moved to strike Linda Lee, explaining that she “was over 15 minutes late” after lunch, “showing a complete disregard for the whole court system.” JA163. The judge denied the challenge, ruling that Ms. Lee “explained the reason why she was late to the [court’s] satisfaction” and “is trying real hard to be here and fulfill her civic duty as a juror.” *Ibid.*

After a recess, Ms. Steiner challenged two more jurors, for not returning questionnaires. JA164-65. The court granted the challenges. JA165-66.

The cause-strike process left 36 or 37 white potential jurors and 5 black potential jurors. JA575; see JA153-66, 172-73. To select the final jury, the parties took turns tendering jurors and exercising peremptory strikes. JA575; JA166-74. Petitioner used all 12 of his peremptory strikes for the main panel on white potential jurors, and a further strike on a white potential alternate juror. JA575-76; JA167, 171, 172-73; see JA66-67, 953. The prosecution used 7 of its 12 peremptory strikes, on 3 white potential jurors and 4 black potential jurors. JA576.

After the prosecution struck those 4 black potential jurors, petitioner made a *Batson* challenge. JA167-68. Ms. Steiner said: “[O]n the basis of [the] State’s” strikes, “[w]e would object on the grounds of *Batson versus Kentucky* that it appears there is a pattern of striking almost all of the available African-American jurors. They have tendered one African-American juror out of the five that have thus far—four that have thus far arisen on the venire.” JA167. She continued: “As we had noted previously, due to the process of cause challenges, particularly death qualification challenges, this is already a disproportionately white jury for the population of this county.” JA167-68. She added: “I would invite the Court’s attention to” *Miller-El v. Dretke*, 545 U.S. 231 (2005), “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.” JA168.

In response, the judge said: “I’ll hear from the State.” JA168. Some back and forth ensued on whether the State should give reasons for all of its peremptory strikes or just for the challenged strikes of 4 black potential jurors. JA168-69. Ms. Steiner said: “I think the jurisprudence simply states that the Court must make a determination on the basis of all relevant circumstances to racial discrimination.” JA169. The judge asked the State to “give race neutral reasons” for the 4 challenged strikes. *Ibid.*

The prosecution then gave its reasons for striking Linda Lee, Christopher Tillmon, Patricia Tidwell, and Carlos Ward. JA169-70. The prosecution struck Ms. Lee because she was “15 minutes late” from lunch and

because, according to a police captain, police “had numerous calls to her house” and “she obviously has mental problems.” JA169. The prosecution struck Mr. Tillmon because his “brother” was “convicted of manslaughter” and, “considering that this is a murder case,” the prosecution did not “want anyone on the jury” with “relatives convicted of similar offenses.” *Ibid.* The prosecution struck Ms. Tidwell because “David Tidwell”—identified by the prosecutor as her “brother”—“was convicted in this court of sexual battery,” “her brother is now charged in a shooting case” in the county, and, “according to police officers,” she “is a known drug user.” JA170; *see* JA109, 1429. And the prosecution struck Mr. Ward for “several reasons”: “he had no opinion on the death penalty”; he “ha[d] numerous speeding violations”; and he had key similarities to petitioner—they are “approximately the [same] age,” “both have children about the same age,” and “both have never been married”—and so was “too closely related to” petitioner and could not avoid “thinking about these issues,” especially at the penalty phase. JA170.

Defense counsel did not object to or attempt to rebut any of the State’s explanations. *See* JA169-70.

The judge recognized that the State provided race-neutral reasons for each challenged strike, credited those unobjected-to reasons as “race neutral,” and so rejected petitioner’s *Batson* challenge. JA169-70. After ruling on the last strike, the judge said: “now we will go back and have the defense” continue selecting jurors. JA170. The defense did not object. Ms. Steiner instead asked the judge to confirm how many strikes the defense had used, and the defense continued with jury selection until there were 12 jurors and 2 alternates. JA171-74.

Before the jury was sworn, Ms. Steiner asked to approach the bench. JA175. A colloquy ensued. That colloquy forms the basis of petitioner's assertions in this Court that the trial judge "refused to hear," "cut[ ] off," "denied," and "thwarted" his counsel's attempts "to rebut" the prosecution's reasons for the challenged strikes, Br.10, 30, 32, 39, "ordered" counsel "to stop" "press[ing]" petitioner's *Batson* claim, Br.3, and "expressly said that no further argument would be permitted" on that claim, Br.37. *See also* Br.2, 16, 35, 36, 44, 45, 49. Here is the colloquy in full:

Ms. Steiner: At some point the defense is going to want to reserve both its *Batson* objection and a straight for Tenth [presumably *Fourteenth*] 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 [co-counsel for the defense]: 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.

JA175-76 (formatting altered).

At trial, the State presented evidence that petitioner's car was at the crime scene, that he had recently tried to rob the same store, that police found in his car a .38-caliber revolver that was taken from the crime scene, and that he confessed his role in the murder to police and to two fellow inmates. JA574-75, 608. He was convicted and sentenced to death. JA576.

Petitioner moved for a new trial. JA177-81. A one-sentence paragraph in his motion faulted the trial court's *Batson* ruling: "The state was allowed to use all of its peremptory challenges to remove all but one African-American from the jury resulting ... in a jury composed of less than 10% African-American citizens selected from a county with nearly a 45% African-

American population.” JA179. In an amended motion, he added: “Additionally, the prosecution’s state of mind was clearly racially discriminatory as it deselected black people from the jury panel who had the same familial, living, social or marital circumstances as whites who were not deselected, which is a clear violation of *Batson* and *Miller-El*.” JA184. He cited nothing in the record to support that claim. The court denied his motions. JA3, 576.

2.a. Petitioner appealed. His lead argument—made in briefs signed by Ms. Steiner, JA331, 550—was that the State violated *Batson*. JA201, 479. In his opening brief that argument spans over 46 joint-appendix pages: 24+ pages of argument and a 22-page chart. JA201-25, 332-53. Petitioner briefly mentioned his trial-court assertions about the State’s number of strikes and county demographics. JA209 & n.5, 224. But he relied overwhelmingly on arguments and factual assertions that he did not present at trial.

Start with Linda Lee. JA215-19. The prosecution struck her because she was late returning to court and reportedly had “mental problems.” JA169. Petitioner now argued that striking Ms. Lee for lateness was pretextual because it was “without pertinence” to her “ability to serve as a juror,” as the trial court “found” when it declined to remove her for cause. JA216. Petitioner also argued that the State “engaged in disparate treatment” because other jurors were late from lunch but “the State made no effort to have anyone” else removed for lateness. JA218. And petitioner claimed that Ms. Lee’s “alleged history of mental problems” was pretextual because “nothing at all in the record” verified it, the State “did not voir dire Ms. Lee or any other juror about”

“mental illness[ ],” and the State “did not even raise” it when it moved to strike her for cause. JA217-19.

Next, Christopher Tillmon. JA219-20. The prosecution struck him because his “brother” was “convicted of manslaughter”—an “offense[ ]” “similar” to petitioner’s murder charge. JA169. Petitioner now claimed that this reason was pretextual “because of disparate treatment by the State of two similarly situated white venire members.” JA220; *see* JA220 n.12, 333, 337-39. One “similarly situated” juror said on his questionnaire that his uncle was convicted of forgery. JA931. The other said on his questionnaire that he had a son convicted of commercial burglary and a stepson convicted of forgery. JA811. Petitioner said that “[n]either Mr. Tillmon nor the two comparable whites was questioned on voir dire about the[se] convictions or whether they actually bore ... any resemblance to [petitioner’s] crime.” JA220.

Now, Patricia Tidwell. JA221-23. The prosecution struck her because “[h]er brother, David Tidwell, was convicted in this court of sexual battery,” “her brother” had “pending” “charge[s] in a shooting case,” and she was reportedly “a known drug user.” JA170; *see* JA109, 1429. Petitioner now claimed that the first reason was pretextual because the prosecution did not strike two “similarly situated” white jurors—those described above, with relatives convicted of forgery or burglary—and because the prosecution did not voir dire jurors “on this topic.” JA222. On the shooting charge, petitioner said that the prosecutor “appear[ed] to confound” Ms. Tidwell’s unnamed brother and her cousin David, and that this “casts further doubt on the [prosecutor’s] credibility.” JA222 n.13. And petitioner faulted the prosecution for not

calling a police officer to testify that Ms. Tidwell was a “known drug user.” JA222-23.

Last, Carlos Ward. JA210-15. The prosecution struck him for “several reasons”: “he had no opinion on the death penalty”; he “ha[d] numerous speeding violations”; and he had key similarities to petitioner—they are “approximately the [same] age,” “both have children about the same age,” and “both have never been married”—and so was “too closely related to” petitioner. JA170. Petitioner claimed that “[t]he State accepted 11 white venire members who shared at least one of” the cited “demographic characteristics” (including 6 who “shared more than one”) and faulted the State for not conducting voir dire about those characteristics. JA212; *see* JA212-14 n.9. He faulted the prosecution’s reliance on speeding tickets because they were not in the record and because the questionnaires did not seek such information. JA214-15. And he said that the prosecution accepted two white jurors who also lacked an opinion on the death penalty. JA215 & n.10.

The State argued that petitioner’s new arguments on pretext were “procedurally barred” because in the trial court he “did not attempt to refute the reasons offered by the State.” JA367-68; *see* JA367-70. It cited Mississippi Supreme Court cases holding that a defendant waives arguments rebutting the State’s reasons if he fails to make those arguments to the trial court. JA368; *see supra* p.5. The State also argued that its reasons were sound and the trial court was right to credit them. JA371-72; *see* JA368-70.

On reply, petitioner expanded on his new pretext arguments and included an “updated” appendix with comparative-juror arguments. JA479-83 & nn.1-2,

551-72. In resisting waiver, he now claimed that “[a]ny deficiencies in the record are the product of trial court error, not the default of” petitioner, and that the trial court “erroneously pretermitted” him “from making any rebuttal” and “disregarded” his “request that the trial court make a final totality of the circumstances analysis required under *Batson*.” JA483; *see* JA483-87.

b. The Mississippi Supreme Court affirmed. JA573-658. The court found “overwhelming evidence of guilt” (*e.g.*, JA601; *contra* Br.10, 11) and rejected arguments that petitioner now presents to this Court as fact (*e.g.*, JA608-11, 615-23; *contra* Br.10-12). Central here, the Mississippi Supreme Court set out the *Batson* framework, assessed each step, and rejected petitioner’s claim. JA577-85.

On step 1, the state supreme court ruled that petitioner’s presentation on the number and pattern of strikes “supports the trial court’s finding of a prima facie showing,” though it did not compel that finding “as a matter of law.” JA580, 581; *see* JA578-81.

On step 2, the state supreme court upheld the trial judge’s rulings that the reasons for each challenged strike were race neutral. JA581-84.

On step 3, the state supreme court upheld the trial judge’s ruling that petitioner failed to show discrimination. JA584-85. The court observed that, “on appeal,” petitioner argued at “considerable” length that the State’s asserted reasons were “pretext[ual]” and “that some of the reasons the State proffered for its strikes” of black potential jurors “were also true of” white potential jurors “the State did not strike.” JA584. But petitioner “did not present these arguments to the trial court during the voir dire

process or during post-trial motions.” *Ibid.* Under Mississippi caselaw implementing *Batson*, the court explained, a defendant “waive[s]” pretext arguments and evidence if he fails to present them “to rebut” the State’s explanations at trial. JA584 & n.16. Although “the trial judge must look at the totality of the circumstances and all of the facts” in assessing a *Batson* claim, the court added, “those circumstances and facts do not include arguments not made by” the defense. JA585 n.17. The supreme court therefore declined to consider—or disturb the trial judge’s rulings based on—“rebuttal evidence and argument” that petitioner “never presented” to the trial judge. JA585. Faced with petitioner’s “sufficient” but not compelling prima facie case and the State’s legitimate and unrebutted reasons, JA579-84, the supreme court upheld the trial judge’s decision to credit the State’s reasons and reject petitioner’s claim, JA584-85.

In dissent, then-Justice Graves concluded that the trial court clearly erred at least in upholding the strike of Ms. Lee. JA667-69. Justice Graves “d[id] not dispute” that Mississippi caselaw announces the waiver rule the majority applied. JA673. But he maintained that petitioner “preserved the issue” of pretext “by making a *Batson* objection.” JA674.

3. Petitioner sought state post-conviction relief, through new counsel.

Petitioner pressed a *Batson* claim, reiterating pretext arguments that he made on direct appeal. RA17a-36a, 155a-58a. He now also claimed that his trial counsel “was ineffective in failing to properly challenge, litigate, and preserve the record” on his *Batson* claim. RA38a (formatting altered); see RA37a-42a, 158a-66a. He explained that the Mississippi

Supreme Court had “held in numerous cases long before [his] trial began that a defendant’s failure to offer any argument or evidence to rebut the prosecution’s proffered reasons results in a waiver and the trial judge must base his decision only on the reasons given by the prosecution.” RA39a. Yet his counsel “failed to offer any rebuttal” to the State’s reasons. RA2a-3a. The arguments and assertions that counsel first raised on appeal were available “at the time of trial or when post-trial motions were filed,” but counsel “failed to use [them].” RA40a. Counsel’s “appalling failure” “to rebut,” petitioner declared, resulted in the trial court “denying [his] *Batson* challenge” and the Mississippi Supreme Court “finding any rebuttal arguments” to be “procedurally barred.” RA41a.

Petitioner submitted a supporting affidavit from Ms. Steiner. She attested that she “failed to challenge the prosecution’s reasons as pretextual at trial”; “did not ... do anything to raise, or reserve the right to raise, before the trial court any of the evidence suggestive of pretext” that she “cited” on appeal; and “failed to suggest that pretext or the evidence of it be asserted in post-trial motions.” RA77a; *see* RA40a. She did not claim that the trial judge blocked her from making rebuttal or pretext arguments.

The Mississippi Supreme Court denied relief on those claims. RA191a-93a.

4. Petitioner sought federal habeas relief. The district court granted it. JA687-711. It ruled that “the state courts’ rejection of” petitioner’s *Batson* claim “was contrary to or an unreasonable application of clearly established federal law.” JA711 (citing 28 U.S.C. § 2254(d)(1) & (2)).

The district court credited the state supreme court's rulings at steps 1 and 2. The district court agreed that "the State's pattern of strik[es]" "demonstrated a prima facie showing." JA695; *see* JA693-95. And the district court ruled that "there was no error in the state courts' acceptance of the State's race-neutral reasons." JA699; *see* JA696-99.

But the district court concluded that "no state court" performed the analysis required at step 3. JA707; *see* JA699-711. The district court said that the trial judge "quickly deemed" the State's reasons "race-neutral," "thwarted" defense counsel's "attempt ... to argue pretext," and thus "*seemingly* failed to conduct" the step-3 "inquiry." JA703, 708; *see* JA700-04, 707-08. The district court also faulted the state supreme court for failing "to address" petitioner's "arguments regarding pretext on appeal." JA708. The district court acknowledged Mississippi's rule that a defendant waives pretext arguments by failing to offer them to rebut the State's explanations at trial. JA700 & n.4. But the court ruled that "there was no waiver" because petitioner "*did* object" to the State's explanations "when he raised the [*Batson*] issue again" at the post-jury-selection bench conference. JA704. The district court said that it would "not fault" defense counsel "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." *Ibid.*

The district court vacated petitioner's conviction and sentence and ordered the State to retry or release him within 180 days. JA711. It later stayed its judgment. JA722.

5. The Fifth Circuit reversed. It held that 28 U.S.C. § 2254(d) bars habeas relief. JA716-32.

*First*, the Fifth Circuit held that the state supreme court’s decision was not “contrary to” or an “an unreasonable application of” “clearly established Federal law.” JA722 (quoting 28 U.S.C. § 2254(d)(1)); *see* JA722-30. The Fifth Circuit reached two main conclusions.

One: The state trial judge “did not omit *Batson*’s third step” or violate clearly established federal law by not expressly explaining the full basis for his step-3 ruling. JA724; *see* JA724-25. “No Supreme Court holding,” the Fifth Circuit ruled, clearly requires a trial court to “make explicit findings” on “the validity of the State’s prof[er]ed race-neutral reasons” at step 3. JA724-25. The Fifth Circuit added that the record refutes the view that petitioner “was seemingly given no chance” to show pretext. JA725 n.5. The trial judge “allowed defense counsel to clarify their [*Batson*] objections” and “never cut off any request” “to object” to the State’s reasons. *Ibid*.

Two: The state courts reasonably did not consider arguments supporting petitioner’s *Batson* claim that he did not make to the trial judge. JA725-30. Because petitioner failed to raise “pretext arguments” at trial, the judge soundly credited the prosecution’s facially legitimate reasons. JA726; *see* JA725-27. And “no Supreme Court holding supports” the view that the state supreme court had to consider arguments that petitioner first raised on appeal. JA727. So the state courts did not err in declining to consider “facts and circumstances”—including a “comparative juror analysis”—that petitioner did not “identif[y]” or “argue[ ]” at trial. JA728, 729; *see* JA728-30.

*Second*, the Fifth Circuit held that the state supreme court’s decision was not “based on an unreasonable determination of the facts.” JA722 (quoting 28 U.S.C. § 2254(d)(2)); *see* JA730-32. It is “unclear,” the Fifth Circuit observed, whether the district court “actually” found any state-court factual determination to be unreasonable. JA730 n.10. But “[i]t was not clearly unreasonable” for the state courts to find that petitioner’s “bare assertions” to the trial judge “failed to overcome the State’s race-neutral reasons.” JA731-32.

This Court granted review, limited to the question whether the Mississippi Supreme Court’s waiver ruling comports with 28 U.S.C. § 2254(d). *Supra* p.i.

### SUMMARY OF ARGUMENT

I. The Mississippi Supreme Court reasonably determined that petitioner waived pretext arguments challenging the prosecution’s reasons for striking four potential jurors. So, as the Fifth Circuit held, AEDPA bars habeas relief. This Court should affirm.

A. The state supreme court’s waiver ruling is not an “unreasonable application of” this Court’s clearly established precedents. 28 U.S.C. § 2254(d)(1). This Court has never held that courts must consider arguments or evidence that a *Batson* challenger could have presented to the trial judge but did not. And the state supreme court’s waiver rule soundly applies this Court’s *Batson* caselaw, which places the burden to show discrimination on the challenger, recognizes that trial judges—not appellate judges—are best equipped to evaluate pretext arguments, and enables prompt and solid rulings on *Batson* claims based on the parties’ presentations at trial.

B. The state supreme court’s waiver ruling does not rest on an “unreasonable determination of the facts.” 28 U.S.C. § 2254(d)(2). The record establishes that petitioner failed to raise pretext arguments to the trial judge despite ample opportunity. So he waived those arguments—as he previously admitted with an affidavit attesting to his waiver.

II. Petitioner’s other arguments—on the merits of his *Batson* claim and on his request for ultimate habeas relief—are not presented and lack merit. Even with his late pretext arguments, his claim fails: he cannot show discrimination, under AEDPA or any other standard. And even a resolution of the question presented in his favor would not permit the remedy he urges this Court to grant—release or retrial.

## ARGUMENT

### **I. The Mississippi Supreme Court’s Waiver Ruling Was Reasonable, So 28 U.S.C. § 2254(d) Bars Habeas Relief For Petitioner.**

Passed in Congress by wide margins and signed by President Clinton, the Antiterrorism and Effective Death Penalty Act allows federal habeas courts to disturb state-court decisions “in only narrow circumstances.” *Brown v. Davenport*, 596 U.S. 118, 125 (2022). When a state court has ruled on the merits of a claim, a federal court may not grant habeas relief on that claim unless the state-court decision (1) was “contrary to” or an “unreasonable application of” clearly established federal law, as determined by this Court, or (2) 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). Those standards bar relief here. In

rejecting petitioner's *Batson* claim, the Mississippi Supreme Court reasonably determined that petitioner waived his right to rebut the prosecution's reasons for the peremptory strikes that petitioner challenged. This Court should affirm the Fifth Circuit's judgment upholding that decision.

**A. The Mississippi Supreme Court's Decision Comports With Clearly Established Federal Law.**

The Mississippi Supreme Court's decision is not "contrary to" or an "unreasonable application of" clear federal law. 28 U.S.C. § 2254(d)(1).

1. The Mississippi Supreme Court's decision is not "contrary to" clearly established federal law. Petitioner does not claim otherwise. *See* Br.40-50.

A state-court decision is "contrary to" this Court's clear precedents "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). In rejecting petitioner's *Batson* claim, the Mississippi Supreme Court declined to consider "argument[s] concerning pretext" that petitioner "failed to provide" to the trial judge. JA585. The court applied its rule that "a defendant claiming that proffered reasons" for a peremptory strike "are pretextual" must "raise th[at] argument before the trial court" to avoid "waiver." JA584 n.16.

That decision is not "contrary to" this Court's precedents. This Court has never held that, in assessing an otherwise timely *Batson* claim, an appellate court must consider arguments or evidence

that the challenger could have presented to the trial judge but did not. As the Fifth Circuit recognized, no “holding” of this Court requires courts to consider “facts and circumstances” that a *Batson* challenger did not “identif[y]” or “argu[e]” at trial. JA728. So the Mississippi Supreme Court did not—and could not—“arrive[ ] at a conclusion opposite to that reached by this Court” on that question or “decide[ ]” this case “differently than this Court has on a set of materially indistinguishable facts.” *Williams*, 529 U.S. at 413.

2. The Mississippi Supreme Court’s decision is not an “unreasonable application of” clearly established federal law.

a. “[C]learly established Federal law” in section 2254(d)(1) “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-court decision.” *Carey v. Musladin*, 549 U.S. 70, 74 (2006). A state-court decision is an “unreasonable application” of this Court’s clear precedents “if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of” the case. *Williams*, 529 U.S. at 413. “[A]n unreasonable application” means that the state court’s decision was “objectively unreasonable,” not “merely wrong” or “even clear[ly] erro[neous].” *White v. Woodall*, 572 U.S. 415, 419 (2014) (cleaned up). “[I]t is not ‘an unreasonable application of ‘clearly established Federal law’ for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.” *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Petitioner must show that “the state court’s ruling” on his *Batson* claim “was so lacking in justification that there was an error well understood and comprehended in existing law beyond

any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

Petitioner cannot meet those standards. The “governing legal principle” (*Williams*, 529 U.S. at 413) here is this Court’s 3-step *Batson* framework for assessing claims of discrimination in jury selection. The Mississippi Supreme Court “identifie[d]” that framework. *Ibid.*; see JA578; compare *ibid. with supra* pp.3-4 (setting out framework). And it reasonably applied that framework to reject petitioner’s claim. JA577-85. At step 1, the court was “persuaded that,” based on the number of black potential jurors struck by the State, “the record supports the trial court’s finding of a prima facie showing of discrimination.” JA580; see JA578-81. At step 2, the court upheld the trial judge’s ruling that the prosecution gave race-neutral reasons for the challenged strikes. JA581-84. And at step 3, the court ruled that the trial judge properly rejected petitioner’s claim. JA584-85. The court explained that petitioner provided the trial judge “no rebuttal to the State’s race-neutral reasons” and thus “waive[d]” the “rebuttal” arguments he first made on appeal. JA584 n.16, 585. Because the State gave reasons that were facially race neutral, credible, and unchallenged—and because all petitioner offered to the trial judge to show discrimination was bare numbers—the state supreme court upheld the trial judge’s ruling that petitioner failed to meet his burden to show purposeful discrimination. JA584-85. That is a reasonable application of the *Batson* framework.

In particular, the Mississippi Supreme Court reasonably applied this Court’s precedents when it ruled that petitioner waived his rebuttal arguments by failing to present them to the trial judge. This

Court has never held that an appellate court must consider arguments or evidence supporting a *Batson* claim that the challenger failed to timely present to the trial judge. See JA726-27; *supra* Part I-A-1. And this Court has never “squarely established” “a specific legal rule” forbidding the waiver rule that the Mississippi Supreme Court applied. *Mirzayance*, 556 U.S. at 122.

Indeed, the Mississippi Supreme Court’s waiver ruling is firmly grounded in—and flows from—this Court’s precedents.

The Mississippi Supreme Court’s waiver ruling is a straightforward application of the burdens that *Batson* imposes. Under *Batson*, “the defendant” must “establish[] purposeful discrimination,” 476 U.S. at 98, and the “ultimate burden of persuasion” “rests with, and never shifts from,” the defendant, *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Steps 1 and 2 of *Batson* “govern the production of evidence that allows the trial court to determine the persuasiveness of the defendant’s” *Batson* claim at step 3, *Johnson v. California*, 545 U.S. 162, 171 (2005), and the step-3 determination rests on “the parties’ submissions,” *Davis v. Ayala*, 576 U.S. 257, 270 (2015)—not on the trial court’s canvassing of the record for rebuttal arguments on the defendant’s behalf or on an appellate court’s cold-record view of those arguments made first on appeal. Here, as elsewhere in the law, “the parties ... are responsible for advancing the facts and arguments entitling them to relief” and courts serve “the role of neutral arbiter of matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 243, 244 (2008).

The Mississippi Supreme Court’s waiver ruling also follows from the central role that *Batson* assigns to trial judges. Trial judges are “in the best position to determine whether a peremptory challenge is based on” race—“a difficult determination” that often rests “on subtle impressions and intangible factors.” *Ayala*, 576 U.S. at 285. So requiring defendants to present pretext arguments to trial judges is sensible: trial judges—not appellate judges—are “best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor.” *Id.* at 273-74. And by requiring defendants to make these arguments at jury selection, Mississippi’s rule enables the “prompt rulings”—“without substantial disruption”—that *Batson* encourages. *Johnson*, 545 U.S. at 172; see *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (same). It also combats gamesmanship. Without that rule, defendants have strong incentives to remain silent after raising a threadbare *Batson* objection, thereby bypassing the inconveniences of an adversarial presentation while preserving the ability on appeal to fault the trial judge for not considering unraised facts or circumstances that allegedly support the claim.

Even without all those points, the Mississippi Supreme Court’s waiver ruling reasonably exercises the leeway that this Court has entrusted to lower courts to implement *Batson*. This Court in *Batson* “ma[d]e no attempt to instruct” trial courts “how best to implement [its] holding.” 476 U.S. at 99 n.24. This Court has left it to lower courts to “develop rules” for assessing claims under *Batson*’s framework. *Powers*, 499 U.S. at 416. In *Ford v. Georgia*, 498 U.S. 411 (1991), this Court accordingly recognized that “state court[s] may 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.” *Id.* at 423. The Mississippi Supreme Court—like many other courts—has thus reasonably adopted a complementary rule that a defendant waives rebuttal arguments if he fails to timely make them to the trial judge. That rule promotes thorough *Batson* presentations to trial judges, which produce better trial-judge rulings on *Batson* claims, which spawn fewer appellate reversals and new trials based on *Batson* errors or violations.

Fairminded jurists could thus conclude that the Mississippi Supreme Court was not “objectively unreasonable” in ruling that petitioner waived pretext arguments by failing to raise them at trial. *Woodall*, 572 U.S. at 419. Many federal courts of appeals and state high courts have adopted similar rules. *E.g.*, *United States v. Pulgarin*, 955 F.2d 1, 1-2 (1st Cir. 1992); *Garraway v. Phillips*, 591 F.3d 72, 76 (2d Cir. 2010); *United States v. Wiley*, 93 F.4th 619, 629 n.3 (4th Cir. 2024); *Davis v. Baltimore Gas & Electric Co.*, 160 F.3d 1023, 1027-28 (4th Cir. 1998); *United States v. Arce*, 997 F.2d 1123, 1126-27 (5th Cir. 1993); *United States v. Jackson*, 347 F.3d 598, 604-06 (6th Cir. 2003); *United States v. Lovies*, 16 F.4th 493, 502 (7th Cir. 2021); *United States v. Walley*, 567 F.3d 354, 358 (8th Cir. 2009); *United States v. Clark*, 747 F.3d 890, 895 (D.C. Cir. 2014); *State v. Porter*, 491 P.3d 1100, 1107-08 (Ariz. 2021); *State v. Brown*, 498 P.3d 167, 175-77 (Kan. 2021); *State v. Diggins*, 836 N.W.2d 349, 356-57 (Minn. 2013); *State v. Taylor*, 944 S.W.2d 925, 934 (Mo. 1997); *People v. Smocum*, 786 N.E.2d 1275, 1279 (N.Y. 2003); *Buck v. Commonwealth*, 443 S.E.2d 414, 415-16 (Va. 1994). Mississippi’s waiver rule—and its waiver ruling

here—does not defy clearly established federal law. *Cf. Woodall*, 572 U.S. at 422 n.3 (courts of appeals’ “diverging approaches” to question “illustrate the possibility of fairminded disagreement” barring habeas relief).

b. Against those points, petitioner makes two sets of arguments. Br.40-50. Each is unavailing.

*First*, petitioner contends that the Mississippi Supreme Court unreasonably applied this Court’s cases establishing “that appellate courts consider comparative juror analyses pressed for the first time on appeal.” Br.41 (formatting altered); *see* Br.41-46.

But under AEDPA, petitioner needs this Court to have clearly established that appellate courts *must* consider comparative-juror arguments first raised on appeal. No such rule exists. Even if “appellate courts *can* consider such comparisons in the first instance,” Br.44 (emphasis added), that would not show that in declining to do so the state supreme court here erred “beyond any possibility for fairminded disagreement,” *Richter*, 562 U.S. at 103. That court did not “ignore[ ] that it had authority to conduct a comparative juror analysis.” *Contra* Br.42. It applied a considered, settled waiver rule that flows from this Court’s precedents. *Supra* pp.25-29.

Petitioner claims that *Snyder v. Louisiana*, 552 U.S. 472 (2008), “made clear that appellate courts conduct comparative juror analyses even when not pressed at trial.” Br.41; *see* Br.41-42. Appellate courts sometimes do that. But *Snyder* does not say—let alone hold—that appellate courts *must* do that. And in *Snyder* (unlike here) the defendant “disputed” the prosecution’s explanations before the trial judge, the judge had “thoroughly explored” the “characteristic”

that formed the key basis of the prosecution’s strike, and the developed trial-court record showed that this basis was “clear[ly]” “unconvincing.” 552 U.S. at 478-79, 483; *see id.* at 479-84. The characteristics that petitioner identifies here “were not raised at trial,” and so “a retrospective comparison” based on them risks being “very misleading.” *Id.* at 483. More: *Snyder* emphasized that the Louisiana Supreme Court “did not hold” that Snyder “had procedurally defaulted reliance on a compar[ative-juror analysis]” for the relevant strike. *Id.* at 483 n.2; *cf. State v. Snyder*, 942 So. 2d 484, 493 n.13 (La. 2006) (noting that Snyder “procedural[ly] default[ed]” challenges to other strikes by failing to “argue” them at trial). If comparative-juror arguments are (as petitioner suggests) immune from waiver, there would have been little reason to emphasize that point.

Petitioner also suggests that *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), clearly established that a defendant need not raise comparative-juror arguments at trial “to preserve [them] for appeal.” Br.43; *see* Br.42-44. *Miller-El II* did no such thing. *Miller-El II* decided only “a factual question under [28 U.S.C.] § 2254(d)(2),” so it “could not and did not establish” “a new procedural rule that state courts must” consider certain arguments or evidence “when evaluating a *Batson* claim.” *McDaniels v. Kirkland*, 813 F.3d 770, 782, 783 (9th Cir. 2015) (Ikuta, J., concurring); *see Chamberlin v. Fisher*, 885 F.3d 832, 838 (5th Cir. 2018) (en banc) (*Miller-El II* “did not clearly establish” that state courts must “conduct a comparative juror analysis”). Even if *Miller-El II* had been decided under section 2254(d)(1)—and so had turned on a rule of law rather than a determination of fact—it could not have established the rule that

petitioner needs. Decisions under section 2254(d)(1) apply only “govern[ing]” law—and only clearly established governing law at that—and so do not “ma[k]e” or announce “new law.” *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). *Miller-El II* thus did not (and could not) “reject[ ]” the waiver rule the state supreme court applied here. *Contra* Br.44.

At all events, *Miller-El II* nowhere states the rule petitioner needs: that comparative-juror arguments are categorically preserved for appeal even when the defendant does not make them to the trial judge. *Miller-El II* credited a *Batson* claim only after emphasizing that the defendant “base[d] his arguments” on “evidence” of discrimination that was “record[ed]” in the “transcript of *voir dire*.” 545 U.S. at 241-42 n.2; *see id.* at 236 (noting “evidence” the trial court “received”). Unlike petitioner here, Miller-El “presented extensive evidence in support of” his claim “to the state trial court.” *Miller-El v. Cockrell*, 537 U.S. 322, 328-29, 331 (2003) (*Miller-El I*); *see id.* at 331-35. And this Court “omitted” reference to “material” that, Texas noted, “was not in evidence in the state trial court.” 545 U.S. at 264 n.37.

Petitioner highlights *Miller-El II*'s statement distinguishing “evidence” presented to the trial court from “theories about that evidence.” 545 U.S. at 241 n.2 (cited at Br.43). That is the point: *Miller-El II* decided that certain evidence was “presented to the state courts” and so could “be considered by federal [habeas] courts.” *Ibid.* It did not decide the lawfulness of any waiver rule. Further—unlike Miller-El—all petitioner offered to the trial judge was a bare presentation on numbers. He claims that the state supreme court “need[ed] only” to “compare the prosecution’s stated reasons for its strikes with the

[juror] questionnaires.” Br.42. That is not so. Some of those reasons were based on information from law enforcement—information that petitioner did not question at trial and the trial judge accepted as credible. *Cf.* RA194a (petitioner stating his expectation that, “in selecting the jury,” the prosecution would draw from law enforcement). Petitioner also attacks the prosecution’s reasons for lack of an evidentiary presentation. *Infra* Part II-B. But petitioner never demanded such a presentation. He could not cure that failure on appeal by pointing to juror questionnaires. These points confirm the flaws in petitioner’s proposed anti-waiver rule.

Petitioner says that he could not have “present[ed] a real-time comparative juror analysis with the level of specificity that [he] presented on appeal,” when jury selection involved “a 126-member initial jury pool, 564 pages of juror questionnaires, 189 pages of voir dire testimony, and only a 20-minute period” to prepare peremptory strikes. Br.45-46. That argument admits the implausibility of requiring trial courts to undertake a sweeping comparative-juror analysis without the defendant’s aid or prompting. Anyway, the Mississippi Supreme Court did not rule that petitioner had to make “a long-form juror analysis” (Br.45) at jury selection. It ruled that he had to offer rebuttal arguments—as counsel in many cases have done. *E.g., Manning v. State*, 735 So. 2d 323, 339-40 (Miss. 1999) (defense offered rebuttal on two strikes); *Berry v. State*, 728 So. 2d 568, 571-73 (Miss. 1999) (one strike). Petitioner made detailed for-cause and other objections at jury selection. *E.g., JA158-62, 164-66*. If he could do that, he could have made rebuttal arguments on pretext. He offered none.

*Second*, petitioner contends that the Mississippi Supreme Court unreasonably applied this Court's precedents by "excusing the trial court" from performing step 3 of *Batson*. Br.46; *see* Br.46-50.

Petitioner claims that the state supreme court unreasonably excused the trial judge from providing him "an opportunity to rebut the prosecution's race-neutral proffer." Br.46; *see* Br.48, 49. If petitioner means that a trial court unreasonably applies federal law unless it affirmatively elicits rebuttal from defense counsel, the claim fails. Petitioner cites no decision of this Court establishing such a rule. And if he means that the trial judge in fact denied him an opportunity for rebuttal by "refus[ing] further argument" (or otherwise), Br.49, the record (as detailed below) refutes that view. *Infra* Part I-B.

Petitioner also claims that the state supreme court excused the trial judge from assessing "all relevant circumstances" to decide whether the prosecution committed "intentional discrimination." Br.46; *see* Br.47-50. That is wrong. The trial judge conducted step 3. *Supra* pp.10-12. He ruled that the prosecution's asserted reasons were in fact race neutral and credible, JA169-70—as he confirmed at the post-jury-selection bench conference, JA175. He considered the "relevant circumstances" before him, including petitioner's presentation on numbers, the State's explanations, and petitioner's failure to dispute any of those explanations. *Ibid*. No precedent of this Court required the trial judge to do, say, or consider more. Petitioner did not cite any other "circumstances," raise "persisting doubts" about any strike, or present anything to cast doubt on the "prosecutors' intentions." *Contra* Br.47-48. No precedent of this Court required the trial judge to

scour the record for (or otherwise conjure on his own) every possible fact or circumstance that might support petitioner’s claim. No precedent of this Court required the trial judge to “sa[y]” that he had considered “all relevant circumstances” or elaborate on those circumstances. *Contra* Br.48, 49. The Mississippi Supreme Court reasonably upheld the trial judge’s *Batson* ruling.

**B. The Mississippi Supreme Court’s Decision Rests On A Reasonable Determination Of The Facts.**

The Mississippi Supreme Court’s decision is not based on an “unreasonable determination of the facts.” 28 U.S.C. § 2254(d)(2).

A state court’s decision is based on an “unreasonable determination of the facts” only when “a reasonable factfinder must” reject the relevant factual finding—when there is “no permissible alternative but to” find otherwise. *Rice v. Collins*, 546 U.S. 333, 338, 341 (2006). “[I]t is not enough to show that reasonable minds reviewing the record might disagree about th[at] finding.” *Brown v. Davenport*, 596 U.S. 118, 135 (2022) (cleaned up). When the “evidence in the state-court record can fairly be read to support” the state court’s “factual determination,” section 2254(d)(2) bars habeas relief. *Wood v. Allen*, 558 U.S. 290, 301-02 (2010). Further, state-court factual findings are “presumed” “correct”: petitioner has the burden of rebutting the presumption by “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

1. The Mississippi Supreme Court’s waiver ruling is not based on an “unreasonable determination of the facts.” A reasonable factfinder could conclude that

petitioner failed to raise pretext arguments at trial and thus waived those arguments.

Under Mississippi law “[i]t is incumbent upon a defendant claiming that” the prosecution’s “proffered reasons” for a peremptory strike “are pretextual” to “raise th[at] argument before the trial court.” *Manning*, 735 So. 2d at 339. “The failure to do so constitutes waiver” of that “argument.” *Ibid.* Applying that rule, the Mississippi Supreme Court reasonably found that petitioner waived his pretext arguments.

In making a *Batson* claim during jury selection, petitioner (through Ms. Steiner) said that there “appears” to be a “pattern” of the State “striking almost all” black jurors except “one” and that the jury was “disproportionally white” compared to the “population of this county.” JA167-68. She said that *Miller-El II* “reversed a conviction” where a State used strikes to leave only “one or two black jurors” on the jury. JA168. And when the trial judge asked the defense whether it sought explanations for all the prosecution’s strikes or for the 4 challenged strikes, Ms. Steiner said: “I think the jurisprudence simply states that the Court must make a determination on the basis of all relevant circumstances to racial discrimination.” JA169; *see* JA168-69. She cited no “relevant circumstances.”

The trial judge then instructed the prosecution to “give race neutral reasons” for the challenged strikes. JA169. As the prosecution did so for each strike, defense counsel stayed silent. *See* JA169-71. Neither Ms. Steiner nor her co-counsel objected to any of the prosecution’s reasons, disputed that they were race neutral and credible, or asked the trial judge to explore or demand further support for any of them.

Nor did defense counsel ask the trial judge to consider whether the proffered reasons applied to white jurors that the prosecution accepted. After the judge credited the prosecution's reasons and upheld the strikes, defense counsel continued with jury selection without objection. JA170-71.

After the jury was selected, the trial judge permitted Ms. Steiner to approach the bench to "reserve" petitioner's "Batson objection." JA175. The judge confirmed that the objection was "clear in the record." *Ibid.* He granted Ms. Steiner's request "to state into the record" that "one ... of [the] fourteen jurors" is "non-white, whereas this county is approximately, what, 40 percent?" JA176. Ms. Steiner did not offer any further arguments or suggest that she wanted to do so. As before, she did not fault any of the State's reasons for its strikes, ask the court to compare those struck to other jurors, or cite any other facts or circumstances supporting petitioner's *Batson* claim. JA175-76. That silence contrasts markedly with Ms. Steiner's presentations, just pages earlier in the transcript, in which she offered detailed constitutional arguments, record-based challenges for cause, and tailored responses to the judge's comments. JA158-63, 164-66; *supra* pp.7-8.

After trial, petitioner claimed, in two motions for a new trial, that the State improperly "remove[d] all but one African-American from the jury," producing "a jury composed of less than 10% African-American citizens" in "a county with nearly a 45% African-American population." JA179, 184. His second motion added: "the prosecution's state of mind was clearly racially discriminatory as it deselected black people from the jury panel who had the same familial, living, social or marital circumstances as whites who were

not deselected.” JA184. He cited no record evidence supporting these assertions. JA179, 184.

Petitioner’s approach to his *Batson* claim changed dramatically on appeal. In the Mississippi Supreme Court, he offered (through Ms. Steiner) extensive argument and a detailed chart disputing each of the prosecution’s reasons, faulting the prosecution for not introducing evidence on them, and claiming that some reasons also applied to white jurors the State did not strike. JA201-25, 332-53; *supra* pp.13-16. The State invoked Mississippi’s waiver rule and emphasized that petitioner made none of those pretext arguments at trial. JA367-70. In reply, petitioner now claimed that the trial judge “erroneously pretermitted” him “from making any rebuttal” and “disregarded” his “request” to “make a final totality of the circumstances analysis required under *Batson*.” JA483; *see* JA483-87.

On this record, the Mississippi Supreme Court was correct—and plainly reasonable—in determining that petitioner waived any right to rebut the State’s asserted race-neutral reasons with pretext arguments that he did not raise to the trial judge. JA584-85. Indeed, petitioner conceded every relevant point (*supra* pp.17-18) in state post-conviction proceedings that he now ignores. *See* Br.iv, 13. Mississippi’s waiver rule was settled when petitioner was tried. *E.g., Manning*, 735 So. 2d at 339; *supra* p.5. Petitioner later admitted this. RA39a. Petitioner did not make the pretext-based rebuttal arguments to the trial judge that he later made, at length, on appeal. JA169-70, 175-76; *supra* pp.9-16. He later admitted that at trial he “made no attempt to rebut or otherwise offer argument or evidence” on pretext. RA39a. Petitioner had multiple opportunities to make pretext

arguments, he gave the trial judge no indication that he wanted to raise such arguments, and he did not even attempt to belatedly develop those arguments in post-trial motions. JA169-70, 175-76, 179, 184. He later admitted these points. RA38a-42a. He fortified all this with an affidavit from Ms. Steiner, who declared that she “did not ... do anything to raise, or reserve the right to raise, before the trial court any of the evidence suggestive of pretext” that she cited on appeal and that she “failed to suggest that pretext or the evidence of it be asserted in post-trial motions.” RA77a; *see* RA40a.

The Mississippi Supreme Court was thus right—and certainly not unreasonable—in ruling that petitioner waived the pretext arguments that he first raised on appeal. To quote petitioner: he “fail[ed]” “to properly challenge, litigate, and preserve the record” on his *Batson* claim and pretext arguments. RA38a (formatting altered). The “evidence in the state-court record can fairly be read to support” the court’s waiver determination, so section 2254(d)(2) bars relief. *Wood*, 558 U.S. at 301-02.

2. In claiming (Br.30-40) that the Mississippi Supreme Court’s waiver finding is an “unreasonable determination of the facts,” petitioner argues: that he “raised” a *Batson* “objection” “three separate times” (at and after jury selection, in post-trial motions, and on direct appeal), Br.31; *see* Br.31-34, 35-36, 37-39; that the trial judge said that his “objections” were “in the record,” Br.36 (quoting JA175); *see* Br.36-37, 40; and that he “reli[ed]” on that “assur[ance]” in not “attempt[ing] further argument” on pretext. Br.37; *see* Br.39, 40.

One record-based reality dooms all those points: as shown above, petitioner never made (or attempted to make) to the trial judge the pretext arguments that he later made for the first time on appeal. *Supra* Part I-B-1. Take his points in turn. One: He “raised” a *Batson* objection. Br.31. That does not help him. The state supreme court agreed that he raised a *Batson* “objection”: that court rejected his objection on the merits. JA577-85; *see* ROA.17493 (petitioner’s amended federal habeas petition, affirming that supreme court rejected the claim “on the merits”). But petitioner did not press or preserve at jury selection the pretext arguments that he made on appeal, so that court found that he waived those “arguments.” JA584-85; *cf. Davenport*, 596 U.S. at 145 (deeming “forfeited” a “theory” that was a “variation” of an argument that a party had made). Far from disputing that he “did not present” those arguments at jury selection, petitioner agrees: he insists that he was “thwarted” from making them (a point addressed below). Br.35. He says that he “re-rais[ed]” his claim in post-trial motions. Br.33-34. But, as the state supreme court recognized, even then “he did not present” his pretext arguments, and by then it was too late anyway. JA584-85 & n.16. He also says that “on direct appeal” he “spelled out” his *Batson* claim “in more detail.” Br.34. But that is the problem: as the state supreme court reasonably found, by then it was much too late to raise pretext arguments. JA584-85. Two: The trial judge said that petitioner’s *Batson* objection was “in the record.” Br.36 (quoting JA175). His *objection* was in the record. But his rebuttal arguments were not, because he did not make them to the trial judge. So the trial judge did not (and could not) find that he had preserved those arguments. Three: He “reli[ed]” on the trial judge’s “assur[ance]”

on preservation in not “attempt[ing] further argument” on pretext. Br.37. But the trial judge did not (and could not) “assure[ ]” petitioner that he had preserved arguments he never made. *Ibid.* And petitioner and his counsel later admitted that they did not rely on any such assurance. *Supra* pp.17-18.

Petitioner also suggests that it was unreasonable to find that he waived rebuttal arguments because the trial judge “thwarted” and “prevented” him “from making any record-based rebuttal.” Br.31, 35-36. According to petitioner, the trial judge “cut[ ] off” and “denied” him rebuttal, “withheld [any] rebuttal opportunity,” “ordered” him to “stop” “press[ing]” his *Batson* claim, and “expressly said that no further argument would be permitted.” Br.3, 32, 33, 37, 39; *see* Br.2, 16, 44, 45, 49; *supra* p.11. Those assertions have no basis. The transcript—which petitioner quotes only in curated snippets—shows the opposite. *Supra* pp.9-12 (cataloguing the relevant parts of the record). The transcript shows that throughout jury selection the trial judge patiently and thoughtfully worked with the parties and the venire members to select a jury in accordance with law. *E.g.*, JA23-24, 42, 54, 70, 73, 79-80, 82-83, 90, 121-22, 125-26, 137-38, 143-44; *see, e.g.*, JA17-86, 145-52. The judge repeatedly let defense counsel raise detailed objections and arguments during jury selection, and often credited those presentations. JA158-63, 164-66. The judge never blocked the defense from disputing the prosecution’s reasons. JA169-70; *see* JA725 n.5. Indeed, the judge let Ms. Steiner offer more; she cited only numbers and county demographics. *E.g.*, JA175-76; *see* JA725 n.5. Petitioner’s thwarted-from-rebuttal claims defy the record. They do not show that any state court was unreasonable.

Petitioner’s other arguments fail too. One: He suggests that he should be deemed to have preserved rebuttal arguments because the trial judge “never conducted th[e] [s]tep 3 analysis”—which, petitioner implies, must incorporate rebuttal that he could have made but did not. Br.31; *see* Br.32-33, 34. But the judge soundly completed each step of *Batson*. *Supra* Part I-A. Two: He disputes that the rule the Mississippi Supreme Court applied meets the definition of “waiver.” Br.35-36. That would not help him even if he were right. Regardless of label, petitioner does not contest that in Mississippi the “failure” to argue pretext on rebuttal bars relief on such arguments on appeal. *Manning*, 735 So. 2d at 339. And given the facts before it, the state supreme court had a solid basis to rule that petitioner failed to make timely pretext arguments and so could not secure appellate relief based on those arguments. Three: Petitioner suggests that the state supreme court’s waiver ruling would require litigants to “re-litigate every angle of every objection raised throughout trial” to ensure preservation. Br.40. But the waiver rule does not require exhaustive or appellate-brief-level granularity. It requires rebuttal arguments—which petitioner did not offer. And there was no “unfairness” in the Mississippi Supreme Court’s enforcement of its waiver rule here. *Contra* Br.37. As petitioner and his trial counsel later affirmed, that waiver rule was well established and counsel committed an “appalling failure” by not heeding it. RA39a, 41a; *see* RA77a.

Petitioner has not shown that every “reasonable factfinder must” reject the Mississippi Supreme Court’s waiver finding. *Rice v. Collins*, 546 U.S. 333, 341 (2006); *compare Wiggins v. Smith*, 539 U.S. 510,

528 (2003) (cited at Br.35-38) (“factual error” was so “clear” that “the State and the United States now concede[d]” the error); *Brumfield v. Cain*, 576 U.S. 305, 309-10, 314, 317, 319 (2015) (cited at Br.35) (finding unreasonableness based on “evidence” that was timely put before state court). Section 2254(d)(2) blocks relief.

## **II. Petitioner’s Other Arguments—On The Merits Of His *Batson* Claim And On His Request For Ultimate Habeas Relief—Are Not Presented And Lack Merit.**

This Court limited its grant of certiorari to the question—reformulated by the Court—whether the Mississippi Supreme Court’s waiver ruling comports with AEDPA. *Supra* p.i. The Court did not agree to decide the merits of petitioner’s *Batson* claim. And that larger merits question is not a “subsidiary question” that is “fairly included” within the question presented. S. Ct. R. 14.1(a).

Yet petitioner’s lead argument in this Court—spanning 11+ pages—is that “the state courts violated *Batson*.” Br.18 (formatting altered); *see* Br.18-29. And petitioner closes his brief by urging this Court to grant him ultimate habeas relief—to “vacate” his conviction and “order [him] released if not retried within a reasonable time.” Br.51; *see* Br.50-52. That is not relief that petitioner could be granted under even a favorable answer to the actual question presented. If this Court were to rule that the state supreme court unreasonably determined that petitioner waived his right to rebut the prosecutor’s asserted race-neutral reasons, the relief available would at most be an order allowing the state supreme court to reassess petitioner’s *Batson* claim in light of

his rebuttal arguments. *Cf.* Br.48 (“The Mississippi Supreme Court could have cured” any “*Batson* error” by “conduct[ing] the Step 3 analysis” or “remand[ing] to the trial court to conduct a *Batson* hearing.”).

Aside from his apparent hope that this Court will disregard those points, petitioner’s lead argument seems aimed at jumpstarting the AEDPA arguments that he delays until page 30 of his brief. But even with his late pretext arguments, he has not shown a *Batson* violation under any standard.

A. Start with petitioner’s prima facie case. He cited the “pattern” of strikes—the prosecution struck 4 of 5 black potential jurors—and its “disproportiona[te]” impact, given “the population of th[e] county.” JA167-68. He now claims that the prosecution struck “80% of eligible black jurors” (4 of 5) and “only 8.3% of eligible white jurors” (3 of 36). Br.22-23. The “36” is wrong: it includes 8 white potential jurors who were never considered for peremptory strikes because the juror-tendering process had already produced a final jury. *See* JA166-74. And of the peremptory strikes it used, the State used 57% on black potential jurors and 43% on white potential jurors—which (as the state supreme court ruled) “support[ed]” but did not compel finding a prima facie case. JA580-81. Further, in a tendering process that began with 36 (or 37, *supra* p.8) white potential jurors and 5 black potential jurors, it is not “remarkable” that a jury of 12 members and 2 alternates would include only 1 black juror. *Contra* Br.22. Petitioner’s prima facie case was sufficient to proceed to step 2 but it could not alone overcome the prosecution’s race-neutral explanations.

Petitioner cites the prosecution’s “juror list[s],” which were “marked up” with notations including

prospective jurors' race and sex. Br.2, 7-8, 9 (citing ROA.2186-95). Petitioner has conceded that those lists, produced in federal habeas discovery, "are not part of the state court record" under 28 U.S.C. § 2254(d). ROA.18029; *see, e.g.*, Cert. Reply 10 n.7; ROA.17966 n.1. This Court should reject—and view with deep skepticism—petitioner's reliance on extra-record materials. *See Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011); *cf.* Br.11 (relying on other material not in state-court record). Anyway, the prosecution had strong non-discriminatory reasons for noting jurors' race and sex. That information helps to identify jurors at jury selection and is critical to bringing or defending against *Batson* claims and to making a "complete record" on them. *Lynch v. State*, 877 So. 2d 1254, 1276 (Miss. 2004); *cf.* JA577 n.4. Indeed, *petitioner* asked potential jurors to state their "[r]ace" and "[g]ender" on the juror questionnaire, JA733, which (he said) sought information "necessary for the intelligent use of peremptory strikes," RA199a.

Petitioner also stresses that the "lead prosecutor" at his trial was the prosecutor in *Flowers v. Mississippi*, 588 U.S. 284 (2019). Br.23, 28-29. But *Flowers* reaffirms that this Court assesses each *Batson* claim based on "the ... facts of th[e] case" and on the "evidence" and "arguments" the "defendant[ ]" "present[s]" to "the trial judge." *Id.* at 288, 301, 302. The "extraordinary" record in *Flowers* showed a *Batson* violation. *Id.* at 316. The record here (as detailed below) does not.

B. Now take the prosecution's reasons for its strikes and petitioner's late arguments against them. Br.23-28. Petitioner does not dispute that all those reasons are facially race-neutral and legitimate

grounds for a peremptory strike. And his new pretext arguments are unavailing.

1. The prosecution struck Linda Lee because she “was 15 minutes late” to court after a lunch recess and because police “had numerous calls to her house and said she obviously has mental problems.” JA169.

Petitioner claims pretext because the prosecution “did not object to the other late-returners.” Br.23. But Ms. Lee was unique: she was “later than everybody” else and the court waited several minutes before proceeding without her. JA87-88. The trial judge did find her lateness “insufficient” to strike her for cause. Br.23-24. But the basis for a peremptory strike “need not rise to the level justifying exercise of a challenge for cause.” *Batson*, 476 U.S. at 97. The prosecution reasonably deemed Ms. Lee’s unique lateness to show “disregard” for the court system (JA163), which was at odds with the State’s desire for jurors who would follow the law. *See* JA87-109.

Petitioner also claims that Ms. Lee’s alleged “potentially disqualifying” “mental-health” “condition” was an implausible basis for a strike because the prosecution did not seek to strike her for cause on that ground, “never asked her about it during voir dire,” “did not raise” it until after the parties recessed “to prepare” their “peremptory strikes,” and “presented no evidence” about it. Br.24. None of that holds up. One: The prosecutor did not claim a “disqualifying” condition, so he did not challenge Ms. Lee for cause on that ground. He cited lesser “mental problems” that made her an unattractive juror. JA169. Two: The prosecutor learned about those “problems” from local police, so he did not need to ask about them at voir dire. *Ibid.*

Petitioner had acknowledged his “anticipat[ion]” that the prosecution would “obtain information from law enforcement personnel regarding potential jurors” that the prosecution would “utilize[ ]” “in selecting the jury.” RA194a. Three: It is not suspicious that the prosecution gave this reason after the court recessed for the parties “to prepare” their “preemptory strikes.” Br.24. The recess allowed the prosecution to obtain such information. And four: The prosecution did not submit further evidence because *Batson* does not require it and because petitioner neither objected to the prosecutor’s reason nor demanded such evidence.

2. The prosecution struck Christopher Tillmon because his “brother” was convicted of manslaughter and the prosecution did not “want anyone on the jury” with “relatives convicted of similar offenses” in petitioner’s “murder case.” JA169. Petitioner claims that the State accepted two “similarly situated” white jurors who “had relatives with felony convictions.” Br.25. Petitioner’s brief omits that those convictions were for burglary and forgery, which are not “similar[ ]” to a manslaughter conviction—especially in a murder trial. Br.25; *see* JA811, 931 (questionnaires). The prosecution reasonably believed that these facts negated any “attractive qualities” Mr. Tillmon had as a juror. Br.24-25. Petitioner adds that the prosecution did not “question” the other two jurors “about the nature of” their relatives’ convictions or the jurors’ “relationship with the convicted relative[s].” Br.25. But that information was included in the juror questionnaires that petitioner says the prosecution “rel[ied] upon,” Br.42 (“prosecutor’s proffers stemmed from” questionnaires), so the prosecution did not need to ask more about it. *See* JA811, 931. Indeed, for all petitioner’s attacks on the State’s lack of voir-dire

questioning (e.g., Br.2, 8-9, 20-21, 22, 24-26) the prosecution had a reliable, unobjected-to source of information—like questionnaires or law enforcement. Cf. RA199a (defense’s statement that questionnaires would “save substantial time in voir dire”).

3. The prosecution struck Patricia Tidwell because “[h]er brother” was convicted of sexual battery in the same court as petitioner’s trial, “her brother” had “pending” “charge[s] in a shooting case” in the same county, and, “according to police officers,” she was “a known drug user.” JA170; *see* JA109. Petitioner does not dispute that Ms. Tidwell’s questionnaire listed her brother’s sexual-battery conviction. JA1429. Instead, he cites the same two white jurors with relatives convicted of “serious crimes.” Br.26. But forgery and burglary are not comparable to sexual battery, and Ms. Tidwell’s relative’s “pending” “charge[s]”—which petitioner does not claim applies to those two other jurors—buoyed concerns about her relationships and sympathies. Petitioner also claims that Ms. Tidwell’s drug use was “unsubstantiated.” Br.26. But he did not object to that reason, demand evidence on it, or give any basis to fault it. JA170. He suggests that Ms. Tidwell was not a “known drug user” because she had not “been charged with a drug-related crime.” Br.26. That is a non sequitur.

4. The prosecution struck Carlos Ward for “several reasons”: “he had no opinion on the death penalty”; he “ha[d] numerous speeding violations”; and he had key similarities to petitioner (they are “approximately the [same] age,” “have children about the same age,” and “have never been married”) and so was “too closely related to” petitioner and would “not be able to not be thinking about these issues,” especially at the penalty phase. JA170.

Petitioner emphasizes the prosecution's reliance on Mr. Ward's "demographic profile," Br.27, but the cited characteristics (youth, children, marital status) are race neutral. *Rice v. Collins*, 546 U.S. 333, 341-42 (2006) (age, marital status). And those characteristics have special force—and special concern for the State—when combined. A young, unmarried father (like Mr. Ward) could naturally empathize with a fellow young, unmarried father (like petitioner). Petitioner says that other jurors had one or two of the cited characteristics. Br.27, 28. But none was a young, unmarried father—a highly pertinent "profile" (Br.27) in petitioner's case—let alone a young, unmarried father who lacked an opinion on the death penalty and had "numerous" speeding violations. JA170. Petitioner says that there is "no evidence" of those "speeding violations." Br.28. But he failed to object to that reason or give the trial court any reason to doubt it. He says that the prosecution "disclaimed" that "speeding violations" are "relevant to jury service" by "specifically exclud[ing]" them from "the jointly crafted jury questionnaire." *Ibid.* But the defense crafted the questionnaire. *Compare* RA202a-08a (defense's proposed questionnaire) *with* JA733-39 (same questionnaire sent to jurors); *see* RA209a-10a (State agreeing that proposed questionnaire "filed by the defendant" was "satisfactory"). And it "specifically excluded" (Br.28) "traffic offenses" in questions about jurors' "friend[s]" and "family," not about jurors themselves. JA735-36; *see* RA28a. Anyway, in accepting that questionnaire, the State did not deem irrelevant information the questionnaire did not seek.

C. One last point. Petitioner faults the prosecution for "le[aving]" "one black juror on the panel"—what he calls "part of the playbook" to "obscure"

discrimination. Br.29. Petitioner does not identify that juror's name and ignores his individual qualities. Those qualities made Leonard Jones an attractive juror for the State. JA174, 1159-65. Mr. Jones generally favored the death penalty (unlike Mr. Ward), JA1164, 1467; he reported no relatives or friends with criminal charges (unlike Ms. Tidwell and Mr. Tillmon), JA1162, 1429, 1447; and nothing indicates that he had "mental problems" or was late to court (unlike Ms. Lee) or that he was known to police as a drug user (unlike Ms. Tidwell), JA169-70. Mr. Jones was also quite different from petitioner: Mr. Jones was much older, his children were all older than petitioner's, and he had previously been married. JA1159, 1163-64; *compare* JA1462, 1466 (Mr. Ward). The record supports the view that the prosecutor evaluated Mr. Jones—like other potential jurors—based on individual, race-neutral qualities and made his jury-selection decisions accordingly. At all events, petitioner has not overcome that view of the record by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). He has not shown any *Batson* violation—let alone overcome AEDPA.

**CONCLUSION**

This Court should affirm.

Respectfully submitted.

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**APPENDIX A**

**IN THE SUPREME COURT OF MISSISSIPPI**  
*Case No. 2010-DR-01032-SCT*

[Filed Sept. 23, 2011]

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**TERRY PITCHFORD, *Petitioner***

**v.**

**STATE OF MISSISSIPPI, *Respondent***

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**Motion for Leave to Proceed in the Trial Court  
With a Petition for Post-Conviction Relief**

Petitioner TERRY PITCHFORD, along with his counsel, seek leave to file a petition for post-conviction relief in accordance with:

- Mississippi Code Annotated § 99-39-27;
- the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution;
- Article 3, §§ 8, 14, 17, 21 through 28, and 31 of the Mississippi Constitution;
- Mississippi Rule of Appellate Procedure 22; and
- all other applicable federal and state law.

Mr. Pitchford requests that this Court grant post-conviction relief or, in the alternative, grant him leave to seek post-conviction relief in the trial court, so that he may have the opportunity to prove his allegations

at an evidentiary hearing. Mr. Pitchford is simultaneously filing the proposed petition for post-conviction relief along with supporting affidavits and exhibits, and respectfully requests a reasonable period of time within which to supplement and/or amend his petition.

### Introduction

The Sixth Amendment to the Constitution of the United States of America guarantees all citizens charged with a crime the right to an attorney. The United States Supreme Court has interpreted that right to not only include the right to counsel but the right to effective assistance of counsel.

This is a case of layer upon layer of ineffective trial counsel and trial court error. Terry Pitchford was incompetent to stand trial. His trial counsel failed to fulfill his obligation to Terry—a constitutional duty that required him to raise the issue of Terry's competence before the trial court. And the trial court failed to fulfill its constitutional duty to conduct a competency hearing after it ordered Terry's competency to be evaluated.

Adding another layer of trial counsel's ineffectiveness, Terry's trial counsel was admittedly unprepared for trial. They failed to properly communicate with Terry and failed to conduct constitutionally adequate fact and mitigation investigations. Beyond the most basic information, trial counsel did not know who their client really was.

Adding another layer of ineffectiveness, trial counsel failed to offer any rebuttal to the State's so-called "race-neutral" reasons during jury selection when it engaged in racial discrimination. Trial counsel failed to apprise themselves of the current

law on issues that were critical to Terry's case, and did not even properly preserve some of those issues for appeal.

Adding yet another layer, Dr. Rahn Bailey--a mental health expert and key mitigation witness for Terry--did not testify because trial counsel failed to serve him with a subpoena. And when trial counsel learned that that Dr. Bailey was unavailable to testify at trial they failed to request a continuance, or even make a record of what Dr. Bailey's testimony would have been. And because trial counsel were unprepared and had not conducted a constitutionally adequate mitigation investigation, the jury did not learn of the abuse Terry endured as a child or that he suffers from organic brain dysfunction, or that he has serious mental health issues.

Adding even another layer, a juror failed to disclose a relationship with one of the witnesses who testified at Terry's trial. She also failed to disclose that she had a close relationship with several family members of the victim and that she learned of the nephew's relationship to the victim at a recess during jury selection from a conversation with that nephew.

By the time the trial ended, Terry was left with a capital murder conviction, a death sentence, and a layer cake of ineffectiveness and trial court error. Accordingly, Mr. Pitchford is entitled to have post-conviction relief granted, his conviction and sentenced vacated, and his case remanded for a new trial pursuant to Miss. Code Ann. § 99-39-27(7).

#### Procedural Information

Mr. Pitchford is seeking post-conviction relief for his conviction and death sentence. Mr. Pitchford was indicted for the capital murder of Ruben Britt on

January 11, 2005. Mr. Pitchford was tried, convicted, and sentenced to death by a Grenada County jury in February 2006. All post-trial appeals were timely filed. This Court denied Mr. Pitchford's direct appeal on June 24, 2010.<sup>1</sup> Rehearing was denied on October 14, 2010.<sup>2</sup> The Mandate issued on October 21, 2010. This Court ordered the Mississippi Office of Capital Post-Conviction Counsel ("the Office") to represent Terry Pitchford during his post-conviction proceedings upon a finding of indigence on June 29, 2010. The Circuit Court of Grenada County found Mr. Pitchford to be indigent and appointed the Office as his post-conviction counsel on September 29, 2010.

All Claims Are Properly Preserved

Mr. Pitchford is required by statute to show that the facts necessary to prove his claims are not procedurally barred.<sup>3</sup> The purpose of capital post-conviction proceedings is to "bring 'to the trial court's attention the facts not known at the time of judgment.'"<sup>4</sup> In other words, postconviction proceedings afford courts the opportunity "to review those matters which, in practical reality, could not or should not have been raised at trial or on direct appeal."<sup>5</sup> As a result, this Court must go beyond the specific points raised on direct appeal and determine

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<sup>1</sup> *Pitchford v. State*, 45 So. 3d 216 (Miss. 2010).

<sup>2</sup> *Id.*

<sup>3</sup> Miss. Code Ann. § 99-39-21(6).

<sup>4</sup> *Williams v. State*, 669 So. 2d 44, 52 (Miss. 1996) quoting *Smith v. State*, 477 So.2d 191, 195 (Miss. 1985). *See also* Miss. Code Ann. § 99-39-5.

<sup>5</sup> Miss. Code Ann. § 99-39-3(2); *see also Brown v. State*, 798 So. 2d 481 (Miss. 2001).

whether a death sentence was imposed under unfair influences.<sup>6</sup> Therefore, a claim may not be denied simply because of a procedural defect related to the direct appeal.<sup>7</sup> In addition, this Court has a tradition of ensuring that the interest of justice is served when reviewing death penalty cases in awareness of the finality of the death penalty and, as a result, will relax procedural rules when necessary.<sup>8</sup> This Court holds that procedural bars will not prevent the consideration of issues when errors at trial “affect fundamental rights.”<sup>9</sup>

There is no doubt that the claims in this Motion implicate fundamental rights.<sup>10</sup> Moreover, this is the

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<sup>6</sup> Miss. Code Ann. § 99-19-105(3)(a).

<sup>7</sup> *Rowland v. State*, 42 So. 3d 503,507 (Miss. 2010); *Smith v. State*, 477 So. 2d 191 (Miss. 1985).

<sup>8</sup> *Williams v. State*, 445 So. 2d at 81 O; see also *Randall v. State*, 806 So. 2d 185 (Miss. 2001); *Conerly v. State*, 760 So. 2d 737, 740 (Miss. 2000) (“This Court has recognized an exception to procedural bars where a fundamental constitutional right is involved”); *Gilliard v. State*, 614 So. 2d 370,375 (Miss. 1992) (“This Court has looked beyond a procedural bar in instances where the error was of constitutional dimensions”); *Smith v. State*, 477 So. 2d 191 (Miss. 1985); *Cole v. State*, 666 So. 2d 767 (Miss. 1995); *Pinkney v. State*, 602 So. 2d 1177 (Miss. 1992); *Clemons v. State*, 593 So. 2d 1004 (Miss. 1992). In addition, claims that arise in the context of death penalty cases are so serious that they constitute “plain error”—routinely reviewed by this Court even where procedural preservation is lacking.

<sup>9</sup> *Rowland*, 42 So. 2d at 507; *Gallion v. State*, 469 So. 2d 1247, 1249 (Miss. 1985) citing *Brooks v. State*, 46 So. 2d 97 (Miss. 1950).

<sup>10</sup> See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972) (the right not to be sentenced to death except in accordance with legal and constitutional principles).

first time that Mr. Pitchford has had the opportunity to raise many of them.<sup>11</sup> The failure of this Court to consider the claims would be a fundamental miscarriage of justice.<sup>12</sup> All of the issues raised by Mr. Pitchford in this petition are procedurally preserved in accordance with the law, and are as follows:

- I. MR. PITCHFORD'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS NOT AFFORDED A MANDATED COMPETENCY HEARING.**
  
- II. MR. PITCHFORD'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE STATE'S RACIAL DISCRIMINATION DURING VOIR DIRE.**
  
- III. TRIAL COUNSEL'S MYRIAD DEFICIENCIES DEPRIVED MR. PITCHFORD OF HIS CONSTITUTIONALLY REQUIRED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND CAUSED HIM UNDENIABLE PREJUDICE.**

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<sup>11</sup> To the extent this Court considers the provisions of the Post-Conviction Collateral Relief Act concerning procedural bars as applied to Mr. Pitchford's claims, those provisions are unconstitutional. They are an invasion of this Court's rule-making powers, as they are a legislatively-created limitation on the scope of this Court's review of post-conviction petitions.

<sup>12</sup> See *Smith v. Murray*, 477 U.S. 527, 538 (1986); *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Sawyer v. Whitely*, 505 U.S. 333 (1992).

**IV. ALTHOUGH THESE ISSUES STANDING ALONE WARRANT RELIEF, THE CUMULATIVE ERRORS PRESENT IN MR. PITCHFORD'S CASE DENIES HIS CONSTITUTIONALLY-GUARANTEED RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

Standard of Review

This Court recognizes “that post-conviction efforts ... have become an appendage, or part, of the death penalty appeal process at the state level.”<sup>13</sup> The well-established standard of review for capital convictions and sentences is “one of ‘heightened scrutiny’ under which all bona fide doubts are resolved in favor of the accused.”<sup>14</sup> This Court recognizes that “[w]hat may be harmless error in a case with less at stake becomes reversible error when the penalty is death.”<sup>15</sup> Because all bona fide doubts must be construed in the petitioner’s favor,<sup>16</sup> an evidentiary hearing is

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<sup>13</sup> *Jackson v. State*, 732 So. 2d 187, 190 (Miss. 1999); *see also id.* at 191 (finding that in capital cases, state post-conviction efforts have become a part of the death-penalty appeal process at the state level).

<sup>14</sup> *Flowers v. State*, 773 So. 2d 309, 317 (Miss. 2000) (internal citations omitted); *see also Randall v. State*, 806 So. 2d 185 (Miss. 2001) (“the rule in this State is clear: death is different. In capital case, all bona fide doubts are resolved in favor of the defendant”).

<sup>15</sup> *Flowers*, 773 So. 2d at 317.

<sup>16</sup> *See Irving v. State*, 361 So. 2d 1360, 1363 (Miss. 1978) (“We recognize that thoroughness and intensity of review are heightened in cases where the death penalty has been imposed”); *Havard v. State*, 928 So. 2d 771, 779-80 (Miss. 2006) quoting

mandated “unless it appears beyond a doubt that the petitioner can prove no set of facts in support of his claim ...”<sup>17</sup>

Grounds for Relief with Supporting Facts

**I. MR. PITCHFORD’S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS NOT AFFORDED A MANDATED COMPETENCY HEARING.**<sup>18,19</sup>

**A. Terry Pitchford Was Incompetent to Stand Trial.**

The U.S. and Mississippi Constitutions require that a defendant be competent to stand trial. For a defendant to be competent to stand trial he must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding”<sup>20</sup>

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*Irving v. State*, 361 So. 2d 1360, 1363 (Miss. 1978) (“Under this standard of review, all doubts are to be resolved in favor of the accused because ‘what may be harmless error in a case with less at stake becomes reversible error when the penalty is death.’”).

<sup>17</sup> See *Sanders v. State*, 846 So. 2d 230,234 (Miss. Ct. App. 2002) (quoting *Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996).

<sup>18</sup> This is brought as a free-standing claim, as well as a claim of ineffective assistance of counsel which is discussed in Section III.

<sup>19</sup> This free-standing claim is properly preserved. The U.S. Supreme Court specifically rejected the notion that competency to stand trial is subject to waiver. *Pate v. Robinson*, 383 U.S. 375, 376 (1966); see also *Sanders v. State*, 9 So. 3d 1132, 1136 (Miss. 2009). Further, the issue of competency to stand trial implicates a fundamental constitutional right, and therefore is excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act. *Rowland*, 42 So. 3d at 507.

<sup>20</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

and have “a rational as well as a factual understanding of the proceedings against him.”<sup>21</sup> This Court, elaborating on the standard established by the U.S. Supreme Court in *Dusky v. U.S.*,<sup>22</sup> holds:

In order to be deemed competent to stand trial, a defendant must be one: (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity of the case.<sup>23</sup>

Terry Pichford was not competent to stand trial. The forensic psychiatrist that examined Terry on February 4, 2006 – only a few days before trial – found that Terry’s “[m]ental illness [inhibited] his ability to communicate fully [with his attorney].”<sup>24</sup> Besides his inability to fully communicate with his trial counsel, Terry was “unable to maintain a consistent defense . . . unable to inform his attorney of distortion or misstatements.” Furthermore, Terry “exhibit[ed] confusion, paranoia, and suspicions of the legal system,” and he “display[ed] a high level of cognitive impairment.”<sup>25</sup> And although Terry was “able to

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Jay v. State*, 25 So. 3d 257, 261 (Miss. 2009) citing *Martin v. State*, 871 So.2d 693, 697 (Miss. 2004) quoting *Howard v. State*, 701 So.2d 274, 289 (Miss.1997) (overruled on other grounds).

<sup>24</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>25</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

understand the term of [a] plea bargain; however he [was] not able to make good decisions on his own behalf.”<sup>26</sup>

Psychiatrist Dr. Rahn K. Bailey also found that Terry was “unable to rationally discuss his side of the incident, . . . [was] not consistent with a courtroom presentation, . . . [and was] unable to understand questions satisfactorily.”<sup>27</sup> Additionally, Terry had “a psychiatric impairment that [would have] exacerbate[d] during the stress of the trial.”<sup>28</sup> Speaking specifically about the competency criteria, Dr. Bailey pointed out that:

Terry Pitchford was able to understand the basic roles of the common court personnel, basic court terminology, courtroom legal defenses, identify pertinent witnesses and routine pleas in a court of law and potential consequences; therefore, he [was] clearly able to meet the cognitive standard of competency. However, he is unable to fully collaborate with his attorney or show appropriate judgment in making good decisions in his own behalf.<sup>29</sup>

Dr. Bailey went on to conclude: “Therefore, in my professional opinion, based on reasonable medical certainty, Terry Pitchford is **not competent** to fully assist his attorney adequately at the current time. He

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<sup>26</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>27</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>28</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>29</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey. (Emphasis added).

has pertinent residual cognitive impairment which may limit his decision making capacity.”<sup>30</sup>

Dr. Bailey is not the only mental health expert that found that Terry was incompetent to stand trial. Dr. Richard G. Dudley, Jr., a licensed psychiatrist who is a Diplomat of the American Board of Psychiatry and Neurology evaluated Mr. Pitchford on June 21 and 22, 2011, found that Terry’s competency was questionable from the time of his arrest throughout the trial process. Dr. Dudley found:

[I]t is the opinion of this psychiatrist within a reasonable degree of medical certainty that [Terry’s] decision-making capacity was sufficiently impaired from the time of his arrest through the completion of his trial that his competency to stand trial was at least fluid . . . Terry Pitchford’s competency to make the rational decisions required of him before and during trial varied from moment to moment, and should have been a matter of ongoing concern, as it is doubtful that Terry Pitchford remained competent throughout the entirety of the pre-trial and trial proceedings.<sup>31</sup>

In addition to Drs. Bailey and Dudley, Dr. D. Malcolm Spica, a licensed psychologist that evaluated Mr. Pitchford on June 16, 2011, also found Terry was incompetent:

Based on a reasonable degree of psychological certainty, these findings give me no confidence that Terry Pitchford would be able to make

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<sup>30</sup> Exhibit I, Affidavits of Dr. Rahn K. Bailey. (Emphasis added).

<sup>31</sup> Exhibit 2 at 15, Affidavit of Dr. Richard Dudley.

important decisions under emotional circumstances, time pressure, or when dealing with abstract concepts. As a result of these deficiencies, it is further my opinion, based on a reasonable degree of psychological certainty that Mr. Pitchford's decision-making capacity was sufficiently impaired from the time of his arrest through the completion of his trial that his capability to stand trial was at the very best fluid. In other words, Terry Pitchford's capacity to make the rational decisions required for him before and during trial varied from moment to moment, and it is doubtful that he remained capable throughout the entirety of the pretrial and trial proceedings as a result of these deficiencies.<sup>32</sup>

Three experienced mental health professionals found that Terry was incompetent. The evidence clearly shows that Mr. Pitchford could not meet the criteria for competence to stand trial set out by this Court. He was unable to fully communicate with his attorney about the case or show appropriate judgment in making good decisions on his own behalf.<sup>33</sup> Mr. Pitchford's ability to satisfy these criteria was not even close to being "commensurate with the severity of the case," as required by this Court.<sup>34</sup> The U. S. Supreme Court long ago held that "the conviction of an accused person while he is legally incompetent violates due process."<sup>35</sup> Accordingly, Mr. Pitchford is

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<sup>32</sup> Exhibit 3 at 2, Affidavit of Dr. D. Malcom Spica.

<sup>33</sup> See *Jay* at 261 (quoting *Howard* at 280).

<sup>34</sup> *Jay v. State*, 25 So. 3d at 261.

<sup>35</sup> *Pate v. Robinson*, 383 U.S. 375,378 (1966) citing *Bishop v. United States*, 350 U.S. 961 (1956).

entitled to post-conviction relief, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7). Alternatively, this Court should grant him leave to proceed in the trial court with his petition for post-conviction relief on this issue.

**B. The Trial Court Violated Mr. Pitchford's Rights Under the U.S. and Mississippi Constitution By Failing to Conduct A Competency Hearing.**

The trial court failed to conduct a competency hearing even though grounds existed to put Mr. Pitchford's competency in question. Rule 9.06 of the Uniform Rules of Circuit and County Court mandates the procedure to follow if the issue of a defendant's competency arises. Rule 9.06 provides in relevant part:

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds

that the defendant is incompetent to stand trial, then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility.<sup>36</sup>

Mr. Pitchford's attorneys filed a Motion for a Mental Health Evaluation February 1, 2005 and an agreed Order for Psychiatric Evaluation was entered by the trial court on September 9, 2005.<sup>37</sup> Both the motion and the order state that the issue of Mr. Pitchford's competence was in question. The Motion for a Psychiatric Evaluation states in relevant part:

The defendant would show that he has a history of mental problems and that this Court should appoint a competent psychologist or psychiatrist for the purpose of conducting a thorough mental examination.

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Notice is hereby given pursuant to the Rules aforesaid, that the Defendant intends to offer expert witness testimony in the field of psychiatry, on the issue of the defendant's competence to stand trial, and insanity at the time of the alleged offense. The defendant requests this Court appoint a competent psychiatrist to assist him in the defense of this matter.<sup>38</sup>

The agreed Order for Psychiatric was entered on the motion of both the State and Mr. Pitchford.<sup>39</sup> The

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<sup>36</sup> URCCC 9.06.

<sup>37</sup> C.P. 177.

<sup>38</sup> C.P. 20-21.

<sup>39</sup> C.P. 177.

order states that the parties were requesting the trial court:

[T]o appoint experts at the Mississippi State Hospital at Whitfield, Mississippi as the Court's experts to examine Terry Pitchford, to determine his competency to stand trial and whether or not under the M'Naughten standard he is insane and whether or not under the Atkins ruling he is retarded.<sup>40</sup>

The order went on to require, among other things, Mr. Pitchford undergo psychiatric examination at the State Hospital at Whitfield to determine his competency to stand trial."<sup>41</sup> Mr. Pitchford was evaluated by the State Hospital and Dr. Bailey in January and February 2006, respectively. Despite this, no hearing on competency was ever held.

This Court recently addressed this very issue in *Jay v. State*.<sup>42</sup> This Court found that Rule 9.06:

[R]equires that, following such examinations, the court *shall* hold a competency hearing to determine whether the defendant is competent to stand trial. *Id.* Furthermore, the rule requires the court to make its finding a matter of record before the case proceeds to trial. Nothing in the record indicates that the trial court ever held a competency hearing or made findings as to Jay's competency to stand trial.<sup>43</sup>

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<sup>40</sup> C.P. 177.

<sup>41</sup> C.P. 177.

<sup>42</sup> *Jay v. State*, 25 So. 3d 257 (Miss. 2009).

<sup>43</sup> *Id.* at 262.

Regarding URCCC 9.06, this Court in *Sanders v. State*<sup>44</sup> emphatically stated that:

The rule clearly uses the directive “shall” and not the permissive “may” language. The rule requires that the trial court first, “*shall* conduct a hearing to determine if the defendant is competent” and, second, “*shall* make the finding a matter of record.” URCCC 9.06. In the face of this plain language, it is evident that it would be error not to hold a competency hearing once a trial court orders a psychiatric evaluation to determine competency to stand trial.<sup>45</sup>

Here, no competency hearing was held and no mental health expert that evaluated Mr. Pitchford testified regarding his competency.<sup>46</sup> Because there was no testimony or finding on the record regarding Terry’s competency, the trial court did not comply with the unambiguous mandate of URCCC Rule 9.06.

Once the trial court ordered a psychiatric evaluation of Mr. Pitchford that specifically requested a finding as to his competency to stand trial, it had a

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<sup>44</sup> *Sanders v. State*, 9 So. 3d 1132 (Miss. 2009).

<sup>45</sup> *Id.* at 1136 (emphasis in original).

<sup>46</sup> Because there was no mental health testimony presented at trial regarding Mr. Pitchford’s competency from a mental health expert that had previously evaluated Mr. Pitchford, this case is readily distinguishable from *Hearn v. State*, 3 So. 3d 722 (Miss. 2008). There, the Court found because the defendant was able to cross-examine the mental health expert regarding his findings and he “was afforded the opportunity to present competing evidence, the purposes of Rule 9.06 were satisfied.” *Id.* at 730.

duty to conduct a competency hearing<sup>47</sup> Both the U. S. Supreme Court and this Court have stated, “[T]rial courts are *obligated* to conduct a competency hearing, either on the defendant’s own motion or *sua sponte*, if there is sufficient doubt about a defendant’s competence. The U.S. Supreme Court holds that: failure to observe procedures to protect a defendant’s right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial.<sup>48</sup>

Terry Pitchford’s constitutional rights were violated when the trial court failed to adhere to the mandatory procedures of Rule 9.06.<sup>49</sup> By failing to conduct a competency hearing and make a finding of fact on the record regarding Mr. Pitchford’s competency, the trial court committed reversible error.<sup>50</sup> Mr. Pitchford is entitled to post-conviction relief, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7).

**II. MR. PITCHFORD’S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE STATE’S RACIAL DISCRIMINATION DURING VOIR DIRE.**

The U.S. Supreme Court has repeatedly stated that every person is entitled to be tried by a jury that is selected and impaneled by a non-discriminatory

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<sup>47</sup> See, e.g., *Sanders*, 9 So. 3d at 1135.

<sup>48</sup> *Id.* at 172.

<sup>49</sup> *Drape v. Missouri*, 429 U.S. 162 (1975); *Sanders*, 9 So. 3d at 1135; *Jay*, 25 So. 3d at 257.

<sup>50</sup> *Sanders*, 9 So. 3d at 1135; *Jay*, 25 So. 3d at 257.

means.<sup>51</sup> When a peremptory challenge is exercised in a discriminatory manner against a juror, the Equal Protection Clause of the Fourteenth Amendment of the U. S. Constitution is violated.<sup>52</sup> The U.S. Supreme Court requires a new trial where this situation has occurred.<sup>53</sup> Reversal is required because such conduct “violates a defendant’s right to equal protection,’ ‘unconstitutionally discriminate[s] against the excluded juror,’ and ‘undermine[s] public confidence in the fairness of our system of justice.’”<sup>54</sup>

In Mr. Pitchford’s case, the prosecutor exercised peremptory challenges on four African American members of the venire.<sup>55</sup> In accordance with U.S. Supreme Court precedent, the trial court found a prima facie case that discrimination had occurred and required the prosecutor to give race-neutral reasons for his peremptory strikes against the African-Americans.<sup>56</sup> Trial counsel offered no evidence or argument to rebut the prosecutor’s proffered reasons.<sup>57</sup> The trial court found the reasons given by

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<sup>51</sup> See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1879).

<sup>52</sup> *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 616 (1991); *Georgia v. McCollum*, 505 U.S. 42, 55 (1992).

<sup>53</sup> *Batson v. Kentucky*, 476 U.S. 79, 86 (1986).

<sup>54</sup> *Rivera v. Illinois*, 129 S. Ct. 1446, 1455 (2009) (quoting *Batson v. Kentucky*, 476 U.S. 79, 86 (1986)).

<sup>55</sup> T. 321-23.

<sup>56</sup> T. 323-24.

<sup>57</sup> This claim is brought as a free-standing claim pursuant to *Batson v. Kentucky*. The failure to offer any evidence or rebuttal to the prosecutor’s reasons for striking the jurors in question also constitutes ineffective assistance of counsel which will be discussed in Section III.

the prosecutor for striking each juror were race-neutral.<sup>58</sup>

**A. This Claim is Procedurally Preserved.**

On direct appeal, appellate counsel Alison Steiner, who also represented Mr. Pitchford at trial, argued the trial court erred in not finding a constitutional violation under *Batson v. Kentucky*, and offered numerous reasons why the reasons offered by the prosecution were pretextual in accordance with the requirements of that case.<sup>59</sup> This Court affirmed the trial court's finding that a prima facie showing of a *Batson* violation was made.<sup>60</sup> This Court further found that the arguments regarding pretext were procedurally barred for failure to raise them in the trial court either during the jury selection process or on post-trial motion.<sup>61</sup>

Accordingly, the Court decided the *Batson* claim on the basis of a procedural bar and not on the merits.<sup>62</sup> Because the Court did not consider the arguments and evidence regarding pretext in deciding the *Batson* claim, it is not barred by *res*

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<sup>58</sup> *Pitchford*, 45 So. 3d at 226-27.

<sup>59</sup> See Brief of Appellant, No. 2006-DP-00441-SCT. See also *Pitchford*, 45 So. 3d at 227.

<sup>60</sup> *Pitchford*, 45 So. 3d at 226.

<sup>61</sup> *Pitchford*, 45 So. 3d at 228.

<sup>62</sup> *Pitchford*, 45 So. 3d at 227 (“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”).

*judicata*, which applies to issues “decided at trial and on direct appeal.”<sup>63</sup>

Moreover, this claim is procedurally preserved because it implicates a fundamental constitutional right.<sup>64</sup> This Court has held that procedural bars will not prevent consideration of issues on the merits “when errors at the trial affect fundamental rights.”<sup>65</sup> In *Batson*, the U.S. Supreme Court observed that “the basic principles prohibiting exclusion of persons from participation in jury service on account of their race ‘are essentially the same for grand juries and for petit juries.’”<sup>66</sup> The unlawful exclusion of African-American jurors from the grand jury constitutes “structural error,”<sup>67</sup> which is “not amenable to harmless error review.”<sup>68</sup> A *Batson* violation is an error that affects fundamental constitutional rights and “is too significant a deprivation of liberty to be subjected to a procedural bar.”<sup>69</sup>

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<sup>63</sup> Miss. Code Ann. 99-39-21(3). See also *Ballenger v. State*, 761 So. 2d 214,219 (Miss. 2000).

<sup>64</sup> *Rowland*, 42 So. 3d at 507.

<sup>65</sup> *Gallion v. State*, 469 So. 2d 1247, 1249 (Miss. 1985) citing *Brooks v. State*, 46 So. 2d 97 (Miss. 1950).

<sup>66</sup>*Batson*, 476 U.S. at 84 n. 3 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 626 n. 3 (1972)).

<sup>67</sup> *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

<sup>68</sup> *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986).

<sup>69</sup> *Rowland*, 42 So. 3d at 507 (quoting *Smith v. State*, 477 So. 2d 191 (Miss.1985); *Fulgham v. State*, 47 So. 3d 698, 700 (Miss. 2010)).

**B. Mr. Pitchford Satisfies the Requirements of *Batson*.**

To make a *Batson* claim, the defendant must first make a prima facie showing that a prohibited reason—such as race, gender, national origin, or religion—is the reason for the State’s exercise of a peremptory strike.<sup>70</sup> If a prima facie case is established, the burden of production<sup>71</sup> shifts to the prosecution to provide non-discriminatory reasons for the use of the strike against the juror or jurors in question.<sup>72</sup> If the reason given by the prosecution is not facially discriminatory, then it will be deemed neutral.<sup>73</sup> The defendant then has the right to rebut the explanation given by the prosecution.<sup>74</sup>

When the process reaches the third step, the “defendant may rely on ‘all relevant circumstances’ to raise an inference of purposeful discrimination.”<sup>75</sup> If the prosecution offers “implausible or fantastic justifications,” those justifications “may (and

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<sup>70</sup> *McFarland v. State*, 707 So. 2d 166, 171 (Miss.1997) citing *Batson*, 476 U.S. at 96-97.

<sup>71</sup> This is a burden of production only. The burden of proof remains with the party making the *Batson* claim throughout the process. *Berry v. State*, 802 So. 2d 1033, 1042 (Miss. 2001).

<sup>72</sup> *McFarland*, 707 So. 2d at 171.

<sup>73</sup> *Randall v. State*, 716 So. 2d 584, 588 (Miss. 1998) (citation omitted).

<sup>74</sup> *Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991).

<sup>75</sup> *Miller-El v. Dretke* (“*Miller-El II*”), 545 U.S. 231, 240 (2005) quoting *Batson*, 476 U.S. at 96-97. *See also Hernandez v. New York*, 500 U.S. 352,363 (1991) (an “invidious discriminatory purpose may often be inferred from the totality of the relevant facts”) (internal quotation marks and citation omitted).

probably will) be found to be pretexts for purposeful discrimination.”<sup>76</sup>

The trial court must then determine whether the totality of the circumstances establish the reasons given by the proponent of the strike are pretextual.<sup>77</sup> This determination “requires the judge to assess the plausibility of that reason in light of all the evidence bearing on it.”<sup>78</sup> Thus, there need only be a finding that the decision to exercise the strike was “motivated in substantial part by discriminatory intent.”<sup>79</sup> A single discriminatory act in an otherwise nondiscriminatory jury selection process is sufficient to establish a *Batson* violation.<sup>80</sup>

**1. Mr. Pitchford Demonstrates a Prima Facie Case in Accordance with *Batson*.**

On direct appeal, this Court affirmed the trial court’s finding that Mr. Pitchford made a prima facie showing that the prosecutor’s use of peremptory challenges was racially motivated.<sup>81</sup> No further inquiry regarding the first step is necessary.

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<sup>76</sup> *Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 338-39 (internal quotation marks and citation omitted).

<sup>77</sup> *McFarland*, 707 So. 2d at 171.

<sup>78</sup> *Miller-El II*, 545 U.S. at 252 (citing *Miller-El I*, 537 U.S. at 339).

<sup>79</sup> *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008).

<sup>80</sup> *Johnson v. California*, 545 U.S. 162, 169 n. 5 (2005); *McGee v. State*, 953 So. 2d 211 (Miss. 2007).

<sup>81</sup> *Pitchford*, 45 So. 3d at 226.

## 2. The Prosecutor's Asserted "Race-Neutral Reasons" Are Clearly Pretextual.

Because the trial court found that a prima facie case of discrimination was made, it required the prosecutor to give a race-neutral reason for each of the four African-American jurors it peremptorily struck.<sup>82</sup> As set forth by this Court, the following things must be considered as indicia of pretext when analyzing a proffered non-discriminatory reason for exercising the peremptory strike:

(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.<sup>83</sup>

These indicia, however, are not exclusive. Evidence or other things that established the prima facie case or offered at the second stage must be taken into account.<sup>84</sup> For instance, statistical evidence used to initially make a prima facie showing must be considered as indicative of discriminatory intent if it

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<sup>82</sup> *Id.*

<sup>83</sup> *Lynch v. State*, 877 So. 2d 1254, 1272 (Miss. 2004) (citing *Manning v. State*, 765 So. 2d 516, 519 (Miss. 2000)). *See also Snyder v. Louisiana*, 552 U.S. 472 (2008); *Miller-El II*, 545 U.S. 231 (2005).

<sup>84</sup> *Stewart v. State*, 662 So. 2d 552, 559 (Miss. 1995). *See also Flowers III v. State*, 947 So. 2d 910, 929, 936 (Miss. 2007).

is unlikely to be the product of happenstance.<sup>85</sup> This Court on direct appeal found that the prosecutor used 57 percent of its peremptory strikes to remove African Americans from the venire which was 74 percent white and 26 percent African-American.<sup>86</sup> The Court also found that “statistically speaking, 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.”<sup>87</sup> This statistical imbalance was not simple happenstance; it was “indicative of discriminatory intent . . . .”<sup>88</sup>

The U. S. Supreme Court has also found that factors such as a history of discriminatory behavior on the part of the prosecutor whose strikes are under scrutiny may be used as an indicator of pretext.<sup>89</sup> In the present case, there is a clearly established history of this prosecutor using peremptory challenges in a discriminatory manner. In 1999, the trial judge presiding over the trial of Curtis Flowers (*Flowers II*) found that this same prosecutor racially discriminated in peremptorily striking an African-American juror and ordered that the juror be seated on the jury.<sup>90</sup> And in *Flowers III*,<sup>91</sup> this Court again

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<sup>85</sup> *Miller-El I*, 537 U.S. at 342.

<sup>86</sup> *Pitchford*, 45 So. 3d at 225-226.

<sup>87</sup> *Pitchford*, 45 So. 3d at 225 (footnotes omitted).

<sup>88</sup> *Miller-El I*, 537 U.S. 322 (2003).

<sup>89</sup> *Miller-El II*, 545 U.S. at 263-66.

<sup>90</sup> See Record of Mississippi Supreme Court Case No. 1999-DP-01369-SCT at T. 1356-64 (conviction and sentence reversed on other grounds, *Flowers II*, 842 So. 2d 53).

<sup>91</sup> *Flowers III*, 947 So. 2d 910 (Miss. 2007).

found this very same prosecutor exercised peremptory challenges in a racially discriminatory manner. Thus, the reasons given by the prosecutor must also be viewed in light of his prior history of exercising peremptory challenges in a racially discriminatory manner.<sup>92</sup>

**a. Carlos Ward, Venire Member 48**

Carlos Ward is an African-American male who was twenty-two years old at the time of trial.<sup>93</sup> The reasons the prosecutor gave for striking Mr. Ward were:

One, he had had no opinion on the death penalty. He has a two year old child. He had never been married. He has numerous speeding violations that we are aware of. The reason 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 children about the same age. They both have never been married. In my opinion he will not be able to be thinking about these issues, especially on the second phase. And I don't think he would be a good juror because of that.<sup>94</sup>

The trial court found the prosecutor's reasons to be race-neutral.<sup>95</sup>

Explanations cannot be race neutral if "the State asserts that it struck a black juror with a particular

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<sup>92</sup> *Miller-El II*, 545 U.S. 231 (2005).

<sup>93</sup> T. 325; C.P. 811-814.

<sup>94</sup> T. 325-326.

<sup>95</sup> T. 325-326.

characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects.”<sup>96</sup> In Mr. Pitchford’s case, such pretexts were clearly present.

First, the prosecution accepted no less than seven white jurors who had young children.<sup>97</sup> Second, the prosecutor accepted Chad Eskridge, a white juror who had never been married and who also was very close

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<sup>96</sup> *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) citing *Miller-El II*, 545 U.S. at 247 n. 6. The Court in *Miller-El II* expressly rejected the dissent’s assertion that the comparative jurors had to be similar in all respects except race, and in so doing held: “A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.”

<sup>97</sup> White jurors with young children accepted by the State included:

Michael Sherman (tendered by State, T. 321): daughter 2 1/2 years old, son 3 months (C.P. 763);

Lisa Wilbourn (Alternate 2, C.P. 1104): son 23 months old (C.P. 837);

Lisa Parker (tendered by State, T. 321): child 6 years old (C.P. 701);

Nathalie Drake Tramel (Alternate 1, C.P. 1104): daughter 4 years old, son 5 years old (C.P. 808);

Laura Candida Ward (Juror 5, C.P. 1104): daughter 6 years old (C.P. 817);

Stephen Abel Marter, Jr. (tendered by State, T. 321): son 4 years old (C.P. 657); and

Michael Curry (tendered by State, Tr. 328): son 5 years old (C.P. 497).

in age to Mr. Ward.<sup>98</sup> Third, the prosecutor accepted white jurors who answered the juror questionnaire regarding their opinion on the death penalty in the same fashion as Mr. Ward. Those jurors were Laura Candida Ward<sup>99</sup> and Nathalie Drake Tramel.<sup>100</sup> Both of these individuals also had young children—another characteristic cited by the prosecutor for striking Mr. Ward. This Court has previously held that the State’s use of attitudes concerning the death penalty to justify striking blacks renders the whole process “suspect,” if it fails to strike white jurors with similar attitudes concerning the death penalty.<sup>101</sup> And that is exactly what the prosecutor did here, rendering the whole process “suspect.”

Even more suspect is that the prosecutor accepted a total of 11 white venirepersons that shared at least one of the characteristics cited by him for striking Mr. Ward, and six of the white jurors shared more than one of the those characteristics with Mr. Ward.<sup>102</sup> This was not a mere coincidence. It was discrimination by the prosecutor.

Further, there is absolutely no record support for the “numerous speeding violations” alleged by the prosecutor. The prosecutor did not even state the alleged source of the information. “[L]ack of record support for the stated reason” is another indicia of

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<sup>98</sup> C.P. 527; 1104. Mr. Ward was 22 years old at the time of the trial and Mr. Eskridge was 25 years old at the time of trial. C.P. 527; 811.

<sup>99</sup> Juror 5, C.P. 818; 1104.

<sup>100</sup> Alternate 1, C.P. 806; 1104.

<sup>101</sup> *Flowers III*, 947 So. 2d at 935-39.

<sup>102</sup> C.P. 527-29; 817-18; 805-06; 699-701; 835-37; 761-63.

pretext. And further revealing of the prosecutor's true motives is the fact that the juror questionnaire specifically excluded traffic offenses when inquiring whether a member of the potential juror's family or a close friend ever been charged with a criminal offense or arrested for a criminal offense but not charged.<sup>103</sup>

Even more tellingly, the prosecutor did not question Mr. Ward—or any of the other jurors—regarding any of the reasons he cited for striking Mr. Ward during *voir dire*. “[I]f the State asserts that it was concerned about a particular characteristic but did not engage in meaningful *voir dire* examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination.”<sup>104</sup>

Finally, all of the characteristics cited by the prosecutor for striking Mr. Ward were totally unrelated to the facts of the case. Thus, all five of the indicia of pretext set out by this Court in *Lynch v. State* are satisfied. The evidence is overwhelming that the prosecutor struck Mr. Ward because of his race. Considering the totality of the circumstances and all of the facts,<sup>105</sup> the trial court's finding regarding Mr. Ward was clearly erroneous and against the overwhelming weight of the evidence.<sup>106</sup>

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<sup>103</sup> C.P. 351-54.

<sup>104</sup> *Reed v. Quarterman*, 555 F.3d at 376 (citing *Miller-El II*, 545 U.S. at 246). See also *Lynch v. State*, 877 So. 2d 1254, 1272 (Miss. 2004).

<sup>105</sup> See *Flowers III*, 94 7 So. 2d 910 (Miss. 2007).

<sup>106</sup> *Id.* at 917.

**b. Linda Ruth Lee, Venire Member  
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Linda Ruth Lee is an African-American female who was twenty-six years old at the time of trial.<sup>107</sup> The reasons given the prosecutor for striking Ms. Lee were:

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....<sup>108</sup>

The trial court found the prosecutor's reasons to be race neutral.<sup>109</sup>

There are numerous problems with the prosecutor's proffered reasons for striking Ms. Lee. First, Ms. Lee was not the only juror who was late coming back from lunch.<sup>110</sup> Ms. Lee was later coming back from lunch than the other jurors that were late.<sup>111</sup> The trial court found Ms. Lee's reason for being late acceptable because she had no car and had to walk to and from the courthouse.<sup>112</sup> In fact, when the prosecutor asked that Ms. Lee be removed for

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<sup>107</sup> T. 325; C.P. 635-38.

<sup>108</sup> T. 324-25.

<sup>109</sup> T. 324-325.

<sup>110</sup> T. 238-239. With the exception of Ms. Lee, the record does not reflect the identity of the other jurors that were late coming back from lunch. T. 238-239.

<sup>111</sup> T. 238-240.

<sup>112</sup> T. 318.

cause for being back late from lunch, the trial court found:

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.<sup>113</sup>

The reason offered by the prosecutor simply does not hold up, and it bears a remarkable resemblance to the reason given in *Snyder v. Louisiana*.<sup>114</sup> In *Snyder*, the U. S. Supreme Court invalidated a prosecutor's peremptory strike because the juror was concerned that serving on the jury would interfere with his student teaching obligations.<sup>115</sup> The Court found that the prosecutor's reason was invalid because the dean of the school had made assurance that he would work with the juror to ensure he could make up any missed teaching hours.<sup>116</sup> The Court found the reasoning of the prosecutor to be "specious" and implausible.<sup>117</sup> Based on the implausibility of the prosecutor's reason for striking the prospective juror, coupled with the

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<sup>113</sup> T. 31.

<sup>114</sup> *Snyder v. Louisiana*, 552 U.S. 472 (2008).

<sup>115</sup> *Id.* at 482.

<sup>116</sup> *Id.* at 482-483.

<sup>117</sup> *Id.* at 483.

fact that it failed to strike white jurors that also expressed conflicting obligations with jury service, the Court found the prosecution's reasoning "pretextual which naturally gives rise to an inference of discriminatory intent."<sup>118</sup>

Here, the reason given for Ms. Lee being late coming back from lunch is similarly implausible. The trial court found that Ms. Lee's reason for being late back from lunch was acceptable and that she was "trying real hard to be here and fulfill her civic duty as a juror."<sup>119</sup> When "illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives."<sup>120</sup> And because the prosecutor's reason here was implausible, he must fall. "If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."<sup>121</sup> The pretextual reason for striking Ms. Lee because she was late justifies a finding of discriminatory intent on the part of the prosecutor alone.

Further, the prosecutor's reason that Ms. Lee had mental problems is equally pretextual. There is nothing in the record that supports the prosecutor's statement that Ms. Lee had mental problems. The

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<sup>118</sup> *Id.* at 485 (citations omitted).

<sup>119</sup> T.318.

<sup>120</sup> *Miller-El II*, 545 U.S. at 252. *See also Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam) ("[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.").

<sup>121</sup> *Miller-El II*, 545 U.S. at 252.

prosecutor based his reason on rank hearsay received from a police offer.<sup>122</sup> The officer whose information the prosecutor claimed to be relying on was under subpoena to appear in court that very day, so the prosecutor could have presented evidence concerning the subject. But the prosecutor made no record of the truthfulness of his claim.<sup>123</sup> The prosecutor also failed to question Ms. Lee or any other jurors regarding any alleged mental problems during voir dire. The lack of record support and questioning on the reason stated are two indicia of pretext under *Lynch*.

Moreover, the reason given by the prosecutor was patently false. As Ms. Lee states in her affidavit, she has never been treated for mental problems.<sup>124</sup> She further states that she disagrees that law enforcement has had numerous calls to her house, stating that the only time she remembers law enforcement coming to her house was when her older brothers got into a fight.<sup>125</sup> <sup>126</sup> The fact that the reason proffered by the prosecutor turned out to be false makes the reason he offered implausible and gives rise to an inference of pretext.<sup>127</sup> The prosecutor did not raise the unfitness of Ms. Lee to serve as a juror because of alleged mental problems when he asked

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<sup>122</sup> T. 324-325.

<sup>123</sup> C.P. 215.

<sup>124</sup> Exhibit 4, Affidavit of Linda Lee.

<sup>125</sup> Exhibit 4, Affidavit of Linda Lee.

<sup>126</sup> To the extent this Court looks to *Booker v. State*, 699 So. 2d 132 (Miss. 1997), it is distinguishable from Mr. Pitchford's case because no hearing on the rebuttal evidence was held.

<sup>127</sup> *Purkett*, 514 U.S. at 768; *Miller-El II*, 545 U.S. at 252; *Hayes v. Thaler*, 361 Fed. Appx. 563, 573-74 (5th Cir. 2010).

the trial court to strike her for cause for coming back late from lunch.<sup>128</sup> The fact that he failed to do this makes his “race-neutral” explanation “reek[] of afterthought,”<sup>129</sup> and shows that it should be discredited.<sup>130</sup> This reason given by the prosecutor is an “implausible or fantastic justification ... [which should] be found to be [a pretext] for purposeful discrimination.”<sup>131</sup> Under the totality of the circumstances and facts, the trial court’s finding regarding Ms. Lee was clearly erroneous and against the overwhelming weight of the evidence.<sup>132</sup>

**c. Christopher Lamont Tillmon,  
Venire Member 31**

Mr. Tillmon is an African-American male who was twenty-seven years old at the time of the trial and who strongly favored the death penalty according to his juror questionnaire.<sup>133</sup> The reason the prosecutor gave for striking Mr. Tillmon was:

S-3 is a black male, number 31, Christopher Lamont Tillmon. He has a brother that has been convicted of manslaughter. And considering this is a murder case, I don’t want anyone on the jury that has relatives convicted of similar offenses.<sup>134</sup>

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<sup>128</sup> T. 318.

<sup>129</sup> *Miller-El II*, 545 U.S. at 246,

<sup>130</sup> *Hayes*, 361 Fed. Appx. at 568.

<sup>131</sup> *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

<sup>132</sup> *Flowers III*, 947 So. 2d at 917.

<sup>133</sup> C.P. 799-802.

<sup>134</sup> T. 325. While the prosecutor’s reason on its face is may be racially non-discriminatory, “[t]his Court has cautioned,

As with Mr. Ward and Ms. Lee, the prosecutor engaged in disparate treatment by accepting two white jurors who both had family members that are convicted felons. Jeffrey Counts (venire member 74) had an uncle who was convicted of forgery was accepted by the State and seated as Juror 12.<sup>135</sup> Henry Bernreuter (venire member 65) had a son convicted of burglary and a stepson convicted of forgery. He was also accepted by the State.<sup>136</sup> The defense peremptorily struck Mr. Burnreuter.<sup>137</sup>

The prosecutor did not ask Mr. Tillmon, Mr. Counts, or Mr. Burnreuter on *voir dire* about the convictions. The failure of the prosecutor to ask any questions regarding the criminal convictions of one of the challenged juror's family member "undermined the validity of that reason."<sup>138</sup> The U.S. Supreme Court in *Miller-El II* found that the prosecution had accepted other venire members who had relatives with criminal histories.<sup>139</sup> In light of the prosecutor's failure to voir dire and the disparity in treatment, the *Miller-El II* Court found "the prosecutor's race-

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however, that previous opinions holding reasons to be race-neutral should not be construed to hold those reasons to be automatically race-neutral in any other case." *Lockett v. State*, 517 So. 2d 1346, 1353 (Miss. 1987); *Pruitt v. State*, 986 So. 2d 940, 945 (Miss. 2008) (citation omitted).

<sup>135</sup> C.P. 479-480; 1104.

<sup>136</sup> T. 326; C.P. 399-400.

<sup>137</sup> T. 327.

<sup>138</sup> *Id.* at 250 n. 8.

<sup>139</sup> *Id.*

neutral reasons to be implausible, thereby supporting the defendant's *Batson* challenge."<sup>140</sup>

Had the prosecutor really been concerned about having jurors with family members that had criminal convictions, he would have exercised peremptory challenges against both Mr. Counts and Mr. Burnreuter. The prosecution had several strikes remaining, and in fact failed to even use all of its peremptory strikes.<sup>141</sup> The reason given by the prosecutor for striking Mr. Tillmon is an "implausible or fantastic justification" and should be found to be pretextual.<sup>142</sup> Under the totality of the circumstances and facts, the trial court's finding regarding Mr. Tillmon was clearly erroneous and against the overwhelming weight of the evidence.<sup>143</sup>

The statistics show that the number of African-Americans peremptorily struck by the prosecutor during jury selection in Mr. Pitchford's case was highly disproportionate.<sup>144</sup> It was not the result of mere happenstance.<sup>145</sup> This prosecutor has been found to have a history of exercising peremptory challenges in a racially discriminatory manner. He also engaged in numerous instances of disparate treatment between African-American and white

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<sup>140</sup> *Hayes*, 361 Fed. App'x. at 568 (citing *Miller-El II*, 545 U.S. at 251-52).

<sup>141</sup> T. 328.

<sup>142</sup> *Purkett*, 514 U.S. at 768 (1995); *Miller-El II*, 545 U.S. 231 (2005).

<sup>143</sup> *Flowers III*, 947 So. 2d at 917.

<sup>144</sup> *Pitchford*, 45 So. 3d at 225-226.

<sup>145</sup> *Pitchford*, 45 So. 3d at 225-226.

members of the venire. He further attempted to justify his discriminatory strikes by proffering reasons which had no record support, reasons he failed to voir dire the venire on, and reasons that were founded on group-based traits. There can be no question that the prosecutor struck these three jurors based on race-and not for the reasons he stated to the trial court.

Miss. Code Ann. § 99-39-27(7) provides that this Court may “grant or deny all relief requested in the attached motion,” or that it may grant the petitioner leave to file “the motion in the trial court for further proceedings . . . .”<sup>146</sup> The proper remedy in this case is to grant Mr. Pitchford post-conviction relief, vacate his conviction, and remand for a new trial. Because the prosecutor has already stated his reasons for peremptorily striking the jurors, he must “stand or fall on the plausibility of the reasons he gives,”<sup>147</sup> and a court may only consider “the reasons initially given to support the challenged strike, not additional reasons offered after the fact.”<sup>148</sup> Consequently, there is no reason to remand for an evidentiary hearing on this issue.

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<sup>146</sup> See also *Ballenger v. State*, 761 So. 2d 214, 219 (Miss. 2000).

<sup>147</sup> *Miller-El II*, 454 U.S. at 252.

<sup>148</sup> *United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011) citing *Miller-El II* at 252.

**III. TRIAL COUNSEL'S MYRIAD  
DEFICIENCIES DEPRIVED MR.  
PITCHFORD OF HIS  
CONSTITUTIONALLY REQUIRED  
RIGHT TO THE EFFECTIVE  
ASSISTANCE OF COUNSEL AND  
CAUSED HIM UNDENIABLE  
PREJUDICE.**

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court applies the standards set forth in *Strickland v. Washington*.<sup>149</sup> The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness,"<sup>150</sup> and that the petitioner was "prejudiced" by his attorney's substandard performance.<sup>151</sup> In determining whether "counsel's representation fell below an objective standard of reasonableness" counsel's conduct must be judged under "prevailing professional norms,"<sup>152</sup> "when the representation took place."<sup>153</sup> "Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining

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<sup>149</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>150</sup> *Id.* at 688.

<sup>151</sup> *Id.* at 692.

<sup>152</sup> *Id.* at 688.

<sup>153</sup> *Bobby v. Van Hook*, 130 S. Ct. 13, 16 (2009).

what is reasonable.”<sup>154</sup> The *Strickland* “standard is necessarily a general one.”<sup>155</sup>

**A. Trial Counsel Was Ineffective In Failing to Properly Challenge, Litigate, and Preserve the Record Regarding the State’s Discriminatory Use of Peremptory Challenges.**<sup>156</sup>

During jury selection, Mr. Pitchford’s defense counsel raised a challenge to the prosecution’s use of its peremptory challenges in a racially discriminatory manner.<sup>157</sup> Specifically, defense counsel stated: “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 . . . It appears to be a pattern of disproportionately challenging African jurors.”<sup>158</sup> Defense counsel further pointed the court to *Miller-El v. Dretke*, specifically nothing that the U.S. Supreme Court had reversed a conviction where one or two black jurors had been left on the venire.<sup>159</sup>

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<sup>154</sup> *Strickland*, 466 U.S. at 688-89.

<sup>155</sup> *Bobby*, 130 S. Ct. at 16.

<sup>156</sup> To assert ineffective assistance of counsel based on failure to properly assert a *Batson* claim, the petitioner must first demonstrate that a valid *Batson* claim exists. *Branch v. State*, 882 So. 2d 36, 58 (Miss. 2004). As thoroughly discussed in Section II above, Mr. Pitchford unquestionably has asserted a *Batson* claim. To avoid needless repetition, the analysis set forth in Section II is incorporated as if copied fully herein.

<sup>157</sup> T. 322-323.

<sup>158</sup> T. 322-323.

<sup>159</sup> T. 323.

The trial court required the prosecution to come forward with race-neutral reasons for its peremptory challenges.<sup>160</sup> The prosecution then offered its reasons for its peremptory challenges against the four African-American jurors in question, and the trial court found the prosecution's reasons to be race-neutral in each instance.<sup>161</sup> Defense counsel made no attempt to rebut or otherwise offer argument or evidence that any of the reasons given by the prosecution were pretextual.<sup>162</sup> Defense counsel also made no attempt to offer evidence of pretext in post-trial motions.

**1. Trial Counsel's Failure to Rebut The State's Pretextual "Race-Neutral" Reasons Is Deficient Performance.**

This Court holds that if the prosecution offers a race-neutral reason for the use of its peremptory challenge, then the defendant has the right to rebut that explanation.<sup>163</sup> This Court has also held in numerous cases long before Mr. Pitchford's trial began that a defendant's failure to offer any argument or evidence to rebut the prosecution's proffered reasons results in a waiver and the trial judge must base his decision only on the reasons given by the prosecution.<sup>164</sup>

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<sup>160</sup> T. 323-324.

<sup>161</sup> T. 324-326.

<sup>162</sup> T. 324-326.

<sup>163</sup> *Bush v. State*, 585 So. 2d 1262, 1268 (Miss. 1991).

<sup>164</sup> *Berry*, 802 So. 2d at 1037; *Manning v. State*, 735 So. 2d 323, 339 (Miss. 1999); *Woodward v. State*, 726 So. 2d 524,533 (Miss. 1997); *Mack v. State*, 659 So. 2d 1289, 1297 (Miss. 1994).

All of the information discussed in Section II was available to trial counsel at the time of trial or when post-trial motions were filed, but they failed to use it. Ms. Steiner, Mr. Pitchford's defense counsel who argued the *Batson* issue both at trial and on direct appeal, admits that she did not reacquaint herself with the applicable Mississippi law regarding *Batson* challenges or engaged in any voir dire or jury selection in Mississippi since she had left the private practice of law years before Mr. Pitchford's trial.<sup>165</sup> Ms. Steiner further concedes that she did not inquire if there was any history of discriminatory use of peremptory challenges in the Fifth Judicial Circuit.<sup>166</sup>

Ms. Steiner further confesses:

When a challenge to the prosecution's use of its peremptory challenges was brought pursuant to *Batson v. Kentucky* and its progeny, I did not expressly challenge as pretextual any of the prosecution's alleged non-discriminatory reasons for exercising its strikes or do anything to raise, or reserve the right to raise, before the trial court any of the evidence suggestive of pretext which I ultimately cited in Mr. Pitchford's appellate briefs. I was not exercising any type of trial strategy when I failed to challenge the prosecution's reasons as pretextual at trial, or when I failed to suggest that pretext or the evidence of it be asserted in post-trial motions filed in Mr. Pitchford's case.<sup>167</sup>

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<sup>165</sup> Exhibit 5, Affidavit of Alison Steiner.

<sup>166</sup> Exhibit 5, Affidavit of Alison Steiner.

<sup>167</sup> Exhibit 5, Affidavit of Alison Steiner.

Further, it cannot be said that trial counsel's failure was based on strategy. Ray Carter, Mr. Pitchford's lead trial attorney, explains:

After my appointment, strategic decisions related to the trial were made by me, with the exception of jury selection where Alison Steiner, who is also employed in my office, assisted. The strategic decisions regarding any improprieties in the jury selection process, including making any challenges under *Batson v. Kentucky*, were left solely to her discretion. To my recollection, Ms. Steiner did not participate in any other portion of the trial, including the drafting of any post-trial motions. The failure on my part to raise any issues regarding *Batson v. Kentucky* in post-trial motions was not a strategic decision.<sup>168</sup>

Trial counsel's failure to rebut the prosecutor's "race-neutral" reasons given for exercising his peremptory challenges either during selection or in post-trial motions was an appalling failure on their part. This failure not only resulted in the trial court denying Mr. Pitchford's *Batson* challenge, but it also resulted in this Court finding any rebuttal arguments to the prosecutor's reasons in being procedurally barred.<sup>169</sup>

Trial counsel's failure to rebut the prosecutor's reasons and properly preserve Mr. Pitchford's *Batson* claim for appellate review fell far below "an objective

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<sup>168</sup> Exhibit 6, Affidavit of Ray Carter.

<sup>169</sup> *Pitchford*, 45 So. 3d at 227-228.

standard of reasonableness.”<sup>170</sup> In *Triplett v. State*,<sup>171</sup> this Court found that the failure to make a *Batson* challenge was a factor in reversing a conviction based on ineffective assistance of counsel. Additionally, the failure to properly preserve the record by trial counsel has also been found by this Court to constitute deficient performance.<sup>172</sup> There can be no argument that the prevailing professional norms at the time of Mr. Pitchford’s trial included making a proper rebuttal when making a *Batson* challenge and properly preserving the record regarding the challenge.<sup>173</sup> Trial counsel’s performance on this issue was clearly deficient.

## **2. Mr. Pitchford Was Clearly Prejudiced By Counsel’s Failures.**

As demonstrated in Section II, Mr. Pitchford has a clear *Batson* claim. All of the information referenced in Section II was available at the time of trial and when post-trial motions were drafted. Had trial counsel simply done their jobs, there is little doubt that the outcome of Mr. Pitchford’s *Batson* proceedings at trial and/or on appeal would have been different. Mr. Pitchford is entitled to relief on this claim.

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<sup>170</sup> *Strickland*, 466 U.S. at 688.

<sup>171</sup> *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995).

<sup>172</sup> *Davis v. Sec’y for Dept. of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003).

<sup>173</sup> *Berry v. State*, 802 So. 2d 1033, 1037 (Miss. 2001) citing *Manning v. State*, 735 So. 2d 323, 339 (Miss. 1999); *Triplett*, 666 So. 2d at 1361. See also *Woodward v. State*, 726 So. 2d 524, 533 (Miss. 1997); *Mack v. State*, 659 So. 2d 1289, 1297 (Miss. 1994).

**B. Trial Counsel Violated Mr. Pitchford’s Federal and State Constitutional Rights to Effective Assistance of Counsel by Utterly Failing to Assert Terry’s Incompetency to Stand Trial and Failing to Request a Competency Hearing**

In a clear example of ineffectiveness, Mr. Pitchford’s trial counsel did not read the report of his own expert. If he had read the report, he would have known that Terry was incompetent to stand trial. Because the expert concluded that Terry was, in fact, incompetent, trial counsel had a constitutional duty to request a competency hearing. He did not. This stunning failure violates Mr. Pitchford’s right to effective assistance of counsel.

**1. Failure to Read the Report of the Defense’s Own Expert and Request a Mandatory Hearing is Deficient Performance.**

Counsel in a death penalty case has an obligation to “look into readily available sources of evidence” when it is apparent from the totality of the circumstances that an issue concerning competency, sanity, or mental health mitigation evidence exists.<sup>174</sup> Indeed, “[c]ounsel has a duty to [independently] investigate a client’s competency to stand trial” even when the client denies a history of psychiatric problems and demands that his competency not be challenged.<sup>175</sup>

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<sup>174</sup> *Hall v. Washington*, 106 F.3d 742, 749-50 (7th Cir.), cert. denied, 522 U.S. 907 (1997).

<sup>175</sup> *Agan v. Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1994).

Raymond Baum, the first attorney appointed to represent Mr. Pitchford, moved for Terry to be evaluated in a Motion for Psychiatric Evaluation.<sup>176</sup> Mr. Carter was appointed by the Grenada County Circuit Court to assist in the case after that motion was filed.<sup>177</sup> Once appointed, Mr. Carter was responsible for strategic decisions in the case with the exception of jury selection.<sup>178</sup> After Mr. Carter was appointed, the trial court entered an agreed order to have Terry evaluated by the Mississippi State Hospital. Mr. Carter did not have Terry evaluated by his expert, Dr. Bailey, until mere days before trial. Although Mr. Carter had Terry evaluated by Dr. Bailey, **he never read Dr. Bailey's report** or discussed his ultimate findings with him.<sup>179</sup> In fact, Mr. Carter provided District Attorney Doug Evans a copy of the report without reading it himself.<sup>180</sup> According to Mr. Carter:

Dr. Bailey's report was not finished prior to trial, and I only received it shortly before the guilt phase of the trial was completed. As soon as I received Dr. Bailey's report, I turned a copy of it over to the District Attorney's Office prosecuting Mr. Pitchford. I found out a few minutes later that Dr. Baily could not be present to testify at Mr. Pitchford's trial because he was under subpoena in another court in Texas. At that point, I did not pay

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<sup>176</sup> C.P. 20-21.

<sup>177</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>178</sup> Exhibits 5 & 6, Affidavits of Ray Charles Carter and Alison Steiner.

<sup>179</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>180</sup> Exhibit 6, Affidavit of Ray Charles Carter.

much attention to the report because I was trying to get ready for the sentencing phase of the trial which was to begin the next morning. I do not recall if I even read the report because Dr. Bailey told me he was going to be unable to appear to testify in Mr. Pitchford's case on February 9, 2006.<sup>181</sup>

Mr. Carter had a duty to read the report despite Dr. Bailey's unavailability. If Dr. Bailey was not available to testify, Mr. Carter should have made a proffer that Dr. Bailey had found Terry incompetent to stand trial<sup>182</sup> or admitted the report finding Terry's incompetence into the record in an attempt to preserve the record. But Mr. Carter failed to take any action. And Mr. Carter admits this: "If I would have thought about it, I certainly would have made a proffer of Dr. Bailey's testimony or had his report entered into evidence in an attempt to preserve the record for appeal."<sup>183</sup> Dr. Bailey's report unequivocally stated that Terry was incompetent to stand trial.<sup>184</sup> Oblivious to the findings in Dr. Bailey's

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<sup>181</sup> Exhibit 6, Affidavit of Ray Charles Carter. Supp. T. 34.

<sup>182</sup> In order to make this proffer, Mr. Carter would have had to read the report in the first instance. Accordingly, his clearly deficient performance in not reading his own expert's report begot his further deficient performance of not making a proffer concerning his own expert's finding that his client was incompetent to stand trial. See *Priest v. State*, 275 So. 2d 79, 82 (Miss. 1973) (holding that a proffer must be specific and not a recital of conclusions or generalities). See also *Davis v. Sec'y for Dept. of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003) (holding counsel ineffective in failing to preserve record for appeal).

<sup>183</sup> Exhibit 6, Affidavit of Ray Charles Carter; Supp. T. 34.

<sup>184</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

report, Mr. Carter allowed the trial to move forward and did nothing to protect Mr. Pitchford's constitutional right not to be tried while incompetent.

Further, Mr. Carter was constitutionally obligated to move for a competency hearing provided by Rule 9.06. As a well-seasoned capital trial attorney, Mr. Carter was aware of the safeguards to a defendant's competency in Rule 9.06.<sup>185</sup> He was aware that once a defendant's competency was called into question, the defendant unequivocally has the right to a competency hearing, and the court *shall* make a determination of competency on the record.<sup>186</sup> Yet he failed to ask for a competency hearing.<sup>187</sup> Defense counsel's knowledge of his client's mental health history, medication, and bizarre behavior "trigger[s] not only a duty to investigate further, but also his duty to seek a competency hearing" and failure to do either was "unreasonable."<sup>188</sup>

Further, Mr. Carter's decision not to pursue a competency hearing for Terry cannot be characterized as a strategic decision.<sup>189</sup> There can be no "tactical decision" not to pursue the issue when a defendant's present competence is implicated.<sup>190</sup> Indeed, the U.S. Court of Appeals for the Fifth Circuit held: "[i]t must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel

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<sup>185</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>186</sup> Exhibit 6, Affidavit of Ray Charles Carter; URCCC 9.06.

<sup>187</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>188</sup> *Williamson v. Ward*, 110 F.3d 1508, 1518 (10th Cir. 1997).

<sup>189</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>190</sup> *Bouchillon v. Collins*, 907 F.2d 589,597 (5th Cir. 1990).

has notice of the client's history of mental problems."<sup>191</sup>

Mr. Carter was very much on notice that Mr. Pitchford's mental history--including his competence--was at issue. He was the attorney that signed the agreed Order for Psychiatric Exam specifically directing the Mississippi State Hospital to determine Mr. Pitchford's competency to stand trial.<sup>192</sup> Further, Mr. Carter had a constitutionally-mandated obligation to read Dr. Bailey's report which unambiguously stated that Terry was incompetent to stand trial.<sup>193</sup>

Danalynn Recer, an experienced capital defense attorney discussed the case with Mr. Carter shortly before the trial began. Ms. Recer recalls:

Ray first spoke to me about Terry Pitchford's case at a capital defense training shortly before trial. Ray had serious concerns regarding Terry's competency and the evaluation conducted by Mississippi State Hospital.

Ray did not think that Terry was able to perceive and understand the pretrial proceedings or the plea negotiations. At times Terry was unable to communicate in a rational manner with Ray. Terry often forgot relevant facts in his case. Ray also questioned Terry's ability to testify, if the need should arise. Overall, Ray voiced concerns

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<sup>191</sup> *Id.*

<sup>192</sup> C.P. 177-78.

<sup>193</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

that Terry did not understand the severity of the consequences possible in his case.<sup>194</sup>

Ms. Recer further recalls:

After the conference, Ray and I communicated via email about Terry's case. I informed him that he was absolutely entitled to his own defense competency expert. I recommended that Dr. Rahn Bailey evaluate Terry for competency. I also suggested that he should challenge the manner the Mississippi State Hospital conducted the examination. I also gave him the name and contact information of Dr. Thomas Grisso, who is an expert on competency evaluation.<sup>195</sup>

Despite Mr. Carter's voiced concerns to his colleague, he did not even bother to read the conclusions of his own expert or present them to the trial court. Mr. Carter's performance fell well below the "objective standard of reasonableness" required by the U.S. Supreme Court.<sup>197</sup>

**2. There Can Be No Question That Failure to Assert Clear Incompetence Constitutes Prejudice.**

With respect to prejudice, Mr. Pitchford must show a "reasonable probability" that he was incompetent to stand trial.<sup>198</sup> And as discussed extensively in Section I, Terry was incompetent to

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<sup>194</sup> Exhibit 7, Affidavit of Danalynn Recer.

<sup>195</sup> Exhibit 7, Affidavit of Danalynn Recer.

<sup>197</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>198</sup> *Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

stand trial.<sup>199</sup> Automatic reversal is required pursuant to clearly established federal and state law.<sup>200</sup> This Court should therefore grant Mr. Pitchford post-conviction relief, vacate his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7). Alternatively, the Court should grant Mr. Pitchford leave to proceed in the trial court with his post-conviction petition on this issue.

**C. The Failure of Mr. Pitchford’s Trial Counsel to Investigate and Present Available Mitigation Evidence Deprived Mr. Pitchford of his Constitutionally-Guaranteed Right to Effective Assistance of Counsel.**

**1. Trial Counsel’s Failure to Investigate and Present Available Mitigation Evidence Constitutes Deficient Performance.**

In a capital sentencing context, a “reliable adversarial testing process” generally requires that counsel present to the sentencing jury evidence of “the character and records of the individual offender and the circumstances of the particular offense.”<sup>270</sup> Only when this occurs can a jury reach a “reasoned moral

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<sup>199</sup> The analysis from Section I is incorporated herein as if copied in full in order to avoid needless repetition.

<sup>200</sup> *Drope*, 429 U.S. 162; *Jay*, 25 So. 3d at 263; *Sanders*, 9 So. 3d at 1136.

<sup>270</sup> *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982) (citation omitted) *see also Anderson*, 338 F.3d at 391 (“[I]n short, ‘counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’”) (citation omitted).

response” to punishment.<sup>271</sup> Given trial counsel’s failure to present evidence of Mr. Pitchford’s background, the jury could not have reached the reasoned response that is required in a capital case. This Court has noted: “[i]t is critical that mitigating evidence be presented at capital sentencing proceedings.”<sup>272</sup> Thus, in a capital trial, counsel has a duty to unearth all relevant mitigating evidence.<sup>273</sup>

In *State v. Tokman*,<sup>274</sup> this Court discussed the minimum trial counsel must do to ensure effective representation, stating: “[a]t a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.”<sup>275</sup> Counsel, therefore, must conduct a thorough investigation into a range of possible mitigating evidence, consider all viable theories, and develop evidence to support those theories.<sup>276</sup> If counsel does not do this, his or her

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<sup>271</sup> *Penry*, 492 U.S. at 319 (citation omitted).

<sup>272</sup> *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990) citing *Leatherwood v. State*, 473 So. 2d 964, 970 (Miss. 1985).

<sup>273</sup> *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1998).

<sup>274</sup> *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990).

<sup>275</sup> *Id.* at 1343; see also *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000) (finding that it is essential that there “is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived”).

<sup>276</sup> See *Hill v. Lockhart*, 28 F.3d 832, 837 (8th Cir. 1994); see also *Strickland*, 466 U.S. at 691 (counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary”); *Huffington v. Nuth*, 140 F.3d 572, 580 (4th Cir. 1998) (“*Strickland*’s objective reasonableness prong requires counsel to conduct appropriate

performance is deficient. The U.S. Supreme Court holds that a decision by trial counsel to limit the scope of their investigation is deficient and unreasonable.<sup>277</sup> Investigations into mitigating evidence “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.”<sup>278</sup>

#### a. The Sentencing Phase

The witnesses and testimony presented during the sentencing phase of Mr. Pitchford’s trial was woefully incomplete given the wealth of evidence, discussed below, that was available to Mr. Pitchford’s counsel at the time of trial. At the sentencing phase, trial counsel called Terry’s kindergarten teacher Ms. Washington, elementary school secretary Ms. Sherry Taylor, and two elementary school teachers.<sup>279</sup> At the time of trial, Terry was twenty years old -- far removed from his elementary school years. When Ms. Washington was asked what she remembered about Mr. Pitchford, she replied “not much.”<sup>280</sup> On cross-examination Ms. Washington could not offer anything

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factual and legal inquiries and to allow for adequate time for trial preparation and development of defense strategies”); *Berryman v. Morton*, 100 F.3d 1089, 1095 (3d Cir. 1996); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) (“[I]t was counsel’s duty to collect as much information as possible about [him] for use at the penalty phase”); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir. 1995); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

<sup>277</sup> *Wiggins v. Smith*, 123 S. Ct. 2527, 2537 (2003).

<sup>278</sup> *Id.* at 2537.

<sup>279</sup> T. 673.

<sup>280</sup> T. 674.

further because after she taught him in kindergarten she had no further contact with Terry absent seeing him in passing at the high school.<sup>281</sup> Ms. Taylor was the secretary at the elementary school Terry attended.<sup>282</sup> She could provide no information concerning Terry. In fact, she was not asked anything about Mr. Pitchford during her meeting with trial counsel the day before she testified. Specifically, trial counsel elicited the following:

Q: Miss Taylor, yesterday was the first time I ever met you; is that correct?

A: Yes, sir.

Q: I didn't ask you anything about Mr. Pitchford, did I?"

A: No, sir.<sup>283</sup>

This process was repeated with the remaining witnesses. Nothing was elicited concerning Mr. Pitchford's background or character. The jury heard nothing of the chaos, abuse, and trauma that Terry suffered as a child.

Three members of Terry's family also testified during the sentencing portion of the trial. Perry Pitchford, Veronica Dorsey, and Shirley Ann Jackson all testified that his father's death was sudden and had an effect on Terry's life.<sup>284</sup> None of them testified about Terry's home life, physical and mental abuse, or drug use. The testimony of Perry, Terry's twin

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<sup>281</sup> T. 676.

<sup>282</sup> T. 677.

<sup>283</sup> T. 681.

<sup>284</sup> T. 693, 707, 714.

brother, barely covers four pages.<sup>285</sup> Veronica's direct examination, cross-examination, and re-direct barely covers three pages.<sup>286</sup> The testimony of Ms. Jackson, Terry's mother, at best covers a page and a half of questioning by trial counsel.<sup>287</sup> As discussed below, had the plethora of evidence concerning the abuse Terry endured been presented to the jury, it would have amounted to numerous additional pages of testimony.

**b. Inexcusable failure to investigate and present family history of abuse**

If a proper mitigation investigation had been conducted by trial counsel, the jury would have heard that Terry grew up in a home that was shadowed by rage, abuse, and alcoholism.<sup>288</sup> Psychiatrist Richard Dudley explains:

[A]lthough as a young child he felt extremely close to and loved by his primary caretaker father, there were other, much more negative influences that ultimately had a stronger/more significant impact on his development. For example, he was repeatedly both psychologically and physically abused by his mother; he experienced her as both demeaning of him and rejecting of him; and although she reportedly abused all of her children,

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<sup>285</sup> T. 693.

<sup>286</sup> T. 707.

<sup>287</sup> T. 714.

<sup>288</sup> Exhibit 8, Affidavit of Jessica Brown; Exhibit 9, Affidavit of Perry Pitchford.

he and others noted that he was a particular target/victim of her abuse.<sup>289</sup>

Terry's mother was "physically abusive and would hit him with whatever she could put her hands on."<sup>290</sup> Terry was whipped with switches, belts, and electric cords. Terry was left with welts all over his legs, arms and back.<sup>291</sup> His mother would throw things at the children: "[s]he would just pick up whatever was in front of her and start throwing things. Not just one thing but sometimes it was a lot of things."<sup>292</sup> "If her aim was good that night, we would get hit."<sup>293</sup> Terry would "take everything that she dished out;" a child does not have a choice.<sup>294</sup>

Dr. Dudley noted that Terry's relationship with his mother was extremely difficult for him. Terry was blamed for everything including the things that his twin did. His mother was "always emotionally/psychologically abusive, constantly saying things like 'you can't do this/that' or 'you aren't going to be s\*\*\*.'"<sup>295</sup> Terry's sister Veronica also reports that their mother "would 'plant seeds and repeat over and over that you too slow to get that math. You too slow to read.'"<sup>296</sup> When Terry was

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<sup>289</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>290</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>291</sup> Exhibit 9, Affidavit of Perry Pitchford .

<sup>292</sup> Exhibit 8, Affidavit of Jessica Brown; *see also* Exhibit 10, Affidavit of Veronica Dorsey.

<sup>293</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>294</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>295</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>296</sup> Exhibit 10, Affidavit of Veronica Dorsey

thirteen, on one of those good nights, she threw a can of spray starch at him and busted his head open.<sup>297</sup> Terry was taken to the hospital, but characterized the incident as an accident in order to protect his mother.<sup>298</sup> At sixteen he was treated for complications from a knot to his forehead as a result of being hit with a bottle two years before.<sup>299</sup> At eighteen he was treated for a bruise and left shoulder pain that he stated he received while running through the house at 6:40 in the morning.<sup>300</sup> According to his sister, “we were all taught to protect Mother’s image of a perfect mother, perfect bus driver, and perfect nursing assistant.”<sup>301</sup> Terry and his siblings were drugged by his father – they were given sleeping pills every evening after school.<sup>302</sup> The pills were masqueraded as vitamins.<sup>303</sup>

Terry’s father died suddenly when Terry was approximately ten years old. Soon after his father’s death, his mother married Louis Jackson. Mr. Jackson was an alcoholic and was abusive toward Terry’s mother.<sup>304</sup> The physical abuse of his mother upset Terry. Terry would call 911 for assistance. His mother stopped him from calling 911 because it

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<sup>297</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>298</sup> Exhibit 10, Affidavit of Veronica Dorsey; *see also* Exhibit 11, Grenada Lake Medical Center Records.

<sup>299</sup> Exhibit 11, Grenada Lake Medical Center Records.

<sup>300</sup> Exhibit 11, Grenada Lake Medical Center Records.

<sup>301</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>302</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>303</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>304</sup> Exhibit 17, Abstract of Court Record.

became too expensive to pay the fines levied against Mr. Jackson. So Terry suffered through approximately eight years of seeing the effects of alcoholism and watching the abuse meted out upon his mother all while being helpless to stop the abuse.

The jury did also not hear that Terry had low self-esteem. He engaged in self-mutilation and cutting. On one occasion, Terry cut himself with a piece of glass after he had a problem with his brother.<sup>305</sup> On another occasion when he was about thirteen, he used a razor to cut himself, and then again when he was about fifteen he burned himself with a cigarette.<sup>306</sup> Between the ages of ten and fourteen there were other incidents of self-mutilation.<sup>307</sup> All of this testimony was readily available at the time of trial, but the jury did not hear it because Mr. Pitchford's counsel failed to uncover it.

### **C. Trial Counsel's clear failure to ascertain Terry's mental health status.**

Even though an agreed order was entered for a pretrial psychological assessment, Mr. Pitchford's trial counsel did not follow through or attempt to follow up until two days before trial. If an adequate mental health assessment had been performed, it would have revealed serious mental health issues and numerous suicide attempts. At nine years old Terry heard voices that told him to jump out of the back of a moving vehicle. He did what the voices told him to do and busted his head open. At sixteen, Terry took

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<sup>305</sup> Exhibit 2, Affidavit of Dr. Richard G. Dudley.

<sup>306</sup> Exhibit 2, Affidavit of Dr. Richard G. Dudley.

<sup>307</sup> Exhibit 2, Affidavit of Dr. Richard G. Dudley.

an overdose of pills.<sup>308</sup> At eighteen he rammed his car into a light pole. Terry is clearly mentally ill. Dr. Dudley's opinion to a reasonable degree of medical certainty is that Terry suffers from an Anxiety Disorder, not otherwise specified.<sup>309</sup> "As a result of the traumas he endured during his childhood and early adolescent years, he has been hyper-vigilant, possibly at times to the point of being paranoid, and then over-reactive to perceived mistreatment."<sup>310</sup> Some of Terry's symptoms are also noted in individuals with post-traumatic stress disorder.

Borderline personality disorder is evidenced by Terry's "instability of interpersonal relationships, self-image and affects with marked impulsivity."<sup>311</sup> Associated with this disorder is self-damaging behavior, including chronic suicidality which Terry has exhibited. "This disorder is among the most severe personality disorders in that it is also associated with transient paranoid ideation, as well as dissociative symptoms."<sup>312</sup>

In addition, Dr. Dudley diagnosed Terry with Depressive disorder, not otherwise specified.<sup>313</sup> Terry's "severe and chronic depression has had a significant impact on how he views the world, his

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<sup>308</sup> Exhibit 11, Grenada Lake Medical Center Records; Exhibit 2, Affidavit of Dr. Richard G. Dudley.

<sup>309</sup> Exhibit 2, Affidavit of Dr. Richard G. Dudley.

<sup>310</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>311</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>312</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>313</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

decision-making capacity, and in turn, his level of distress and ability to function.”<sup>314</sup>

Dr. Dudley notes that there is evidence of “other additional major psychiatric illness.” However, further examination and evaluation is necessary to clarify the diagnosis.

It is anticipated that further exploration will help clarify whether these symptoms are best described as Obsessive-Compulsive Disorder or some type of Psychotic disorder. It is important to note however that in either case, these difficulties have also caused him significant distress and have had a significant impact on his ability to function.<sup>315</sup>

It is also Dr. Dudley’s opinion that armed with an adequate and well-documented social history, a qualified mental health professional could have identified and explained Mr. Pitchford’s substantial psychiatric difficulties at the time of trial.<sup>316</sup> Because trial counsel failed to obtain an adequate health assessment, none of this information was presented to the jury.

**D. Trial Counsel’s failure to investigate brain dysfunction/learning disabilities.**

Terry has long-standing developmental organic brain dysfunction.<sup>317</sup> His brain dysfunction causes learning difficulties and problems processing new information and “appreciating subtle cause-effect

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<sup>314</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>315</sup> Exhibit 2, Affidavit of Dr. Richard Dudley.

<sup>316</sup> Exhibit 2, Affidavit of Dr. Richard G. Dudley.

<sup>317</sup> Exhibit 2, Affidavit of Dr. Malcolm Spica.

relationships.”<sup>318</sup> This brain dysfunction played out by confusion during his school years, both in the classroom and when playing sports.<sup>319</sup> This information also was not placed before the jury, and “[e]ven though juries are sometimes skeptical of insanity defense, they are much more receptive to claims of brain damage.”<sup>320</sup>

**a. Trial counsel’s failure to investigate drug use**

In addition to enduring horrific abuse, having clear mental disturbance, and living with organic brain dysfunction, Mr. Pitchford was self-medicating. At age eleven Terry had his first experience with marijuana. By thirteen he had found a regular supplier. Terry describes his marijuana use as daily.<sup>321</sup> Terry relied on the marijuana to keep him calm, relaxed, and to make the voices go away. Dr. Dudley opined to a reasonable degree of medical certainty that Terry suffers from Cannabis Abuse.<sup>322</sup> Due to trial counsel’s failures, the jury never heard about the voices or about Terry’s possible attempts to self-medicate with marijuana.

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<sup>318</sup> Exhibit 3, Affidavit of Dr. Malcolm Spica.

<sup>319</sup> Exhibit 3, Affidavit of Dr. Richard Dudley.

<sup>320</sup> *Glenn v. Tate*, 71 F.2d 1204 (6th Cir. 1995).

<sup>321</sup> Exhibit 3, Affidavit of Dr. Richard G. Dudley.

<sup>322</sup> Exhibit 3, Affidavit of Dr. Richard G. Dudley.

**b. Trial counsel admits the mitigation investigation and presentation was constitutionally inadequate.**

Counsel was clearly deficient in failing to talk to readily available witnesses. Only a superficial mitigation investigation was completed, leaving undiscovered a wealth of information that was available. Counsel presented almost no information about Terry and his life. Counsel certainly did not present the evidence that mattered most: Mr. Pitchford was horribly abused by the adults in his life, he is mentally ill with a history of suicide attempts, he has organic brain dysfunction, and he began to self-medicate with drugs at an early age. Trial counsel admits that “the mitigation investigation for Mr. Pitchford was incomplete: “[he] did not feel like the mitigation investigation that had been done was as thorough as it should have been . . . . [he] was unaware of Mr. Pitchford’s abusive home life and drug use.”<sup>323</sup> Counsel’s performance falls well below the standard established by the U.S. Supreme Court, the Fifth Circuit, and this Court for mitigation investigation and presentation. There is no question counsel’s performance here was deficient.

**2. Mr. Pitchford, sentenced to die, was unquestionably prejudiced by trial counsel’s failures.**

The United States Supreme Court holds that prejudice is established if “there is a reasonable probability that at least one juror would have struck

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<sup>323</sup> Exhibit 6, Affidavit of Ray Charles Carter.

a different balance” but for the constitutional error.<sup>324</sup> In *Lockett v. Anderson*,<sup>325</sup> the Fifth Circuit Court of Appeals applied this standard in granting a writ of habeas corpus “because Lockett’s counsel failed to conduct a constitutionally adequate investigation into the available mitigating evidence which, if presented, would have created a reasonable probability that an objectively reasonable juror would decide that death was not the appropriate penalty for the murder of Mrs. Calhoun, notwithstanding its cold and merciless cruelty.”<sup>326</sup> This Court has likewise found prejudice and concluded trial counsel was ineffective where counsel failed “to make most of the available evidence in mitigation.”<sup>327</sup> Even in a non-death penalty case, this Court has found counsel ineffective at sentencing for making only a brief general plea for mercy rather than presenting available character evidence.<sup>328</sup>

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<sup>324</sup> *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2543 (2003) (emphasis added); see also *Neal v. Puckett*, 286 F.3d 230 (5th Cir. 2002); *Lockett v. Anderson*, 230 F.3d 695 (5th Cir. 2000); *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990); *Leatherwood v. State*, 473 So. 2d 964 (Miss. 1985); *Woodward v. State*, 635 So. 2d 805 (Miss. 1993); *Moody and Garcia v. State*, 644 So. 2d 451, 456 (Miss. 1994).

<sup>325</sup> 230 F.3d 695 (5th Cir. 2000).

<sup>326</sup> *Id.*; see *State v. Tokman*, 564 So. 2d 1339 (Miss. 1990) (with timely investigation, mitigation evidence could have been obtained and offered during the penalty phase which would have presented Tokman to the jury as a person other than the cold-blooded, callous murderer portrayed by the State).

<sup>327</sup> *Woodward v. State*, 635 So. 2d 805 (Miss. 1993). See also *Doss v. State*, 19 So.3d 690 (Miss. 2009).

<sup>328</sup> *Moody and Garcia v. State*, 644 So. 2d 451, 456 (Miss. 1994).

A vivid description of Terry's traumatic childhood during which he experienced abuse, suicide attempts, self-mutilation, brain dysfunction, self-medication, low self-esteem, and learning difficulties<sup>329</sup> would have influenced the jury's assessment of his culpability and the appropriate punishment. Given that there was ample evidence that was not presented that would have supported the argument that Terry's life be spared, there is "a reasonable probability that the result of the sentencing proceeding would have been different' if competent counsel had presented and explained the significance of all the available evidence."<sup>330</sup> Mr. Pitchford is therefore entitled to a new sentencing hearing or, in the alternative, an opportunity to prove these claims at an evidentiary hearing.<sup>331</sup>

**D. The Failures of Mr. Pitchford's Counsel to Subpoena Dr. Bailey Violates His Right to Effective Assistance of Counsel.**

A defense attorney must diligently prepare to test and challenge the case presented by the state in order

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<sup>329</sup> Terry failed twice in elementary school before subsequently dropping out in high school. See also Exhibit 18, School Records and Exhibit 3 Affidavit Dr. Malcolm Spica.

<sup>330</sup> *Williams*, 529 U.S. at 399.

<sup>331</sup> This Court has held that counsel's presentation of little or no mitigating evidence may be unreasonable under the circumstances of the particular case necessitating an evidentiary hearing. *Burns v. State*, 813 So. 2d 668 (Miss. 2001) (remanding for hearing on ineffectiveness claim where trial counsel presented just one witness at the penalty phase); *Davis v. State*, 743 So. 2d 326 (Miss. 1999) (remanding for hearing on ineffectiveness claim where trial counsel had called four mitigating witnesses at penalty phase).

to be a zealous advocate for his client. In death penalty litigation, an attorney has a duty to focus on the complete trial, not just one aspect of it.<sup>332</sup> Mitigation evidence “plays a constitutionally important role in producing an individualized sentencing determination that the death penalty is appropriate.”<sup>333</sup> In Mr. Pitchford’s case, trial counsel failed to assure that the most basic necessity of litigation was perfected. Trial counsel failed to secure a key mitigation witness for trial.<sup>334</sup> Trial counsel did not take any substantial steps to assure that Dr. Rahn Bailey--the forensic psychiatrist that was the defense expert--would be present for trial.<sup>335</sup>

This Court has held that the “failure of counsel to issue subpoenas even for friendly, favorable witnesses is perilous.”<sup>336</sup> This Court has also made it clear that Mr. Pitchford has “a constitutional right to have compulsory process for obtaining witnesses in his favor, Miss. Const. Art. 3, § 26, there is simply no excuse for defense counsel failing to request a subpoena for his witnesses.<sup>337</sup> Dr. Bailey was present

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<sup>332</sup> *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999).

<sup>333</sup> *Id.*

<sup>334</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>335</sup> Trial counsel had plenty of time to ascertain this information: when he picked up Dr. Bailey from the airport, drove him to the jail for Mr. Pitchford’s evaluation, and then drove him back to the airport. See Exhibit 6 Affidavit of Ray Carter.

<sup>336</sup> *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995) citing *Eslick v. State*, 238 Miss. 666, 119 So. 2d 355 (1960); *Bolin v. State*, 209 Miss. 866, 48 So. 2d 581 (1950); *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949).

<sup>337</sup> *Triplett*, 666 So. 2d at 1361.

in Mississippi two days before the start of trial and was therefore subject to the trial court's jurisdiction. Counsel had an opportunity to present Dr. Bailey with a subpoena but made no effort to do so.<sup>338</sup> Counsel has noted that "[t]here was no trial strategy involved in my failing to subpoena Dr. Bailey. I simply failed to do it."<sup>339</sup>

Further, Counsel failed to ask for a continuance once he learned that Dr. Bailey would be unavailable to testify, make a proffer to the trial court of what Dr. Bailey's testimony would have been, or even submit Dr. Bailey's report into evidence. Counsel has stated that:

There was no trial strategy involved when I failed to make a record of the in-chambers discussions regarding the unavailability of Dr. Bailey. I just did not think about making sure there was a proper record of those discussions. There was also no trial strategy involved when I did not make a proffer of what Dr. Bailey's testimony would have been had he testified or have his report entered into evidence. I simply did not think to do it. If I would have thought about it, I certainly would have made a proffer of Dr. Bailey's testimony or had his report entered into evidence in an attempt to preserve the record for appeal.<sup>340</sup>

Counsel's failure to secure Dr. Bailey for the trial is clear deficient performance. Even if this Court were to find – contrary to the evidence presented here – that Dr. Bailey was available and that trial counsel

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<sup>338</sup> Exhibit 6, Affidavit of Ray Carter.

<sup>339</sup> Exhibit 6, Affidavit of Ray Carter.

<sup>340</sup> Exhibit 6, Affidavit Ray Charles Carter.

merely declined to call him, it cannot be considered a reasonable strategic decision because trial counsel had not read Dr. Bailey's report.<sup>341</sup> This information obtained by Dr. Bailey was a critical component of Terry's mitigation case. Dr. Bailey's unavailability severely prejudiced Mr. Pitchford. The jurors did not hear that Terry had "early deficits which clearly led to functional demise in meting[sic] age appropriate expectations. Once his progression towards adolescence and even early adulthood began in earnest, he experienced multiple consistent failures throughout the entire cognitive and emotional growth curve."<sup>342</sup> Additionally, Terry was unable to fully collaborate with his attorney or show appropriate judgment in making good decisions on his own behalf at the time of trial. Dr. Bailey's opinion, based on a reasonable degree of medical certainty, was that Terry was "not competent to fully assist his attorney adequately" at the time of trial.<sup>343</sup>

Counsel was derelict in his duty to request at the very least a witness subpoena for Dr. Bailey.<sup>344</sup> A reasonable probability exists that had this information been presented to the jury, the outcome of his sentencing would have been different. The failure of trial counsel to subpoena Dr. Bailey deprived Mr. Pitchford of a constitutionally fair

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<sup>341</sup> See Section III, stating that trial counsel's failure to read Dr. Bailey's report is clear ineffective assistance of counsel.

<sup>342</sup> Exhibit 6, Affidavit Dr. Bailey.

<sup>343</sup> Exhibit 1, Affidavits Dr. Bailey.

<sup>344</sup> *Triplett*, 666 So.2d at 1361.

trial.<sup>345</sup> Terry Pitchford's sentence should be vacated and remanded for a new sentencing hearing.

**E. Trial Counsel's Failure to Adequately Prepare for Trial Denied Mr. Pitchford His Constitutionally-Guaranteed Right to Effective Assistance of Counsel.**

Originally, Ray Baum was appointed counsel for Mr. Pitchford by the Grenada County Justice Court. Subsequently, Mr. Baum filed a motion seeking assistance of the Office of Capital Defense Counsel. As a result, Mr. Carter from the Office of Capital Defense Counsel was appointed as trial counsel.<sup>346</sup> At the time of appointment, Mr. Carter was also litigating **nine** other capital cases including one that was scheduled for trial approximately sixteen days before the start of Mr. Pitchford's trial.<sup>347</sup>

Mr. Carter acknowledges that the fact investigation was incomplete and that he was not "properly prepared to go to trial on Mr. Pitchford's case."<sup>348</sup> In fact, he was so unprepared that he was trying to prepare for trial during the actual trial.<sup>349</sup> Mr. Carter filed boiler-plate jury instructions that he had not read prior to the jury instruction conference.

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<sup>345</sup> *Triplett*, 666 So. 2d at 1362. See also *Strickland*, 466 U.S. at 693.

<sup>346</sup> C.P.11. See also Exhibit 6, Affidavit Ray Charles Carter

<sup>347</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>348</sup> Exhibit 6, Affidavit of Ray Charles Carter.

<sup>349</sup> Exhibit 6, Affidavit of Ray Charles Carier.

Trial counsel tried to review the instructions as they were being reviewed.<sup>350</sup> The trial court noted:

A lot of them absolutely had no basis in fact or law or anything else. We had to spend an inordinate amount of time going through a bunch of frivolous instructions that should not have been filed to begin with, some of which were not even applicable to this case. Some of which applied to cases in Oktibbeha County and Washington County.<sup>351</sup>

In addition, witnesses were not selected and prepped before trial.<sup>352</sup>

“Counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision because counsel had not ‘fulfill[ed] their obligation to conduct a thorough investigation of the defendant’s background.’”<sup>353</sup>

To provide constitutionally adequate assistance, counsel must -- at a minimum -- conduct a reasonable investigation enabling counsel to make informed decisions how best to represent the client.<sup>354</sup> Only after counsel knows what is available may counsel make reasonable and informed decisions about what

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<sup>350</sup> Exhibit 6, Affidavit of Ray Carter.

<sup>351</sup> T. 611.

<sup>352</sup> Exhibit 10, Affidavit of Veronica Dorsey.

<sup>353</sup> *Wiggins*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)).

<sup>354</sup> *Sanders v. Ratelle*, 21 F.2d 1446, 1456 (9th Cir. 1994).

should be included or excluded from the presentation.<sup>355</sup>

Trial counsels' failure to prepare for a death penalty trial is clearly deficient performance. Moreover, there is no doubt that counsels' failure to prepare prejudiced their client. Mr. Pitchford is entitled to relief.

**IV. ALTHOUGH THESE ISSUES STANDING ALONE WARRANT RELIEF, THE CUMULATIVE ERRORS PRESENT IN MR. PITCHFORD'S CASE DENIES HIS CONSTITUTIONALLY-GUARANTEED RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

Because “[t]he fundamental respect for humanity underling the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special ‘need for reliability in the determination that death is the appropriate punishment’ in any capital case,”<sup>356</sup> the impact of many errors will have greater effect in a capital case. Accordingly, the Mississippi Supreme Court’s review of death-penalty cases has

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<sup>355</sup> *Davis v. State*, 743 So.2d 326,339 (Miss. 1999) (noting that “while attorneys will be granted wide discretion as to trial strategy, choosing defenses and calling witnesses, a certain amount of investigation and preparation is required”).

<sup>356</sup> *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v. Florida*, 430 U.S. 349, 363-64 (1977)).

consisted of a review of the aggregate effect of the variety of errors often appearing in a capital trial.<sup>357</sup>

Cumulative error analysis must be conducted in post-conviction proceedings.<sup>358</sup> The cumulative effect of the errors in Mr. Pitchford's case is not harmless. Although Mr. Pitchford is entitled to relief on all of the errors argued in this motion, when this Court looks at those errors in aggregate, "[t]he combined prejudicial effect requires reversal."<sup>359</sup> Furthermore, the reviewing court must also consider the cumulative effect of counsel's deficient performance.<sup>360</sup>

### CONCLUSION

Mr. Pitchford now asks the Court to grant the following relief:

- (1) vacate the conviction and sentence of death and dismiss the indictment with prejudice to the State based upon the claims apparent from the face of the petition, the accompanying affidavits, exhibits, trial records, and relevant principles of state and federal law. *See* Miss. Code Ann. § 99-37-27 (recognizing this Court's

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<sup>357</sup> *See, e.g., Jenkins v. State*, 607 So. 2d 1171 (Miss. 1992); *Hansen v. State*, 592 So. 2d 114 (1991); *White v. State*, 532 So. 2d 1207 (Miss. 1988); *Stringer v. State*, 500 So. 2d 928 (Miss. 1986).

<sup>358</sup> *See, e.g., Nixon v. State*, 641 So. 2d 751, 755-56 (Miss. 1994) (The Court specifically considered "the cumulative effect of any discovered errors or 'near errors.'").

<sup>359</sup> *Williams v. State*, 445 So. 2d 798,810 (Miss. 1984).

<sup>360</sup> *See Williams v. Taylor*, 529 U.S. 362 (2000); *Moore v. Johnson*, 194 F.2d 586 (5th Cir. 1999); *Henry v. Scully*, 78 F.3d 51 (2d Cir. 1996); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *cf., Kyles v. Whitley*, 514 U.S. 419 (1995).

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authority to grant post-conviction relief on the basis of the pleadings, exhibits and trial records); Rule 22, M.R.A.P.; alternatively,

- (2) grant Mr. Pitchford a new trial based upon his established meritorious claims as set forth in his petition; alternatively,
- (3) grant Mr. Pitchford leave to file the Petition for Post-Conviction Relief in the Circuit Court of Grenada County, Mississippi; and,
- (4) grant such other and further relief as the Court may deem just and appropriate.

Respectfully Submitted:

TERRY PITCHFORD, Petitioner

By: /s \_\_\_\_\_

Louwlynn Vanzetta Williams,  
MSB #99712  
Attorney for Petitioner

Of Counsel:

Glenn S. Swartzfager (MSB# 9535)  
Louwlynn Vanzetta Williams (MSB# 99712)  
Office of Capital Post-Conviction Counsel  
239 North Lamar Street, Suite 404  
Jackson, Mississippi 39201  
Telephone: (601) 359-5733  
Facsimile: (601) 359-5050

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**Certificate of Service**

I, Louwlynn Vanzetta Williams, have on this day mailed postage fully pre-paid a true and correct copy of the foregoing Motion For Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief to the following:

Honorable Lisa Colonias McGovern  
Special Assistant Attorney General  
Post Office Box 220  
Jackson, Mississippi 39205-0220

This, the 23rd day of September 2011.

/s \_\_\_\_\_  
Louwlynn Vanzetta Williams

**IN THE SUPREME COURT OF MISSISSIPPI**  
***Case No. 2010-DR-01032-SCT***

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**TERRY PITCHFORD, *Petitioner***

**v.**

**STATE OF MISSISSIPPI, *Respondent***

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**EXHIBIT**  
**LIST**

1. Affidavit of Dr. Rahn Bailey
2. Affidavit of Dr. Richard Dudley
3. Affidavit of D. Malcolm Spica, Ph.D
4. Affidavit of Linda Lee
5. Affidavit of Alison Steiner
6. Affidavit of Ray Carter
7. Affidavit of Danalynn Recer
8. Affidavit of Jessica Brown
9. Affidavit of Perry Pitchford
10. Affidavit of Veronica Dorsey
11. Grenada Lake Medical Center Records
12. Affidavit of Tracy Krause
13. Affidavit of Andrea Richardson w/notes
14. Medical records from Dr. Rafe Armstrong
15. Affidavit of Dominique Hogan
16. Affidavit of Frankie Reed

17. Louis Jackson's court records
18. Terry Pitchford's school records
19. Judgment and Order Imposing the death sentence
20. Orders:
  - a. Supreme Court Order (June 29, 2010)
  - b. Order on Finding of Indigency and Appointment of Counsel (September 29, 2010)
  - c. Supreme Court Order (April 20, 2011)
  - d. Supreme Court Order (July 14, 2011)
  - e. Supreme Court Order (September 16, 2011)
21. Mandate
22. Verification
23. Trial Court PCR

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**APPENDIX B**

**EXHIBIT 5**

Affidavit of Alison Steiner

**AFFIDAVIT OF ALISON STEINER**

STATE OF MISSISSIPPI  
COUNTY OF HINDS

My name is Alison Steiner, and I am over the age of eighteen. The information set forth in this Affidavit is based on my personal knowledge and belief.

I am currently employed as an attorney with the Office of the State Public Defender, Capital Defense Counsel Division (“Office”) in Jackson, Mississippi, and I have been employed with that office since August 2005.

When I joined the Office in 2005, it was intended that I would be allowed to have some time to get back up to speed and observe before being required to participate in the litigation of any cases.

In the case of State v. Pitchford in Grenada County, Mississippi, I was not brought in to assist as counsel until shortly before the trial began. At trial, I only assisted in the jury selection portion of the trial. I did not participate in any other fashion. To the best of my recollection, I did not even remain in Grenada as an observer or assistant to trial counsel for any trial proceedings occurring after the day on which the jury was selected. I did not draft or otherwise participate in the drafting, filing or argument of the post-trial motions. I became reinvolved as lead counsel on the direct appeal when the record on appeal was tendered by the Clerk for examination pursuant to Rule 11. I was lead counsel for the record correction proceedings thereafter, and throughout the direct appeal, including on the Motion for Rehearing in the Mississippi Supreme Court and through the

denial of Pitchford's Petition for Writ of Certiorari to the United States Supreme Court.

I left the private practice of law in August 2001. From that date through June 2004, I taught law in areas that did not involve capital litigation or jury selection issues. In 2003, I took and passed the Louisiana Bar examination and was admitted to practice in Louisiana. When I became involved in Mr. Pitchford's case in February 2006, I had not taken the opportunity to properly reacquaint myself with the applicable Mississippi law regarding jury selection, including issues involving the discriminatory use of peremptory challenges prohibited by *Batson v. Kentucky*, and had not actually engaged in any voir dire or jury selection of any kind in any jurisdiction since prior to August 2001.

Prior to participating in the jury selection process in Terry Pitchford's case, I did not make inquiries regarding any history of racially discriminatory use by the prosecutors in the 5<sup>th</sup> Judicial Circuit Court District of peremptory challenges. Nor did I familiarize myself with the briefs filed in *Flowers (III) v. State*, then pending, briefed, and awaiting oral argument as Case No. 2004-DP-00738-SCT, where one of the issues raised and argued with factual support from the trial record in that matter was that the same prosecutor's office had used peremptory challenges in a discriminatory manner, an issue which ultimately served as one basis for reversal of Mr. Flowers' conviction in *State v. Flowers, (Flowers III)* 947 So. 2d 910 (Miss. 2007). Andre' de Gruy, the Director of the Office of Capital Defense Counsel, served as one of Mr. Flowers' counsel of record in that case. Nor was I then familiar with fact that the trial record in a previous trial of Curtis Flowers (conviction

and sentence imposed therein ultimately reversed on other grounds in *Flowers v. State (Flowers II)*, 842 So. 2d 53 (Miss. 2003)) reflected a finding by the trial judge in that matter that the same prosecutor's office had exercised a peremptory challenge in a racially discriminatory manner and seated the juror against whom the strike had been exercised on the basis of that factual finding.

When a challenge to the prosecution's use of its peremptory challenges was brought pursuant to *Batson v. Kentucky* and its progeny, I did not expressly challenge as pretextual any of the prosecution's alleged non-discriminatory reasons for exercising its strikes or do anything to raise, or reserve the right to raise, before the trial court any of the evidence suggestive of pretext which I ultimately cited in Mr. Pitchford's appellate briefs. I was not exercising any type of trial strategy when I failed to challenge the prosecution's reasons as pretextual at trial, or when I failed to suggest that pretext or the evidence of it be asserted in post-trial motions filed in Mr. Pitchford's case.

Further affiant sayeth not.

/s \_\_\_\_\_  
ALISON STEINER

SWORN TO AND SUBSCRIBED before me, this this 15th day of September, 2011.

/s \_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

Oct. 28, 2013

**APPENDIX C**

**IN THE SUPREME COURT OF MISSISSIPPI**

[Filed May 1, 2012]

**TERRY PITCHFORD**

*Petitioner*

**versus**

**No. 2010-DR-01032-SCT**

**STATE OF MISSISSIPPI**

*Respondent*

**RESPONSE TO APPLICATION FOR POST-  
CONVICTION RELIEF AND  
SUPPLEMENT/AMENDMENT TO  
APPLICATION FOR POST-CONVICTION  
RELIEF**

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**I. INTRODUCTION**

This matter is before the Court on Application for Leave to File Motion for Post-Conviction Relief in the Circuit Court of Grenada County, Mississippi, pursuant to Miss. Code Ann. §99-39-1, et seq. (Supp. 1989). The respondent asserts that Pitchford is entitled to no post-conviction relief from his conviction of capital murder and resulting death sentence.

**II. PROCEDURAL HISTORY**

This case arises from the brutal murder of Reuben Britt on November 7, 2004. On that date, the Pitchford along with Eric Bullins robbed the Crossroad Grocery store in Grenada County, Mississippi and shot and killed Mr. Britt, the owner of the store, 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 Petitioner’s motion. R. 1264-65. The petitioner then filed his direct appeal with the Court, raising the following assignments of error:

- I. THE JURY SELECTION PROCESS 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 CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN DOING SO
  - A. The Trial Court Erred In Failing To Grant A Continuance Of The Trial
  - 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
- III. PROSECUTORIAL MISCONDUCT AND THE TRIAL COURT'S FAILURE TO CURB IT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHTS
- 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
- V. THE TRIAL COURT ERRED IN PERMITTING THE JURY TO CONSIDER INHERENTLY UNRELIABLE TESTIMONY OF A JAILHOUSE INFORMANT AND/OR IN FAILING TO GIVE A PROPER CAUTIONARY INSTRUCTION CONCERNING IT

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

The Court affirmed Pitchford's conviction and sentence of death in a written opinion on June 24, 2010. *See Pitchford v. State*, 45 So.3d 216 (Miss. 2010). The petitioner's motion for rehearing was then

denied on October 14, 2010. The petitioner then filed a petition for writ of certiorari with the United States Supreme Court on June raising the following issue:

Does a state court of last resort deciding a capitally convicted and death sentenced defendant's statutorily mandated direct appeal violate the Sixth, Eighth and/or Fourteenth Amendments to the United States Constitution, and/or this Court's holdings in *Snyder v. Louisiana* and *Miller-Ell v. Dretke* when it refuses, in its review of claimed trial court error in denying that defendant's timely raised *Batson* challenge, to consider undisputed evidence of discriminatory intent that was part of the record before the trial court, including disparate treatment of similarly situated white and non-white venire members with respect to the characteristics claimed to be non-racial reasons for the strikes, or to otherwise make a totality of the circumstances review of the trial court's conclusion that the prosecution's exercise of peremptory strikes to eliminate all but one of the African-American venire members tendered to it for acceptance did not constitute prohibited racial discrimination.

Certiorari was denied on August 18, 2011. *See Pitchford v. Mississippi*, No. 10-8439 (2010).

Petitioner then filed his present petition on September 23, 2011 raising the following issues:

- I. MR. PITCHFORD'S CONSTITUTIONAL RIGHTS WERE VIOLATED BECAUSE HE WAS NOT AFFORDED A MANDATED COMPETENCY HEARING

- II. MR. PITCHFORD'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE STATE'S RACIAL DISCRIMINATION DURING VOIR DIRE
- III. TRIAL COUNSEL'S MYRIAD DEFICIENCIES DEPRIVED MR. PITCHFORD OF HIS CONSTITUTIONALLY REQUIRED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND CAUSED HIM UNDENIABLE PREJUDICE
- IV. ALTHOUGH THESE ISSUES STANDING ALONE WARRANT RELIEF, THE CUMULATIVE ERRORS PRESENT IN MR. PITCHFORD'S CASE DENIES HIS CONSTITUTIONALLY GUARANTEED RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND THE FOURTEENTH AMENDMENTS.

Petitioner then filed a supplement to the petition on December 28, 2011, raising the following additional issue:

- V. MR. PITCHFORD WAS DENIED A FAIR TRIAL BY A JUROR THAT CONCEALED MATERIAL FACTS THAT DEMONSTRATE BIAS DURING VOIR DIRE

With the submission of the State's response, this case is ready for decision.

### **III. 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 Sheriff's 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 Sheriff's 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 Sheriff's 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. The facts are also recounted by the Court in the opinion on direct review. *See Pitchford*, 45 So.3d at 222-3 ¶¶ 2-10.

#### IV. FRAMEWORK AND SCOPE OF REVIEW

Petitioner herein seeks post-conviction relief resting his claims on errors he alleges occurred before and during his trial and sentencing hearing wherein he was convicted of four capital murders and four sentences of death were imposed upon him. Petitioner asserts his claims here, as he must, pursuant to the Mississippi Uniform Post-conviction Relief Act, Section 99-39-1, *et seq.*, MISS. CODE ANN. The PCR Act states in part:

This act, by its express terms, was created to ... revise, streamline, and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Miss. Code Ann., § 99-39-1(1) (Supp. 1984).

The "exclusivity" intended by the legislature is evidenced further by the inclusion of language abolishing former modes of post-conviction remedy, including error coram nobis, statutory habeas corpus,

post-conviction habeas corpus, statutory error coram nobis, and all other former types of common law writs. Thus, a petitioner in the posture of Eric Moffett approaches this Court through the only route of state post-conviction review he may travel, and in this petition, is bound totally by the terms of and prerequisite conditions contained in the PCR Act. This Court has held that “[r]ealistically, the act is a codification of the law existing in Mississippi for many years.” *Evans v. State*, 485 So.2d 276, 280 (Miss. 1986); *Dufour v. State*, 483 So.2d 307, 308 (Miss. 1985). See *Neal v. State*, 525 So.2d 1279 (Miss. 1988); *Cabello v. State*, 524 So.2d 313 (Miss. 1988); *Wiley v. State*, 517 So.2d 1373 (Miss. 1987); *Johnson v. State*, 511 So.2d 1333 (Miss. 1987); *Johnson v. State*, 508 So.2d 1126 (Miss. 1987); *Irving v. State*, 498 So.2d 305 (Miss. 1986); *Stringer v. State*, 485 So.2d 274 (Miss. 1986); *Wilcher v. State*, 479 So.2d 710 (Miss. 1985); *Tokman v. State*, 475 So.2d 457 (Miss. 1985); *Leatherwood v. State*, 473 So.2d 964 (Miss. 1985); *Culberson v. State*, 456 So.2d 697 (Miss. 1984); *Johnson v. Thigpen*, 449 so.2d 1207 (Miss. 1984); *Gilliard v. State*, 446 so.2d 590 (Miss. 1984), *Pruett v. Thigpen*, 444 So.2d 819 590 (Miss. 1984); *Callahan v. State*, 426 So.2d 801 (Miss. 1983); *In re Evans*, 441 So.2d 520 (Miss. 1983); *Smith v. State*, 434 So.2d 486 (Miss. 1983); *Edwards v. State*, 433 So.2d 906 (Miss. 1983); *Wheat v. Thigpen*, 431 So.2d 486 (Miss. 1983); *Holloway v. State*, 261 So.2d 799 (Miss. 1979); *Auman v. State*, 285 So.2d 146 (Miss. 1973); *In re Broom’s Petition*, 251 Miss. 25, 168 So.2d 44 (1964).

The Court stated in *Wiley v. State*, 517 So.2d 1373 (Miss. 1987):

Issues E, F, H, I, J, K, L and M were assigned as error on direct appeal and decided adversely to

Wiley's position. *This Court does not consider on a petition of this nature, issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted.* Miss. Code Ann. § 99-39-21(2), (3); *Johnson v. State*, 511 So.2d 1333, 1336, (Miss. 1987). *Dufour v. State*, 483 So.2d 307, 311 (Miss. 1985). . . . .

Because this Court has considered all these points on their merits on the direct appeals by Wiley, Wiley cannot now be allowed to relitigate the same issues. *Wilcher v. State*, 479 So.2d 710 (Miss. 1985); *Callahan v. State*, 426 So.2d 801 (Miss. 1983). The issues were decided against Wiley's position and he is not entitled to an evidentiary hearing on the same subject matter. On these points, the motion is denied as to Issues E, F, H, I, J, K, L, and M.

#### IV.

Issues C, D, G, N, O, P, Q and R were not raised on direct appeal or at the trial court. Thus, the claims are procedurally barred and not subject to further review by this Court, under Miss. Code Ann. § 99-39-21. *Wilcher v. State*, 479 So.2d 710 (Miss. 1985).

Additionally, claims which were available, but not previously asserted on direct appeal, are waived, and on this additional ground these claims are not subject to further review.

for the above reasons, the enumerated claims cannot be litigated; an evidentiary hearing on Issues C, D, G, N, O, P, Q, and R is denied.

517 So.2d 1373.

Finally, the Court held in *Cabello v. State*, 524 So.2d 313 (Miss. 1988):

In conclusion, the Court wishes to draw counsel's attention to Miss. Code Ann. § 99-39-3(2) (Supp. 1987), which reads:

direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses claims, questions, issues or errors which in practical reality could not be and should not have been raised at trial or on direct appeal.

Although the Court is aware of counsel's responsibilities, especially given the sentence in this case, it is pointless to relitigate issues previously asserted or waived.

555 So.2d 323.

Further, this Court's decisions in *Wiley v. State*, 842 So.2d 1250 (Miss. 2003); *Woodward v. State*, 843 So.2d 1 (Miss. 2003), *McGilberry v. State*, 843 So.2d 21 (Miss. 2003) and *Brown v. State*, 798 So.2d 481 (Miss. 2001), reiterate that the Mississippi Uniform Post Conviction Collateral Relief Act, MISS. CODE ANN. §§ 99-39-1 to -29, applies with full force and effect to this post-conviction application. While Pitchford contends that the procedural bars do not apply to him, the precedent of this Court is to the contrary. It is clear from the rulings of this Court that the Post-Conviction Collateral relief Act is constitutional and the procedural limitations found in § 99-39-21 (1), (2), & (3) apply with full force and effect to the claims raised in this petition.

Further, in regards to claims of ineffective assistance of counsel, the United States Supreme Court has repeatedly reinforced the use of the *Strickland* standard. See *Rompilla v. Beard*, 545 U.S. 374, 380-81, 393-94, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Any and all claims of ineffective assistance of counsel raised in this case are to be decided under the precedent of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by this Court in *Stringer v. State*, 454 So.2d 468 (Miss. 1984). See *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); 28 U.S.C. § 2254 (d)(1).<sup>1</sup>

## V. THE CLAIMS

### I. PETITIONER'S CLAIM REGARDING COMPETENCY IS BARRED FROM CONSIDERATION AND IS ALTERNATIVELY WITHOUT MERIT

Petitioner's opening claim is that he was incompetent to stand trial. Pet. 6. Petitioner failed to raise this claim on direct review. Therefore, pursuant to Miss. Code Ann. §99-39-21(1) this claim is barred from consideration. See *Russell v. State*, 849 So.2d 95, 144 (Miss. 2003); *Jackson v. State*, 860 So.2d 653

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<sup>1</sup>This Court's decision on any federal claim properly preserved must be based on clearly established Federal law, as determined by the Supreme Court of the United States. Therefore, we would submit that only precedent, other than this Court's own precedent, to be considered is the precedent of the United States Supreme Court. Case law from other states or the various federal courts of appeal need only be given persuasive authority.

(Miss. 2003); *Brown v. State*, 798 So.2d 481 (Miss. 2001). Alternatively, this claim is devoid of merit.

The petitioner argues that he was denied a competency hearing, however, the record reflects the trial court did address the issue of competency on at least two instances. Initially, in the petitioner's third guilty plea hearing, the trial court stated for the record that ". . . an evaluation that was done of Mr. Pitchford by the Mississippi State Hospital. . . confirmed that he does not have any mental defect or disease or anything of that that [sic] would interfere in any way with him understanding or waiving his constitutional rights. Tr. 11. Later, in considering a motion by Pitchford's trial counsel to continue his trial in an attempt to hire an "independent medical examiner, a psychiatrist"<sup>2</sup> in order to render an opinion more to his liking, the trial court noted:

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.

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<sup>2</sup>Tr. 40-1.

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.

Tr. 51-3.

Clearly, the trial court did make a determination regarding competency. The evaluation of the Mississippi State Hospital at Whitfield unequivocally shows the petitioner had no mental defects or impairments whatsoever. See Exhibit A; C.P. 1023-43. Indeed, the examiners were all unanimous in their conclusions that the petitioner:

1. "has the sufficient present ability to consult with an attorney with a reasonable degree of rational understanding in the preparation of his defense and that he has a rational as well as factual understanding of the nature and object of the legal proceedings against him"
2. "that Mr. Pitchford has the ability presently to understand and knowingly, intelligently and voluntarily to waive or assert his constitutional rights; particularly his right to a trial and his right not to incriminate himself"
3. "that Mr. Pitchford would have known the nature and quality of his alleged acts at the

time of the alleged offenses, and that he would have know at both of those times that those alleged acts would be wrong” and that the petitioner

4. “was not experiencing any extreme mental or emotional disturbance at the times of the alleged offenses and that his capacity to appreciate the criminality of his alleged conduct or to conform his conduct to the requirements of the law was not substantially impaired at those times.”

C.P. 1024-5.

This claim was not raised on direct review and is therefore barred from consideration. Alternatively, and without waiving the procedural bar, this claim is additionally devoid of merit. Pitchford is entitled to no relief on this assignment of error.

## **II. THE PETITIONER’S *BATSON* CLAIM IS BARRED FROM CONSIDERATION AND IS ALTERNATIVELY DEVOID OF MERIT**

Petitioner argues next that his *Batson* claim is not procedurally barred from consideration. Pet. 13. He is mistaken. Specifically, the petitioner argues that he made a prima facie case of a *Batson* violation<sup>3</sup> and that the prosecutor’s race-neutral reasons were pretextual. Pet. 16. The respondent submits that this is the very same claim which was previously presented to the Court on direct review *in Pitchford v. State*, 45 So.3d 216 (2010). There, the Court held:

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<sup>3</sup>Pet. 15.

¶ 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*,<sup>3</sup> Pitchford asserts the State exercised its peremptory strikes in a racially discriminatory manner.<sup>4</sup> In *Batson*, the United States Supreme Court held that the State of Kentucky was prohibited from racially discriminating through its exercise of peremptory strikes.<sup>5</sup> Building on *Batson*, the Supreme Court later stated that the Constitution forbids striking even a single juror for a discriminatory purpose.<sup>6</sup> For purposes of analyzing a claim of discrimination injury 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.<sup>7</sup>

**Prima facie showing**

¶ 15. As stated, a trial court faced with a *Batson* challenge must determine whether the defense<sup>8</sup> 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 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.<sup>9</sup>

¶ 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-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<sup>10</sup> was fourteen whites (seventy-four percent), and five blacks (twenty-six percent). Thus, statistically speaking,<sup>11</sup> 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.<sup>12</sup> However, the State used fifty-seven 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.<sup>13</sup>

45 So.3d at 222-6 [footnotes omitted]

The Court then proceeded with an analysis of each of the jurors for which a *Batson* violation was ascribed. The first juror, Carlos Ward was struck due to the race-neutral reasons that:

. . .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*,<sup>14</sup> 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.

45 So.3d at 226.

The Court held that the trial court did not abuse its discretion regarding this juror. The Court then addressed juror Linda Ruth Lee, holding that she was struck due to a history of mental problems. Specifically, the Court held:

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

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.

Id. at 226-7.

As the Court held, this juror was properly struck due to the race-neutral reason regarding mental problems. There was no *Batson* violation regarding this juror as the Court previously held. Neither was there a *Batson* violation regarding juror Christopher Lamont Tillmon who was struck because:

. . . 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.<sup>15</sup> The trial judge found the State’s proffered race-neutral reason acceptable. We cannot say the trial judge abused his discretion.

Again, the Court addressed the State’s valid race-neutral reason for striking this juror and held the trial court did no abuse its discretion in allowing this juror to be struck. The Court held there was no *Batson* violation. The Court took great pains to analyze the petitioner’s *Batson* claim on direct review addressing each claim as the opinion clearly shows. The Court specifically found that the trial court did not abuse its discretion in deeming the State’s “proffered race-neutral reason[s] acceptable.” Id. Therefore, these claims are *res judicata* and are barred pursuant to Miss. Code Ann. §99-39-21(3). See *Stevens v. State*,

867 So.2d 219, 222 (Miss. 2003). Pitchford is entitled to no relief on these assignments of error. Likewise barred from consideration is the petitioner's claim regarding pretext.

Pitchford argues that the State's race-neutral reasons were merely pretextual. Pet. 16. However, as the Court held on direct review regarding 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." <sup>16</sup>

¶ 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.<sup>17</sup> We will not entertain those arguments now.

45 So.3d at 227-8.

The petitioner's claim regarding pretext is barred from consideration pursuant to Miss Code Ann. § 99-39-21(3) as the Court held that he had "failed to provide any argument concerning pretext during the *Batson* hearing." *Id.*; 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.")(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 pretextual."); *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.). The State offered race-neutral reasons which were not rebutted by the petitioner at trial as the Court held. *Id.* A trial judge cannot be faulted for "failing to discern whether

the State's race-neutral reasons were overcome by rebuttal evidence and argument never presented." Further, the Court held there was no *Batson* violation. This claim is barred from consideration. Pitchford is therefore entitled to no relief on this assignment of error.

**CLAIM III. PETITIONER'S CLAIMS OF  
INEFFECTIVE ASSISTANCE  
OF COUNSEL ARE DEVOID  
OF LEGAL MERIT**

Petitioner's next argues that trial counsel provided ineffective assistance of counsel at every turn. Specifically, the petitioner avers that counsel was ineffective for failing to challenge the State's peremptory strikes<sup>4</sup>, for failing to assert the issue of competency and request hearing on same<sup>5</sup>, for failing to present mitigation evidence<sup>6</sup>, for failing to investigate brain dysfunction and learning disabilities and finally, for failing to prepare for trial.<sup>7</sup> The respondents submit that the majority of these claims are barred from consideration and those that are not do not constitute ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

**A. Failure to Challenge Peremptory Strikes**

The petitioner argues that counsel was ineffective for failing to rebut the State's race neutral reasons as being pretext. The issue of pretext was addressed on

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<sup>4</sup>Pet. 26.

<sup>5</sup>Pet. 29.

<sup>6</sup>Pet. 34.

<sup>7</sup>Pet. 46.

direct review as argued in Claim II, *supra*. See *Pitchford*, 45 So.3d at 227-8. The underlying substantive claim of pretext was raised on direct review with the Court finding the claim had been waived and was consequently barred from consideration. *Id.* Moreover, the Court on direct review, held the trial court had not abused its discretion in finding the “State’s proffered race-neutral reason acceptable.” *Id.* at 227. The underlying *Batson* claim is therefore *res judicata*, thus, the petitioner’s *Strickland* claim is not sustainable as he cannot now show the requisite cause and resulting prejudice. See *King v. State*, 23 So.3d 1067, 1073 (Miss. 2009); *Spicer v. State*, 973 So.2d 184, 197 (Miss. 2007). Alternatively, the respondents submit the record is clear as to the race-neutral reasons provided by the State.

The petitioner relies on the case of *Triplett v. State*, 666 So.2d 1356 (Miss. 1995), in support of his claim yet that case did not concern a claim of failure to rebut race-neutral reasons. Rather, that case concerned a counsel who failed to assert a *Batson* claim. That is not the case here. Additionally, the petitioner states that this Court has held that the failure to preserve the record by trial counsel constitutes deficient performance but then cites to the Eleventh Circuit case of *Davis v. Sec’y for Dept. of Corrections*, 341, F.3d 1310 (11<sup>th</sup> Cir. 2003), which is not binding authority for this Court. Pet. 29. At any rate, the *Batson* claim in *Davis* concerned a Florida law that placed additional requirements on trial counsel when rebutting race neutral reasons. *Id.* at 1316. In the case *sub judice*, trial counsel offered no rebuttal to the State’s race-neutral reasons as the

Court held.<sup>8</sup> The petitioner now argues, among other things, that African American jurors with certain characteristics were struck while other white jurors with the same characteristics were not struck. However, as this Court recently held in *Chamberlin v. State*, 55 So.3d 1046 (Miss. 2010) citing to *Puckett v. State*, 788 So.2d 752, 763 (Miss.2001):

One of the recognized indicia of pretext is “disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge.” *Mack v. State*, 650 So.2d [1289] at 1298

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<sup>8</sup> The petitioner offers the affidavit of trial counsel, Alison Steiner, a long time attorney with the Office of Capital Defense, in support of his ineffective assistance of counsel claim. See Pet. Exh. 5. This affidavit is puzzling in that counsel’s job is to represent capital defendants both at trial and on appellate review yet counsel states that at the time of the petitioner’s trial she “had not taken the opportunity to properly reacquaint myself with the applicable Mississippi law regarding jury selection, including issues involving the discriminatory use of peremptory challenges prohibited by *Batson*. . . .” Id. 2. Counsel for petitioner did however raise a *Batson* claim at trial as the record reflects. Further Steiner does not state that she did not know to raise the issue of pretext nor does she state that she was unaware that she could rebut the State’s race-neutral reasons. Counsel did make a lengthy *Batson* argument to the Court on direct review. See *Pitchford*, 45 So.3d 216, 222-31. This affidavit, while troubling in that counsel would attest to her own ineffectiveness, as does her colleague Mr. Carter, (who are both employed by then Office of Capital Defense, which is charged with defending capital offenders) is of no moment as the record shows and the Court held that there was no *Batson* violation. Accordingly, there can be no violation of *Strickland* since the underlying claim was held to be without merit. Thus, the petitioner cannot show the requisite cause and resulting prejudice necessary to sustain such a claim.

[ (Miss.1994) ]. This Court has explained that while such use of challenges is a factor which may be considered by the trial court, *where multiple reasons led to the strike of the State to strike one juror, the existence of another juror with one of his or her individual characteristics does not demonstrate that the reasons assigned were pretextual.*

55 So.3d at 1051.

Here, the State offered multiple reasons for the striking of these jurors, again as the Court has previously held. *See Pitchford, supra.*

Juror 30 (Linda Lee) was “late” and had “mental problems” as the police had been to her home on numerous occasions. Tr. 324-5. Juror 31 (Christopher Lamont Tillmon) indicated on his jury questionnaire that he had a brother who was convicted of manslaughter. Tr. 325; C.P. 799-802. Such a strike has been held to be acceptable and not violative of *Batson. Simmons v. Thaler*, 440 Fed.Appx. 237, 238-9 (5<sup>th</sup> Cir. 2011). Juror 48 (Carlos Ward) was struck for a multitude of 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. 325-6.

Petitioner attempts to isolate one characteristic of Mr. Ward, his having a young child, which was shared by another juror to support his claim. Ward, however, was struck for multiple reasons, not just because he had a small child, but for all the reasons noted. Moreover, the race-neutral reasons provided for each of these jurors were all proper bases for strikes, as the Fifth Circuit recently held in *U.S. v. Turner*, \_\_\_F.3d\_\_\_, 2012 WL 716885 (5<sup>th</sup> Cir. 2012):

. . . . At the final stage of the *Batson* analysis, “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination,”<sup>52</sup> but “*intuitive assumptions*,” “*inarticulable factors*, or even *hunches*” can all be proper bases for rejecting a potential juror, even in the *Batson* context.<sup>53</sup> We have specifically approved of eye contact, or the lack thereof, as a valid neutral explanation.<sup>54</sup>

2012 WL 716885 at 9. [emphasis added]

<sup>52</sup> *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (per curiam).

<sup>53</sup> See *United States v. Bentley-Smith*, 2 F.3d 1368, 1374 (5<sup>th</sup> Cir.1993) (internal quotation marks omitted).

<sup>54</sup> *Id.* (citing *Polk v. Dixie Ins. Co.*, 972 F.2d 83, 86 (5<sup>th</sup> Cir.1992) (per curiam)).

The petitioner also attempts to compare the prosecutor in this case to the one in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), saying the District Attorney has previously engaged in a systematic striking of blacks from juries. This is not the case. This case is clearly

distinguishable from *Miller-El*. As the Fifth Circuit recently noted in *Haynes v. Thaler*, 438 Fed.Appx. 324 (5<sup>th</sup> Cir. 2011), in regards to a petitioner who made the same claim:

Haynes first compares this case to *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), arguing that, as in *Miller-El*, (1) there was a practice of excluding minorities from juries in the county where Haynes was tried, and (2) there was a pattern of strikes against African-American potential jurors in his case. In *Miller-El*, the Supreme Court cited multiple factors that led it to grant habeas relief based on the petitioner's *Batson* claim. These factors included evidence that "for decades leading up to the time this case was tried prosecutors in the Dallas County office had followed a specific policy of systematically excluding blacks from juries." *Id.* at 263, 125 S.Ct. 2317. There was testimony from witnesses in *Miller-El* about the existence of a policy adopted by the district attorney's office to exclude African-Americans from juries. *Id.* at 264, 125 S.Ct. 2317. The Court also emphasized the importance of "evidence that the [Dallas County] District Attorney's Office had adopted a formal policy to exclude minorities from jury service .... [namely] [a] manual entitled 'Jury Selection in a Criminal Case' .... [which] contained an article authored by a former prosecutor ... under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service." *Id.* (second alteration in original) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 334-35, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)) (quotation marks omitted). Another factor

cited by the Court was that out of twenty African-American potential jurors, the prosecution used peremptory strikes on ten of them, and excused nine others for cause or by agreement. *Id.* at 240-41, 125 S.Ct. 2317.

The circumstantial indications of intentional racial discrimination in this case, although not as compelling as in *Miller-El*, have some persuasive value. Haynes cites to cases in which *Batson* violations occurred in Harris County, where he was tried,<sup>4</sup> as well as cases from the 1980s and early 1990s in which courts and judges observed that African-Americans were rarely part of juries for criminal<sup>5</sup> or capital<sup>6</sup> cases in Harris County. Haynes, however, was tried and convicted in 1999. He also notes that the prosecution in this case used peremptory strikes against four of six African-American potential jurors. Relatedly, he argues that the prosecutor had a motive to exclude African-Americans from the jury, because Haynes was an African-American defendant accused of shooting and killing a white police officer. Nevertheless, these circumstantial indications are insufficient to show that the TCCA's determination—that the decision of the prosecutor in this case to peremptorily strike potential jurors Owens and McQueen was not based on purposeful racial discrimination—was objectively unreasonable.

438 Fed.Appx. at 330-1.

Here, there is no evidence of a decades long policy of “systematically excluding blacks from juries” nor is there any evidence of a “policy adopted by the district attorney’s office to exclude African-Americans from

juries.” *Id.* The decision of the district attorney to strike these jurors was based on information about jurors provided by law enforcement, observations, and answers on their jury questionnaires, all of which are proper. They were not violative of *Batson* and they most certainly were not pretextual. There is no *Batson* violation. Neither is there a violation of *Strickland* if the underlying substantive claim is held to be devoid of merit. As stated, the petitioner’s substantive *Batson* claim was decided on direct review and is now barred pursuant to Miss. Code Ann. §99-39-21(3). *See Simon v. State*, 857 So.2d 668, 681 (Miss. 2003). Therefore, petitioner’s claim of ineffective assistance of counsel on this issue is unsustainable pursuant to *Strickland* as he cannot show the requisite cause and resulting prejudice. Alternatively, the claim is devoid of legal merit. Pitchford is entitled to no relief on this assignment of error.

#### **B. Failure to Assert Competency and Request Hearing**

The petitioner argues next that trial counsel was ineffective for failing to raise the issue of incompetency and for not requesting a competency hearing. Pet. 29. This claim is specious. First, petitioner argues that counsel failed to raise the issue of competency and failed to request a hearing, yet in Claim I. *supra*, he argues the judge failed hold a competency hearing after acknowledging his counsel had signed an agreed order for Pitchford to be evaluated by the experts at the State Hospital at Whitfield. He confesses as much in this claim, stating clearly that his attorney “moved for Terry to be evaluated in a Motion for Psychiatric Evaluation.” Pet. 30; C.P. 20-1. The petitioner further confesses

that his second counsel, Ray Carter was appointed before the trial court granted this order. Pet. 30;C.P. 177. The specious nature of this claim is further evident in that counsel Carter was surely aware of the State Hospital's report, which was sent to him, and which found absolutely no evidence of any issues of competency. C.P. 1023. Counsel Carter admitted that he had read that report as the following exchange clearly shows:

Q. Were there other psychiatrists or psychologists who had examined Mr. Pitchford?

A. Yes.

Q. Who were they?

A. Dr. Criss Lott. Dr. Reb McMichael. One or two more. I can't remember their name.

Q. These were the doctors at Whitfield pursuant to the prior examination; is that correct?

A. That's correct.

Q. Had you also reviewed their reports?

A. I had.

Supp. Record at 20.

Counsel reviewed this report, which certainly prompted the need for an expert of his own choosing in mitigation. As argued in Claim I., the petitioner filed a motion for testing by the Mississippi State Hospital at Whitfield and that report confirmed that Pitchford was competent to stand trial. See Claim I., *supra*. Further, the trial court made a ruling on the issue of competency. *Id.* Counsel cannot therefore be found to have been ineffective when he did the very thing complained of. Counsel did raise the issue of

competency and the trial court made its ruling, finding the petitioner to be competent. Therefore, this claim is without legal merit. Pitchford is entitled to no relief on this assignment of error.

The petitioner also argues that counsel was ineffective for not reading his expert's report. Pet. 30. In support of this claim, the petitioner offers the affidavit of trial counsel Ray Charles Carter who, according to his affidavit was appointed counsel "on or about June 15, 2005." See Pet. Exh.6. The respondent is puzzled by the fact that a trial counsel who has been a member of the Mississippi Bar since September 30, 1991, and a member of the Capital Defense Counsel Division of the State Public Defender's office since October 1, 2001, would attest to his own ineffectiveness in such a fashion when the record clearly shows he was not. The crux of the petitioner's claim is that trial counsel did not "read" his expert's report. Counsel confesses that he was fully aware of the issues of competency and was familiar with the State Hospital's report finding petitioner to be competent. Id. at 2. Counsel further admits that he secured Dr. Rahn Bailey in order to conduct a mental evaluation of Pitchford. Id. at 3. Counsel does not admit that he did not "read" Dr. Bailey's report, merely that he does "not recall" if he read the report. Id. He states that he was "unaware that Dr. Bailey's report found Mr. Pitchford was not competent to stand trial or assist in his defense." Id. This begs the question of why Dr. Bailey was sought as a witness by such an experienced death penalty lawyer, if said counsel had not read the report, a report which he admitted to giving to the prosecution. Supp. Tr. 34. This same experienced counsel admitted that he does "not recall having an in-chambers

conversation” with the trial judge and his law clerk regarding Dr. Bailey’s availability. *Id.* That also is puzzling that such an experienced attorney would not recall such a crucial meeting. Indeed, this meeting was fully recounted in record proceedings held on November 12, 2007. There, counsel Carter testified that he had hired Dr. Bailey as a mitigation witness and fully expected him to testify in the sentencing phase. *Supp. Tr.* 15. Indeed, Carter testified that he had made arrangements for Bailey to be picked up by one of his investigators. *Id.* This of course begs the question, why make such plans and arrangements for this expert to testify if you had not read his report? Carter then testified that he called the judge in Texas regarding his expert who was under subpoena there and then “took the phone directly. . . to Judge Loper and asked Judge Loper if he would talk to him.” *Id.* at 23-4. This is in stark contrast to his affidavit in which he states had does not recall this conversation. *Pet. Exh. 6.* at 3. He further testified that he remembered seeing the judge’s law clerk in that meeting, a point he denies in his postconviction affidavit. *Supp. Tr.* 17. Carter then testified regarding the conversation itself and admitted under cross examination that this conversation took place in chambers:

Q. You went back into judge’s chambers where the judge was and took him the phone.

A. Yes.

*Supp. Tr.* 22.

He then testified, as the Court has previously held, that he did not ask for a continuance. *Id.* at 23. Most telling of all however, is that Carter testified that he had indeed discussed Dr. Bailey’s findings with him as the following exchange shows:

Q. All right. Did you talk to Dr. Bailey about his findings, about his conclusions?

A. Yes, sir. On -- actually, Your Honor, for completeness, I actually gave Dr. Bailey a ride from Jackson here to Grenada. And on the way back, I remember talking to him about his, his overall opinions.

Supp. Tr. 33.

Clearly, Carter was well aware of what was in the report, as he testified that he had discussed Dr. Bailey's findings from Grenada to Jackson. To come to the Court now and make the claims he has made in his affidavit, which are clearly refuted by the record, is more than disingenuous. Clearly, the claim that counsel was somehow ineffective in not reading Dr. Bailey's report is completely without merit and wholly unsupported by the record. He certainly was not "[o]blivious to the findings in Dr. Bailey's report" as the petitioner now claims. Pet. at 31. To the extent the petitioner is attempting to relitigate the issue of a continuance under the guise of ineffective assistance of counsel, the respondent submits the underlying substantive claim regarding a continuance was properly adjudicated on direct review. *Pitchford*, 45 So.3d. at 231. Therefore, the petitioner cannot now show the requisite cause and resulting prejudice necessary to sustain a *Strickland* violation. This experienced trial counsel, or as the petitioner refers to him "well-seasoned capital trial attorney"<sup>9</sup>, knew full well that the State Hospital's report left little doubt regarding petitioner's competency. He was also fully aware of his own expert's overall findings. His

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<sup>9</sup>Pet. 31.

decision to not call Dr. McMichael, Dr. Lott, or Dr. Macvaugh was clearly a matter of strategy even though they could have testified regarding mitigation. Counsel's decisions regarding Dr. Bailey could certainly be interpreted as trial strategy considering the nature and detail of the Whitfield report and considering counsel had conferred with Dr. Bailey regarding his findings. Regardless, whether counsel read the report or not, which he most likely did, is immaterial in light of Carter's testimony that he had discussed Dr. Bailey's findings with him in person. This claim is devoid of merit. The petitioner is entitled to no relief on this assignment of error.

### **C. Failure to Present Mitigation Evidence**

Petitioner next argues that counsel was ineffective for failing to present mitigation evidence. Pet. 34. The record says otherwise. Trial counsel called numerous witnesses in mitigation. The first mitigation witness, Dianne Washington, testified that Pitchford's father who died when the petitioner was ten brought him to school every day. Tr. 675. The second mitigation witness, Sherry Taylor also testified regarding the petitioner's father and that he was a "good man." Tr. 677. Counsel then called Janice Diebold who testified that Pitchford was "happy" and "fun loving." Id. 682. Counsel then called Laura Hoffman who testified that Pitchford was "couple of years behind" the other students. Id. 684. Counsel then called Dominique Hogan who testified that the petitioner was the father of her child and that he supported the child financially. Id. 685. She also testified that Pitchford was a "great father." Id. 688.

Counsel then called the petitioner's twin brother, Perry, who testified regarding how good of a father

they had. Id. 695-7. He further testified as to how their father's death adversely affected the petitioner. Id. 698, 700-1. Perry also testified that the petitioner felt he was treated differently than his brother after their father died and that he had numerous problems at school. Id. 700-1.

Counsel then called Veronica Dorsey, the petitioner's older sister, who testified that the death of their father was harder on petitioner than on his brother. Id. 708-9. Petitioner's final mitigation witness was Shirley Ann Jackson, Pitchford's mother. She testified that about the petitioner's relationship with his father. She further testified as to how the petitioner pleaded with the Dr. to save his father and how the petitioner begged for his father not to leave him. Tr. 717-8.

Clearly, Counsel called numerous witnesses in mitigation to show how the petitioner was affected by the death of his father and that he felt he was treated differently than his siblings. This was legitimate trial strategy.<sup>10</sup> As the Court recently held in *Brown v.*

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<sup>10</sup>Both Dr. McMichael and Dr. Lott were under subpoena by counsel for petitioner but were never called to testify even though the Whitfield report reflects many if not most of the items now claimed to be then available mitigation evidence. The Whitfield report noted that Pitchford's father died when he was young, that his step-father was an alcoholic who "physically abused his mother in his presence", that he abused cannabis and that he had a history of head injuries. C.P. 1025 & 1042. All of these were taken into consideration by the Whitfield staff who ultimately concluded the petitioner was competent. C.P. 1042. Counsel's decision to not call these doctors and to proceed with his mitigation witnesses who testified to the petitioner's relationship with his father and how his father's death adversely affected him was sound trial strategy and not violative of *Strickland*.

*State*, \_\_So.3d\_\_, 2012 WL 954229 (Miss. 2012), regarding a similar ineffective assistance of counsel claim:

¶ 13. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on an ineffective-assistance-of-counsel claim, a defendant must first prove that his counsel was deficient, which requires showing that “counsel made errors so serious that [he or she was] not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. Secondly, a defendant must prove that the “deficient performance prejudiced the defense,” which requires showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* Absent both showings, a defendant may not prevail on his claim that his counsel was ineffective. *Id.*

¶ 14. A reviewing court must “strongly presume that counsel’s conduct falls within a wide range of reasonable professional assistance, and the challenged act or omission might be considered sound trial strategy.” *Liddell v. State*, 7 So.3d 217, 219-20 (Miss.2009). And even where professional error is proven, this Court must determine if there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome.” *Mohr v. State*, 584 So.2d 426, 430 (Miss.1991).

¶ 15. Consideration of relevant mitigating evidence is generally required at the sentencing phase because the imposition of the death sentence should reflect a reasoned, moral response to the defendant’s background and character and the crime. *Russell v. Collins*, 998 F.2d 1287, 1291 (5th Cir.1993). This Court has held that “[i]t is critical that mitigating evidence be presented at capital sentencing proceedings.” *State v. Tokman*, 564 So.2d 1339, 1342 (Miss.1990) (citing *Leatherwood v. State*, 473 So.2d 964, 970 (Miss.1985)). The Court recognized in *Tokman* that “counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” *Tokman*, 564 So.2d at 1342.

2012 WL 954229 at 4-5.

The respondent submits the record reflects the petitioner was not prejudiced by counsel’s performance at any stage of the proceedings and that there exist no errors by counsel which deprived the petitioner of a fair trial. *Id.* Counsel was certainly not ineffective during the sentencing phase. In support of that claim, however, the petitioner offers the affidavit and report of Dr. Rahn Bailey<sup>11</sup> as well as the affidavits of New York psychiatrist Dr. Richard G.

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<sup>11</sup>Pet. Exh. 1.

Dudley<sup>12</sup> and Tennessee psychologist, Dr. D. Malcolm Spica.<sup>13</sup>

### **1. Dr. Bailey**

Dr. Bailey was never subpoenaed to testify. The petitioner makes much now of the failure to have Bailey testify or rather that counsel was ineffective for not pursuing a continuance to secure Bailey's testimony. However, the record reflects that trial counsel did not assert that Dr. Bailey was unavailable. Counsel chose not to call Bailey and further chose not to introduce his report. The respondent submits this was sound trial strategy considering the detailed report of the State Hospital which clearly shows that the petitioner was competent.

The Court addressed issues surrounding Dr. Bailey on direct review. Specifically, the Court held:

¶ 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

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<sup>12</sup>Pet. Exh. 2.

<sup>13</sup>Pet. Exh. 3.

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 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.<sup>33</sup> 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.

45 So3d 231-3.

The Court held that Dr. Bailey was available but was not called nor did counsel seek a continuance to ensure Bailey's presence if he indeed was not available. *Id.* This was a matter of strategy. As previously established, trial counsel was well aware of Dr. Bailey's findings in his report. The inference could certainly be drawn that this “seasoned” trial counsel, after speaking with Dr. Bailey regarding his findings, made the determination that this expert might not be a good witness and his testimony might cause more harm than good. Indeed, Bailey's report, which was not offered at trial but which is relied upon in this petition, is contradictory in that it specifically

states that Pitchford was aware of the charges against him, aware of the roles of the court personnel, was aware of basic court terminology and was aware of “various courtroom legal defenses.” Pet. Exh. 1., Bailey Report at 3-5. Further, the report states that the petitioner was aware of his constitutional rights against self-incrimination and his right to an attorney. The report specifically states that Pitchford was “able to generally communicate with his attorney” and that “[m]ental illness does not inhibit his ability to communicate fully.” Id. at 5. Dr. Bailey makes much of his claim the petitioner did not “make good decisions on his own behalf” based on the fact that Pitchford refused to take a plea deal. Id. 6. One could easily infer that the petitioner did not like the deal and believed he could win his case. The questionable value of Dr. Bailey’s report is further evident in that he makes the judgment that the petitioner had tried to commit suicide at some point in the past, yet the medical records of this incident categorically state that was not the case. See Exhibit B. Pet. Medical Records.<sup>14</sup> These documents reflect that Pitchford “took 6 Naproxen 220 mg pills” in attempt to stop a headache. Id. They also specifically note that the petitioner was “not suicidal.” Id. Therefore, the conclusion that the petitioner had attempted suicide is not supported by the medical records. Bailey’s report makes a number of these questionable contradictory conclusions, among them the conclusion that the petitioner was not “competent to fully assist his attorney” while stating previously that Pitchford understood everything that was

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<sup>14</sup>Taken from petitioner’s Exhibit 11.

transpiring, why he was there and what he had done. Specifically, Dr. Bailey found:

... Mr. Pitchford could appreciate the wrongfulness of his actions. He readily acknowledged that he was wrongful in this action that ultimately took the life of Mr. Britt. Mr. Pitchford, at all times during this event, was in control of his actions. It is my belief that he was able to have conformed his behavior within the constraints of the law.

Pet. Exhibit 1., Bailey Report at 12.

Bailey apparently agrees that Pitchford had no valid issues regarding competency as the trial court held, based on this statement. Due to the contradictory nature of Dr. Bailey's report, trial counsel's decision to proceed with his case in mitigation, calling numerous witnesses to testify regarding Pitchford's father, his death and the impact that event had on the petitioner, without calling Dr. Bailey was sound strategy. This strategic decision could also have been based on his lengthy conversation with Bailey regarding his overall findings. Further, the petitioner has failed to show that but for the lack of Bailey's testimony or the admission of his report he would not have been convicted and sentenced to death. See *Burns v. State*, 879 So.2d 1000, 1007 (Miss. 2004)(citing to *Lamb v. Johnson*, 179 F.3d 352, 360 (5th Cir.1999)). This claim is without merit. Pitchford is entitled to no relief on this assignment of error.

## 2. Dr. Richard G. Dudley

The petitioner also offers that affidavit of Dr. Richard G. Dudley<sup>15</sup> in support of his claim that trial counsel were ineffective in regards to the presentation of mitigation evidence. As previously argued, trial counsel presented numerous witnesses in mitigation. Counsel's trial strategy was to present testimony showing the impact of the death of petitioner's father had on him. Nevertheless, petitioner offers the affidavit of Dr. Dudley in attempt to invalidate trial counsel's mitigation efforts. He fails to do so. Dr. Dudley's affidavit reveals the same issues which were testified to by other witnesses during sentencing. For example, Dr. Dudley speaks to the impact of the death of his father upon the petitioner, which was testified to by numerous witnesses. Also, Dudley discusses the adverse manner in which the petitioner's mother treated him as compared to his twin brother and other siblings, which was also testified to by both the petitioner's twin brother and by his sister. Dudley also discusses the petitioner's feelings for his father **now** that he "learned his father wasn't as perfect as he had always thought" which the petitioner has now discovered "since being incarcerated." Pet. Exh. 2. at 4. This is irrelevant. Like, Dr. Bailey, Dr. Dudley also addresses the petitioner's alleged "overdose" of pills. Unlike Dr. Bailey however, Dr. Dudley does not say this was a suicide attempt, only that Pitchford stated "he [was] not certain he actually wanted to die." Id. 6. Dudley cannot resist however, claiming that the petitioner has had "thoughts of suicide since then, even more so since" being on death row. The respondent submits the petitioner's present suicidal

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<sup>15</sup>Pet. Exh. 2.

thoughts are understandable considering petitioner's current residence and have no relation to any potential mitigating evidence available to counsel at trial and are therefore irrelevant. The medical records clearly reflect his taking of the six pills was not a suicide attempt. The petitioner's own medical records of this incident clearly state Pitchford was not suicidal. He was merely trying to rid himself of a headache. See Exhibit B. Any claims to the contrary by the petitioner or by his experts is wholly unsupported by these records.

Dudley also discusses Pitchford's poor performance in school which was also referenced in testimony during the sentencing phase. Had counsel attempted to use this evidence in mitigation the door would clearly have been opened to discuss the potential reasons for his low grades, namely his behavioral issues, which could have put him in an even worse position in the eyes of the jury. Dudley also states that the petitioner "reacts without thinking" and has "never been one to fully think things through." *Id.* at 8. Apparently not. That is hardly evidence which would sustain a *Strickland* violation. Dr. Dudley's emphasis on petitioner's marijuana use was also addressed by Dr. Bailey although clearly not to the same extent as Dudley. Considering that the petitioner's expert Dr. Bailey did not lay blame for Pitchford's actions on his drug use as Dr. Dudley now claims, it cannot be said that trial counsel was ineffective for failing to introduce testimony that was nonexistent.<sup>16</sup> Moreover, had it been introduced, the petitioner fails to show that

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<sup>16</sup>A petitioner is not entitled to the effective assistance of an expert. *See Brown v. State*, 798 So.2d 481, 499 (Miss. 2001)

there exists a “reasonable probability the outcome would have been different.” See *Burns v. State*, 879 So.2d 1000, 1007 (Miss. 2004)(citing to *Lamb v. Johnson*, 179 F.3d 352, 360 (5th Cir.1999)); See *Russell v. State*, 849 So.2d 95, 122 (Miss.2003); *Walker v. State*, 863 So.2d 1, 22-3 (Miss. 2003); *Davis v. State*, 849 So.2d 1252, 1256-7 (Miss. 2003). Such is the case for all the evidence the petitioner now claims should have been introduced. Trial counsel’s decision to not introduce evidence of petitioner’s drug use based on his understanding at the time was a matter of trial strategy and was not a violation of *Strickland*. See *Howell v. State*, 989 So.2d 372, 394 (Miss. 2008).

### **3. Dr. D. Malcolm Spica**

Next, the petitioner offers the affidavit of Dr. Spica, who apparently has the ability to time travel and with that ability was able to determine that “Pitchford’s decision-making capacity was sufficiently impaired from the time of his arrest through the completion of his trial.” Pet. Exh. 3. at 2. Spica further claims that Pitchford suffered from “organic brain dysfunction.” Id. at 3. Interestingly, Dr. Spica does not state that Pitchford was or is incompetent. Like Dr. Dudley, it is unlikely that this expert’s opinions, had they been introduced would have resulted in a different outcome. See *Burns, supra*.

As stated, trial counsel secured an expert in the form of Dr. Bailey who found that Pitchford was “clearly able to meet the cognitive standard of competency”, “could appreciate the wrongfulness of his actions” and “acknowledged that he was wrongful.” Pet. Exh. 1 a 11-2. Dr. Bailey did not find evidence of organic brain dysfunction. Surely, counsel cannot be said to have been ineffective for not offering

mitigation evidence that was not present. Further, neither Dr. Bailey, Dr. Dudley nor Dr. Spica claim that Pitchford was ever treated for any psychiatric illness nor is there any evidence of any psychiatric issues in his medical records. There is likewise no support in the medical records for petitioner's claims of "cutting" nor is there support in any of the medical records for his claims of "hearing voices."<sup>17</sup> The Whitfield report indicates that the petitioner attempted to "over-claim symptoms of mental illness in order to present himself as more psychologically disturbed than is actually the case." C.P. 1025. In regards to hearing voices, the report specifically notes that Pitchford:

... reported that he has been hearing "voices" since he was approximately seven years old, [but] has no documented history known to us of any major mental disorder. Mr. Pitchford also reported that he was hearing "voices" almost continuously when we were interviewing him; although, he did not appear to be internally stimulated or distracted. He appeared to have no difficulty understanding and responding to our questions during this very lengthy interview. Psychological and neuropsychological test results indicated that overall, Mr. Pitchford's cognitive abilities appear intact and are consistent with his history and educational background. However, there was evidence based on the results of psychological testing that Mr. Pitchford was attempting to

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<sup>17</sup>Dr. Bailey specifically noted in his report that Pitchford "did not exhibit active auditory hallucinations." Pet. Exh. 1 at 10. Translation, he was not hearing voices when Dr. Bailey examined him.

malingering symptoms of mental illness (which was consistent with our clinical observations during our interview of him).

C.P. 1026.

The petitioner was clearly attempting to feign mental illness in claiming he was hearing “voices.” Additionally, the school records provided contradict many claims made by these experts regarding the petitioner’s mental abilities.

Pitchford’s Grade 5 ITBS Performance Assessment for Integrated Language Arts and Mathematics shows he performed above average. Pet. Exh. 18. Under the language arts category are the sub-categories of constructing meaning, identifying the main idea, recalling events in order and interpreting meaning. Tests given in the sixth and seventh grades show the petitioner performed at an average or above average level in reading, language and mathematics. For example, Pitchford showed a mastery of all objectives in the Reading category on his sixth grade Terra Nova CTBS Survey. The Observations portion of this test reflects that the petitioner “scored higher than 75 percent of the students nationally.” Id. It is unlikely that the introduction of these school records would have resulted in a different outcome. Additionally, the jury heard testimony regarding the petitioner’s home life and how he was treated differently by his mother than his brother and siblings. Tr. 700-1. The jury also heard about testimony about how the loss of his father at age ten affected him. Id. All of this testimony was presented at sentencing. Counsel was therefore not deficient in preparing evidence in mitigation. In the case *sub judice*, counsel put on numerous mitigation

witnesses as previously discussed and secured an expert, discussed this expert's findings with him and chose not to utilize his testimony or his report. This was a strategic decision. Also strategic was the decision not to utilize the Whitfield report or to have Dr. McMichael or Dr. Lott testify. As was the case in *Brown, supra*, "[t]his is not a case where no mitigation evidence was presented; it is simply a case where a conscious decision was made to go forward with certain witnesses but not others. The record here does not reflect that the decision of [Pitchford's] attorneys constitutes a professional error. Their decision was calculated to best serve [Pitchford's] interests at trial. *See Spicer v. State*, 973 So.2d 184, 192 (Miss.2007) (decision not to use defendant's mental evaluation as mitigation presumed strategic); *see also Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (strong presumption that counsel's conduct constitutes "sound trial strategy"). *Brown*, 2012 WL 954229 \*6. Counsel was therefore not ineffective under *Strickland* and the petitioner is thus entitled to no relief on these assignments of errors.

#### **E. Failure to Prepare for Trial**

The petitioner's final ineffective of counsel claim is based entirely on trial counsel's affidavit in which he claims he was ineffective. The record reflects otherwise, as has been previously argued. The trial court specifically noted that counsel had "filed 30-something pretrial motions" and noted further:

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.

Tr. 53-4.

As the Court held on direct review:

¶ 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 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.”<sup>31</sup> 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 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.<sup>32</sup> So we hold today that the trial judge did not abuse his discretion by denying Pitchford's motion for continuance.

45 So.3d at 232-3. [footnotes omitted]

The petitioner was represented by no less than three experienced counsel, two of whom specialize in representing capital defendants. The arguments herein and the record reflect that these attorneys rendered effective assistance of counsel at every turn. The petitioner makes no new claims of ineffective assistance here, save for an unspecific claim regarding jury instructions.<sup>18</sup> Counsel was clearly prepared for trial, selected numerous witnesses and provided mitigation testimony in the sentencing phase. While the petitioner takes issue with his trial counsels' performance, he is not entitled to perfect counsel. As the Court stated in *Davis v. State*, 897 So.2d 960 (Miss. 2004), a petitioner is not entitled to "perfect" counsel:

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<sup>18</sup>The petitioner fails to argue this claim with any specificity with regard to a particular instruction. Therefore, the respondent is without the ability to discern which instructions the petitioner believes were error. The Court did, however, address a number of claims raised by the petitioner regarding both guilt and sentencing phase jury instructions on direct review and found no error. See *Pitchford v. State*, 45 So.3d 216, 247-49 ¶¶ 135- 44, 254-56 ¶¶ 164-79.

Perfect representation in hindsight is not the standard, and the accused is not entitled to errorless counsel. *Stringer v. State*, 454 So.2d at 476. “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 124 S.Ct. 1, 4, 157 L.Ed.2d 1 (2003), citing *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Kimmelman v. Morrison*, 477 U.S. 365, 382, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *United States v. Cronin*, 466 U.S. 648,656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

897 So.2d at 966-7.

The petitioner has failed to demonstrate how counsel were deficient. He has further failed to show that he suffered any prejudice as a result of counsels’ performance. See *Strickland*, *supra*. Pitchford is therefore, entitled to no relief on this assignment of error.

#### **IV. THE PETITIONER’S CLAIM OF CUMULATIVE ERROR IS WITHOUT MERIT**

The petitioner contends that the cumulative effect of the errors at his trial require reversal of his conviction and sentence. To the extent that petitioner is asserting that the new claims raised on post-conviction review must be cumulated he has not demonstrated error in any of the new claims he forwards. Therefore, the State would submit that there is nothing to cumulate that requires reversal of either the conviction or sentence in this case. The respondent submits that there are no errors or “near

errors” that can be cumulated to require the granting of post-conviction relief in this case.

Further, petitioner raised a claim of cumulative error in the direct appeal of this case with the Court holding:

¶ 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.<sup>138</sup> After a thorough review of the record and briefs, we do not find the cumulative effect of the individual errors denied Pitchford a fundamentally fair trial, so this issue has no merit.

45 So.3d at 260.

The petitioner contends cumulative errors of counsel at both the trial and appellate level entitle him to relief. As the Court noted in this case direct appeal, individual errors are cumulated in determining whether there has been ineffective assistance of counsel. *Id.* The State would submit that there were no errors cumulative or otherwise which entitle the petitioner to the relief on his claims of ineffective assistance of counsel. The petitioner has failed to demonstrate how counsel was deficient and how he was prejudiced as a result thereof. *See Strickland, supra.* Additionally, the petitioner has certainly not shown in any of his ineffective assistance of counsel claims that counsel’s conduct fell outside a “wide range of reasonable professional assistance” or that any of the alleged errors of counsel gave rise to a reasonable probability that “but for attorney’s errors, the outcome of the trial would have been different.” *See Russell v. State*, 849 So.2d 95, 122 (Miss.2003);

*Walker v. State*, 863 So.2d 1, 22-3 (Miss. 2003); *Davis v. State*, 849 So.2d 1252, 1256-7 (Miss. 2003). This claim is without merit the petitioner is entitled to no relief on this claim.

**V. PETITIONER’S CLAIM OF JUROR BIAS IS BARRED FROM CONSIDERATION AND IS ALTERNATIVELY DEVOID OF MERIT**

Petitioner’s final claim concerns an allegation of juror bias by juror Andrea Richardson. Pet. Supplement at 11. Petitioner bases this claim not on an affidavit of that juror but rather upon the hearsay affidavit of law student, Tracy Krause. Pet. Exh. 12. Petitioner claims, based on the Krause affidavit, that juror Richardson failed to disclose that she “the nephew of the victim, his daughter, and someone married to a member of the Britt family. Pet. Supp. at 11. Further, the petitioner claims this juror failed to disclose that she knew prosecution witness, Malcolm Grant. Id. at 13. Additionally, the petitioner claims juror Richardson “hid from the trial court that she had contact with the victim’s family after jury selection had begun. . . .” Id. at 14. The respondent submits this specious claim is barred from consideration pursuant to Miss. Code Ann. § 99-39-21(1)<sup>19</sup> as the petitioner failed to raise this issue of juror bias at trial or on direct review and is additionally barred pursuant to Mississippi Rule of Evidence 606(b). Alternatively, and without waiving the bars to consideration, this claim is completely devoid of legal merit.

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<sup>19</sup>See *Powers v. State*, 945 so.2d 386, 397 (Miss. 2006).

The only basis for the juror misconduct claim alleged regarding this juror is the hearsay affidavit of a law student intern who makes the aforementioned claims. As the Court held in *Smith v. State*, 877 So.2d 369, 380 (Miss. 2004), this “is not a proper affidavit, and the Court will not consider it in the post-conviction proceedings. Miss. Code Ann. § 99-39-9(1)(e) allows the petitioner to present affidavits from witnesses who would testify at trial, not hearsay statements allegedly made by a juror to a third party.” Perhaps acknowledging the specious nature of the claim, the petitioner confesses that Richardson refused to sign such an affidavit or otherwise provide her own statements attesting to the claims contained in Krause’s hearsay affidavit. Instead, the petitioner submitted the “notes” of Richardson in which there is absolutely no mention, hint or inkling of any support for his claims. Indeed, Richardson’s “notes” indicate that she “still feel[s] the right decision was made concerning the verdict and sentencing of this individual.” Pet. Exh. 13. Even if Richardson had executed an affidavit calling into question the verdict it would have been barred. As the Court held in *Spicer v. State*, 973 So.2d 184 (Miss. 2007):

¶ 77. Even if one of the four jurors had provided his or her own affidavit, Rule 606(b) of the Mississippi Rules of Evidence provides that it would not have been admissible:

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his or any other juror’s mind or emotions as influencing him to

assent to or dissent from the verdict or indictment or concerning his mental process in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. *Nor may his affidavit or evidence of any statement by him concerning a matter about which would be precluded from testifying be received for these purposes.*

973 So.2d at 205-6. [emphasis from original]

This claim is doubly barred from consideration and is alternatively, completely devoid of legal merit. Pitchford is entitled to no relief on this assignment of error.

### CONCLUSION

For the above and foregoing reasons the State would submit the application for leave to file post-conviction relief challenging his capital murder conviction and sentence of death should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jason L. Davis, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing RESPONSE TO APPLICATION FOR POST-CONVICTION RELIEF AND SUPPLEMENT/AMENDMENT TO APPLICATION FOR POST-CONVICTION RELIEF to the following:

Glenn S. Swartzfager, Esquire  
Louwlynn Vanzetta Williams  
Mississippi Office of Capital Post-Conviction  
Counsel  
239 North Lamar Street, Suite 404  
Jackson, Mississippi 39201

This, the 1<sup>st</sup> day of May, 2012.

/s \_\_\_\_\_  
**JASON L. DAVIS**

**APPENDIX D**

**IN THE SUPREME COURT OF MISSISSIPPI**  
***Mississippi Supreme Court Case No. 2010-DR-***  
***01032-SCT***  
***Grenada County Circuit Court Case No. 2005-***  
***009-CR***

[Filed July 6, 2012]

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**TERRY PITCHFORD, *Petitioner***

**v.**

**STATE OF MISSISSIPPI, *Respondent***

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**Reply to State's Response to Application for  
Post-Conviction Relief and  
Supplement/Amendment to Application for  
Post-Conviction Relief<sup>1</sup>**

Mr. Pitchford files this reply under the Due Process Clause and the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; Article 3, §§ 8, 14, 17, 21 through 28, and 31 of the Mississippi Constitution; the Mississippi Rules of Appellate Procedure; and the additional state and federal authorities cited in this petition. Mr. Pitchford adopts and incorporates by reference all matters raised and briefed in his prior filings and presents the following in reply to the State's response. Mr. Pitchford, in this reply, will

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<sup>1</sup> Mr. Pitchford's actual filings were titled: Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and Supplement to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief.

address only those arguments presented by the State and does not waive any issues not addressed here.

### **Introduction**

The majority of the State’s Response attempts to rely on procedural bars in opposition to the claims raised by Mr. Pitchford in his petition.<sup>2</sup> But the claims in his petition are based on fundamental constitutional rights, and therefore are excepted from the procedural bars found in the Uniform Post-Conviction Collateral Relief Act.<sup>3</sup> In *Rowland v. State*,<sup>4</sup> this Court clarified the law regarding the procedural bars found in the Uniform Post-Conviction Collateral Relief Act (UPCCRA). There, this Court took the “opportunity to hold, unequivocally, that errors affecting fundamental constitutional rights are excepted from the procedural bars of the UPCCRA.”<sup>5</sup> The Court, relying on *Smith v. State*,<sup>6</sup> found, “a procedural bar cannot be applied in the face of ‘errors affecting fundamental rights,’” because such a violation “‘is too significant a deprivation of liberty to be subjected to a procedural bar.’”<sup>7</sup> Thus, under *Rowland*, there is discretion in determining whether to apply procedural bars to claims involving

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<sup>2</sup> (See generally State’s Response to Application for Post-Conviction Relief and Supplement/Amendment to Application for Post-Conviction Relief).

<sup>3</sup> *Rowland v. State*, 42 So. 3d 503 (Miss. 2010).

<sup>4</sup> 42 So. 3d 503 (Miss. 2010).

<sup>5</sup> *Id.* at 506.

<sup>6</sup> 477 So. 2d 191 (Miss. 1985).

<sup>7</sup> *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010) (quoting *Smith v. State*, 477 So. 2d 191, 195 (Miss 1985)).

fundamental constitutional rights.<sup>8</sup> The Court also went so far as to expressly overrule *Lockett v. State*,<sup>9</sup> *Mann v. State*,<sup>10</sup> *Jennings v. State*,<sup>11</sup> and *Pinkney v. State*,<sup>12</sup> to the extent they conflict with the Court's holding.<sup>13</sup>

All of the claims that Mr. Pitchford has raised in his petition for post-conviction relief are based on fundamental constitutional rights, and thus, the procedural bars of the Uniform Post-Conviction Collateral Relief Act cannot be applied.<sup>14</sup> The State's argument to the contrary is misplaced.

Further, Mr. Pitchford has provided this Court with a wealth of evidence in support of the claims raised in his petition, and the Court must accept the allegations in his petition as true.<sup>15</sup> The State has not provided this Court with any relevant evidence in opposition to Mr. Pitchford's claims; accordingly, he is entitled, at the very least, to an evidentiary hearing on his claims.<sup>16</sup>

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<sup>8</sup> *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010).

<sup>9</sup> 582 So. 2d 428, 430 (Miss. 1991).

<sup>10</sup> 490 So. 2d 910, 911 (Miss. 1986).

<sup>11</sup> 700 So. 2d 1326, 1328 (Miss. 1997).

<sup>12</sup> 757 So. 2d 297, 298-299 (Miss. 2000).

<sup>13</sup> *Rowland v. State*, 42 So. 3d 503, 508 (Miss. 2010).

<sup>14</sup> *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010); *Smith v. State*, 477 So. 2d 191, 195 (Miss. 1985).

<sup>15</sup> *Simon v. State*, 857 So. 2d 668, 678 (Miss. 2003) (citing *Moore v. Ruth*, 556 So. 2d 1059, 1061 (Miss 1990)).

<sup>16</sup> The State asserts that this Court's decision on any federal claim "must be based on clearly established Federal law, as

Under the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-1 *et seq.*, the procedural posture here “is analogous to that when a defendant in a civil action moves to dismiss for failure to state a claim.”<sup>17</sup> Mr. Pitchford is entitled to an evidentiary hearing on his claims unless it appears *beyond a doubt* that he cannot prove any set of facts entitling him to relief.<sup>18</sup> Mr. Pitchford’s claims are substantial and warrant this Court’s granting him full relief pursuant to Miss. Code Ann. § 99-39-27(7)(a). At the very least, however, Mr. Pitchford’s allegations entitle him to an evidentiary hearing pursuant to Miss. Code Ann. § 99-39-27(7)(b). The factual allegations in Mr. Pitchford’s proposed motion for post-conviction relief are more than enough under this Court’s precedents to warrant an evidentiary hearing.<sup>19</sup>

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determined by the Supreme Court of the United States.” (State’s Response at 13 n.1). This is the incorrect standard as it is the restrictive standard that federal courts must apply in federal habeas proceedings and has no application whatsoever to this Court.

<sup>17</sup> *Neal v. State*, 525 So. 2d 1279, 1280 (Miss. 1987).

<sup>18</sup> See *Marshall v. State*, 680 So. 2d 794, 794 (Miss. 1996) (“a post-conviction collateral relief petition which meets basic requirements is sufficient to mandate an evidentiary hearing unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief”); accord *Archer v. State*, 986 So. 2d 951, 957 (Miss. 2008) (“If [petitioner’s] application states a *prima facie* claim, he then will be *entitled* to an evidentiary hearing on the merits of that issue in the Circuit Court . . .”) (emphasis added).

<sup>19</sup> See, e.g., *Wilson v. State*, 81 So. 3d 1067 (Miss. 2012) (remanding for an evidentiary hearing where trial counsel’s efforts fell short of the prevailing standard, and thus warranted

**Argument****I. MR. PITCHFORD'S CONSTITUTIONAL RIGHTS WERE VIOLATED REGARDING HIS COMPETENCY TO STAND TRIAL.<sup>20</sup>****A. Terry Pitchford Was Incompetent to Stand Trial.**

In its response, the State argues that Mr. Pitchford's claim regarding his competency to stand

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an evidentiary hearing, where trial counsel did not conduct a proper mitigation investigation, failed to properly communicate with their client, and failed to properly prepare for the sentencing phase.); *Spicer v. State*, 973 So. 2d 184, 190-91 (Miss. 2007) (remanding for an evidentiary hearing where post-conviction counsel identified 15 additional witnesses who had not been contacted by defense counsel and were willing to testify regarding defendant's character and childhood history); *Doss v. State*, 882 So. 2d 176, 189 (Miss. 2004) (finding that trial counsel's efforts fell short of the prevailing standard, and thus warranted an evidentiary hearing where trial counsel did not seek any school, medical, mental health, or other records, seek advice from a mental health expert, obtain records resulting from prior criminal charges, or follow-up on witnesses identified by investigator); *Davis v. State*, 743 So. 2d 326, 338-40 (Miss. 1999) (ordering evidentiary hearing on ineffective assistance of counsel when on post-conviction review, affidavits of an additional six witnesses were presented); *Leatherwood v. State*, 473 So. 2d 964 (Miss. 1985) (remanding case for an evidentiary hearing where post-conviction counsel submitted affidavits of several more mitigation witnesses who had not been contacted by defense counsel).

<sup>20</sup> As pointed out in Mr. Pitchford's initial petition, this claim is raised as a free-standing claim, as well as a claim of ineffective assistance of counsel. The ineffective assistance of counsel claim regarding Mr. Pitchford's competency to stand trial is discussed *infra*.

trial is procedurally barred.<sup>21</sup> The State is wrong. The United States Supreme Court has specifically rejected the notion that competency to stand trial is subject to waiver.<sup>22</sup> Further, the issue of competency to stand trial implicates a fundamental constitutional right, and therefore is excepted from the procedural bars of the Uniform Post-Conviction Collateral Relief Act.<sup>23</sup> The State's response ignores this controlling precedent.<sup>24</sup>

The State further argues that Mr. Pitchford's claim is without merit.<sup>25</sup> Relying on the report of the Mississippi State Hospital at Whitfield,<sup>26</sup> the State appears to argue that Mr. Pitchford was competent to stand trial. The State, however, completely fails to address the considerable evidence presented in Mr. Pitchford's initial petition that he was not competent to stand trial.<sup>27</sup> The State fails to address that three experienced mental health professionals found that Mr. Pitchford was incompetent to be tried. Specifically:

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<sup>21</sup> (State's Response at 13).

<sup>22</sup> *Pate v. Robinson*, 383 U.S. 375, 376 (1966); *see also Sanders v. State*, 9 So. 3d 1132, 1136 (Miss. 2009).

<sup>23</sup> *Rowland v. State*, 42 So. 3d 503, 507 (Miss. 2010).

<sup>24</sup> In fact other than to three cases on procedural bars (which are inapplicable to this issue), the State cites no authority in support its position.

<sup>25</sup> (State's Response at 13--15).

<sup>26</sup> The State Hospital evaluated Mr. Pitchford on January 11 and January 25, 2006, and issued its report on January 26, 2006. (C.P. 1023-43).

<sup>27</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 6-9).

- Dr. Rahn K. Bailey, the forensic psychiatrist that examined Terry on February 4, 2006 -- only a few days before trial -- found that Terry's "[m]ental illness [inhibited] his ability to communicate fully [with his attorney] . . .", was "unable to maintain a consistent defense . . . unable to inform his attorney of distortion or misstatements . . .", "exhibit[ed] confusion, paranoia, and suspicions of the legal system . . .", "display[ed] a high level of cognitive impairment . . .", and although he was "able to understand the term of [a] plea bargain; however he [was] not able to make good decisions on his own behalf"<sup>28</sup>;
- Dr. Bailey further found Mr. Pitchford was "unable to rationally discuss his side of the incident, . . . [was] not consistent with a courtroom presentation, . . . [was] unable to understand questions satisfactorily . . .", had a "a psychiatric impairment that [would have been] exacerbate[d] during the stress of the trial . . .", and he was "unable to fully collaborate with his attorney or show appropriate judgment in making good decisions in his own behalf"<sup>29</sup>;
- Dr. Bailey concluded, "Therefore, in my professional opinion, based on reasonable medical certainty, Terry Pitchford is not competent to fully assist his attorney adequately at the current time. He has

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<sup>28</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>29</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

pertinent residual cognitive impairment which may limit his decision making capacity.”<sup>30</sup>

- Dr. Richard G. Dudley, Jr., a licensed psychiatrist who is a Diplomat of the American Board of Psychiatry and Neurology evaluated Mr. Pitchford on June 21 and 22, 2011, found:

[I]t is the opinion of this psychiatrist within a reasonable degree of medical certainty that [Terry’s] decision-making capacity was sufficiently impaired from the time of his arrest through the completion of his trial that his competency to stand trial was at least fluid . . . Terry Pitchford’s competency to make the rational decisions required of him before and during trial varied from moment to moment, and should have been a matter of ongoing concern, as it is doubtful that Terry Pitchford remained competent throughout the entirety of the pre-trial and trial proceedings.<sup>31</sup>

- Dr. D. Malcolm Spica, a licensed psychologist that evaluated Mr. Pitchford on June 16, 2011, also found Mr. Pitchford was incompetent:

Based on a reasonable degree of psychological certainty, these findings give me no confidence that Terry Pitchford would be able to make important decisions under emotional circumstances, time pressure, or when dealing with abstract concepts. As a result of these deficiencies, it

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<sup>30</sup> Exhibit 1, Affidavits of Dr. Rahn K. Bailey.

<sup>31</sup> Exhibit 2 at 15, Affidavit of Dr. Richard Dudley.

is further my opinion, based on a reasonable degree of psychological certainty that Mr. Pitchford's decision-making capacity was sufficiently impaired from the time of his arrest through the completion of his trial that his capability to stand trial was at the very least fluid. In other words, Terry Pitchford's capacity to make the rational decisions required for him before and during trial varied from moment to moment, and it is doubtful that he remained capable throughout the entirety of the pretrial and trial proceedings as a result of these deficiencies.<sup>32</sup>

For a defendant to be competent to stand trial, as required by the United States and Mississippi Constitutions, he must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"<sup>33</sup> and have "a rational as well as a factual understanding of the proceedings against him."<sup>34</sup> This Court, elaborating on the standard established by the United States Supreme Court in *Dusky*,<sup>35</sup> has held:

In order to be deemed competent to stand trial, a defendant must be one: (1) who is able to perceive and understand the nature of the proceedings; (2) who is able to rationally communicate with his attorney about the case; (3) who is able to recall relevant facts; (4) who is able to testify in his own

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<sup>32</sup> Exhibit 3 at 2, Affidavit of Dr. D. Malcolm Spica.

<sup>33</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

defense if appropriate; and (5) whose ability to satisfy the foregoing criteria is commensurate with the severity of the case.<sup>36</sup>

As thoroughly discussed in the initial petition,<sup>37</sup> Drs. Bailey, Dudley, and Spica's findings overwhelmingly demonstrate that Mr. Pitchford was unable to meet all of the criteria set forth by the United States Supreme Court and this Court in order to be deemed competent to stand trial. "The conviction of an accused person while he is legally incompetent violates due process."<sup>38</sup> Accordingly, Mr. Pitchford is entitled to post-conviction relief, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7)(a). Alternatively, this Court should grant Mr. Pitchford an evidentiary hearing on this issue pursuant to Miss. Code Ann. § 99-39-27(7)(b).

**B. The Trial Court Violated Mr. Pitchford's Rights Under the U.S. and Mississippi Constitutions By Failing to Conduct A Competency Hearing.**

In response to this argument, the State asserts that the trial court "did make a determination

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<sup>36</sup> *Jay v. State*, 25 So. 3d 257, 261 (Miss. 2009) (citing *Martin v. State*, 871 So.2d 693, 697 (Miss.2004) quoting *Howard v. State*, 701 So.2d 274, 280 (Miss.1997) (overruled on other grounds.)

<sup>37</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 6-9).

<sup>38</sup> *Pate v. Robinson*, 383 U.S. 375, 378 (1966) (citing *Bishop v. United States*, 350 U.S. 961 (1956)).

regarding competency.”<sup>39</sup> The State’s argument is incorrect. First, the trial excerpt pointed out by the State took place before Mr. Pitchford’s failed attempt to plead guilty.<sup>40</sup> There was no cross-examination regarding the findings of the State Hospital’s report.<sup>41</sup> Second, after Mr. Pitchford’s attempt to plead guilty failed, the trial court failed to conduct a competency hearing as mandated by Rule 9.06 of the Uniform Rules of Circuit and County Court. Rule 9.06 provides in relevant part:

If before or during trial the court, of its own motion or upon motion of an attorney, has reasonable ground to believe that the defendant is incompetent to stand trial, the court shall order the defendant to submit to a mental examination by some competent psychiatrist selected by the court in accordance with § 99-13-11 of the Mississippi Code Annotated of 1972.

After the examination the court shall conduct a hearing to determine if the defendant is competent to stand trial. After hearing all the evidence, the court shall weigh the evidence and make a determination of whether the defendant is competent to stand trial. If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and the case will then proceed to trial. If the court finds that the defendant is incompetent to stand trial,

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<sup>39</sup> (State’ Response at 14). The State references three guilty pleas, however, only two attempts at reaching a plea agreement were held. Tr.8.

<sup>40</sup> (Tr. 51-53).

<sup>41</sup> (*Id.*).

then the court shall commit the defendant to the Mississippi State Hospital or other appropriate mental health facility.

In *Sanders v. State*,<sup>42</sup> this Court held “that it would be error not to hold a competency hearing once a trial court orders a psychiatric evaluation to determine competency to stand trial.”<sup>43,44</sup> Because the Circuit Court in *Sanders* neither conducted a competency hearing nor made an explicit finding that the defendant was competent to stand trial, the Court reversed Sanders’ conviction and remanded for a new trial.

Similarly, in *Jay v. State*,<sup>45</sup> this Court found that Rule 9.06 of the Uniform Rules of Circuit and County Court mandates that “the court shall hold a competency hearing to determine whether the defendant is competent to stand trial.” The Court also observed that the rule “requires the court to make its finding a matter of record before the case proceeds to trial.”<sup>46</sup> Because a competency hearing was never held and no findings as to Jay’s competency were made, the Court reversed his conviction and

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<sup>42</sup> 9 So. 3d 1132 (Miss. 2009).

<sup>43</sup> *Id.* at 1136.

<sup>44</sup> As pointed out in the initial petition, Mr. Pitchford’s attorneys filed a Motion for a Mental Health Evaluation February 1, 2005, and an agreed Order for Psychiatric Evaluation was entered by the trial court on September 9, 2005. The Order for Psychiatric Evaluation, *inter alia*, required the State Hospital to “determine [Mr. Pitchford’s] competency to stand trial.” (C.P. 177).

<sup>45</sup> 25 So. 3d 257, 262 (Miss. 2009).

<sup>46</sup> *Id.*

remanded it for a new trial.<sup>47</sup> *Id.* at 263. In so doing, the Court in *Jay* stated:

The United States Supreme Court has held that a criminal defendant's "constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial" when "the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial." *Pate v. Robinson*, 383 U.S. 375, 385-386, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). Therefore, the trial court's failure to hold a competency hearing was a violation of Jay's constitutional rights and, therefore, requires reversal.<sup>48</sup>

In *Patton v. State*,<sup>49</sup> this Court recently affirmed that when a court rule contains language "shall," then the mandates of the rule are mandatory and must be followed. The Court in *Patton* reiterated, "A rule which is not enforced is no rule."<sup>50</sup> *Patton v. State*, 34 So. 3d at 572 (quoting *Box v. State*, 437 So. 2d 19, 21-22 (Miss. 1983)), The Court also referenced *Sanders*, "And more recently in *Sanders v. State*, 9 So.3d 1132 (Miss.2009), we reversed a conviction because the trial court failed to conduct an on-the-record mental competency hearing, as required by Rule 9.06."<sup>51</sup> The Court concluded:

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<sup>47</sup> *Id.* at 263.

<sup>48</sup> *Jay*, 25 So. 3d at 263.

<sup>49</sup> 34 So. 3d 563, 572 (Miss. 2010).

<sup>50</sup> *Id.* at 572 (quoting *Box v. State*, 437 So. 2d 19, 21-22 (Miss. 1983)).

<sup>51</sup> *Patton*, 24 So. 3d at 572 (citing *Sanders v. State*, 9 So. 3d at 1136-39).

This Court's constitutional power to promulgate judicial rules is no small thing. It is an awesome responsibility, but no less so than our duty to enforce those rules fairly, evenly, and predictably. The bench and bar are entitled to rely on this Court to apply the rules no less diligently to the courts than to the lawyers and litigants. And when a rule that we promulgated says a trial court "shall" do a thing, justice and fairness demand that, absent extremely unusual circumstances, we either require trial courts to do it, or change the rule.<sup>52</sup>

While the trial court in this instance did make findings via the State' Hospital's reports regarding Mr. Pitchford's competency prior to his failed guilty plea attempt, there was no formal competency hearing held where Mr. Pitchford was afforded his right to cross-examine the State Hospital personnel who made the findings in the report.<sup>53</sup> A "hearing" necessarily entails the right to cross-examine adverse witnesses. Regarding the rights afford by the Sixth Amendment of the United States Constitution, this Court has pointed out that "every criminal defendant has a Sixth Amendment right to confront and cross-examine adverse witnesses."<sup>54</sup> Regarding this right afforded by the Sixth Amendment, the United States Supreme Court has found:

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<sup>52</sup> *Patton*, 24 So. 3d at 572. See also *Ivy v. Harrington*, 644 So.2d 1218, 1221 (Miss.1994) ("Unlike the discretionary nature of 'may,' the word 'shall' is a *mandatory* directive .... *no discretion* is afforded the trial judge") (emphasis in original).

<sup>53</sup> (Id.).

<sup>54</sup> *Allen v. State*, 384 So. 2d 605, 607 (Miss. 1980) (quoting *Illinois v. Allen*, 397 U.S. 337 (1970)).

The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence.<sup>55</sup>

Once the trial court ordered a psychiatric evaluation of Mr. Pitchford that specifically requested a finding as to his competency to stand trial, it had a duty to conduct a competency hearing.<sup>56</sup> Both the United States Supreme Court and this Court have stated, “[T]rial courts are *obligated* to conduct a competency hearing, either on the defendant’s own motion or *sua sponte*, if there is sufficient doubt about a defendant’s competence”. The United States Supreme Court holds that: failure to observe procedures to protect a defendant’s right not to be tried or convicted while incompetent deprives him of his due process right to a fair trial.<sup>57</sup>

Terry Pitchford’s constitutional rights were violated when the trial court failed to adhere to the mandatory procedures of Rule 9.06.<sup>58</sup> By failing to conduct a competency hearing where he was afforded his constitutional right to cross-examination, the trial court failed to adhere to the strict mandates of

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<sup>55</sup> *Faretta v. California*, 422 U.S. 806, 818 (1975).

<sup>56</sup> *See, e.g., Sanders*, 9 So. 3d at 1135.

<sup>57</sup> *Id.* at 172.

<sup>58</sup> *Drope v. Missouri*, 429 U.S. 162 (1975); *Sanders*, 9 So. 3d at 1135; *Jay*, 25 So. 3d at 257.

URCCC 9.06 and this Court, and thereby committed reversible error.<sup>59</sup> Accordingly, Mr. Pitchford is entitled to post-conviction relief, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7)(a). Alternatively, this Court should grant Mr. Pitchford an evidentiary hearing on this issue pursuant to Miss. Code Ann. § 99-39-27(7)(b).

**II. MR. PITCHFORD'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE STATE'S RACIAL DISCRIMINATION DURING VOIR DIRE.**

In its response, the State argues that Mr. Pitchford's claim regarding racial discrimination during jury selection is procedurally barred by *res judicata* because the Court decided this issue on direct appeal.<sup>60</sup> Once again, the State is wrong. As Mr. Pitchford pointed out in his initial petition, this Court found that the arguments regarding pretext were procedurally barred from consideration on direct appeal because they had not been raised in the trial court.<sup>61</sup> This Court therefore declined to address the merits of the arguments raised regarding pretext.<sup>62</sup> Thus, the Court decided the pretext portion of Mr. Pitchford's *Batson* claim on the basis of a procedural

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<sup>59</sup> *Sanders*, 9 So. 3d at 1134; *Jay*, 25 So. 3d at 257.

<sup>60</sup> (State's response at 15-22).

<sup>61</sup> *Pitchford*, 45 So. 3d at 227-28.

<sup>62</sup> *Id.*

bar and not on the merits.<sup>63</sup> And because the Court did not consider the arguments and evidence regarding pretext in deciding the *Batson* claim, it is not barred by *res judicata*, which applies to issues “decided at trial and on direct appeal.”<sup>64</sup> The cases cited by the State in support of its position that Mr. Pitchford’s claims regarding pretext are procedurally barred are inapplicable to the present case.<sup>65</sup> All of those cases, *Manning v. State*,<sup>66</sup> *Mack v. State*,<sup>67</sup> and *Woodward v State*,<sup>68</sup> were being decided on direct appeal by this Court, and thus, cannot have any applicability to these post-conviction proceedings.

Further, while the State argues that this claim is also without merit,<sup>69</sup> it provides no argument or evidence in support of its assertion other than citing at length from this Court’s direct appeal decision in Mr. Pitchford’s case where it declined to consider the evidence regarding pretext.<sup>70</sup> Indeed, the State fails to address the lengthy arguments regarding pretext made by Mr. Pitchford regarding Carlos Ward, Venire

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<sup>63</sup> *Pitchford*, 45 So. 3d at 227 (“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”).

<sup>64</sup> Miss. Code Ann. 99-39-21(3). *See also Ballenger v. State*, 761 So. 2d 214, 219 (Miss. 2000).

<sup>65</sup> (State’s Response at 21-22).

<sup>66</sup> 735 So. 2d 1152 (Miss. 1999).

<sup>67</sup> 650 So. 2d 1289 (Miss. 1994).

<sup>68</sup> 726 So. 2d 524 (Miss. 1997).

<sup>69</sup> (State’s Response at 13).

<sup>70</sup> (State’s Response at 15-22).

Member 48,<sup>71</sup> Linda Ruth Lee, Venire Member 30 (including the affidavit signed by Ms. Lee),<sup>72</sup> and Christopher Lamont Tillmon, Venire Member 31<sup>73</sup>, except in the context of Mr. Pitchford's ineffective assistance of counsel claim which is separate and apart from this free-standing claim and requires a different legal analysis.<sup>74</sup> As thoroughly discussed in the initial petition,<sup>75</sup> Mr. Pitchford has overwhelmingly demonstrated that the reasons offered by the prosecution for exercising peremptory strikes against these three individuals was pretextual and cannot withstand scrutiny.<sup>76</sup>

Miss. Code Ann. § 99-39-27(7)(a) provides that this Court may “grant or deny all relief requested in the attached motion,” or that it may grant the petitioner leave to file “the motion in the trial court for further proceedings . . . .”<sup>77</sup> Here, the prosecutor has already stated his reasons for peremptorily striking the jurors, he must “stand or fall on the plausibility of the

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<sup>71</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 17-20).

<sup>72</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 20-23).

<sup>73</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 23-25).

<sup>74</sup> (See State's Response at 15-22; 22-28).

<sup>75</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 6-9).

<sup>76</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 12-25).

<sup>77</sup> See also *Ballenger v. State*, 761 So. 2d 214, 219 (Miss. 2000).

reasons he gives,”<sup>78</sup> and a court may only consider “the reasons initially given to support the challenged strike, not additional reasons offered after the fact.”<sup>79</sup> Consequently, there is reason to remand for an evidentiary hearing on this issue, and the proper remedy in this case is to grant Mr. Pitchford post-conviction relief, vacate his conviction, and remand for a new trial.

**III. TRIAL COUNSEL’S MYRIAD DEFICIENCIES DEPRIVED MR. PITCHFORD OF HIS CONSTITUTIONALLY REQUIRED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND CAUSED HIM UNDENIABLE PREJUDICE.**

**A. Trial Counsel Was Ineffective In Failing to Properly Challenge, Litigate, and Preserve the Record Regarding the State’s Discriminatory Use of Peremptory Challenges.**

The State again argues that this issue is procedurally barred on the basis of *res judicata*.<sup>80</sup> As discussed above in Section II, Mr. Pitchford’s claim regarding this issue is not procedurally barred. In order to avoid needless repetition, the arguments set

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<sup>78</sup> *Miller-El II*, 454 U.S. at 252.

<sup>79</sup> *United States v. Taylor*, 636 F.3d 901, 905 (7th Cir. 2011) (citing *Miller-El II* at 252).

<sup>80</sup> (State’s Response at 23).

forth in Section II are adopted and incorporated by reference herein as if copied in full.

In its response, the State mischaracterizes this Court's holding in *Chamberlin v. State*.<sup>81</sup> There, this Court, quoting *Puckett v. State*,<sup>82</sup> held:

One of the recognized indicia of pretext is “disparate treatment, that is, the presence of unchallenged jurors of the opposite race who share the characteristic given as the basis for the challenge.” *Mack v. State*, 650 So.2d [1289] at 1298 [(Miss.1994)]. This Court has explained that while such use of challenges is a factor which may be considered by the trial court, *where multiple reasons led to the strike of the State to strike one juror, the existence of another juror with one of his or her individual characteristics does not demonstrate that the reasons assigned were pretextual.*<sup>83,84</sup>

However, the State leaves out the very next paragraph in *Chamberlin* which states:

Chamberlin claims that defense counsel should have performed a comparative jury analysis, which would have demonstrated disparate treatment of the jurors, indicating that the State's strikes were pretextual. But a thorough review of the record in this case, including the jury questionnaires provided by Chamberlin, discloses

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<sup>81</sup> 55 So. 3d 1046, 1051 (Miss 2010)

<sup>82</sup> 788 So. 2d 752, 763 (Miss. 2001).

<sup>83</sup> *Chamberlin v. State*, 55 So. 3d at 1051 (quoting *Puckett v. State*, 788 So. 2d 752, 763 (Miss. 2001) (emphasis in original)).

<sup>84</sup> (State's Response at 24).

that each of the African-American jurors struck had at least one response in his or her jury questionnaire that differentiated him or her from the white jurors who were accepted by the State. Therefore, we are unable to find disparate treatment of the struck jurors. And because we find no disparate treatment ***and no other evidence of pretext***, we cannot say that Chamberlin's defense counsel was deficient in this stage or the jury-selection process. This issue is without merit.<sup>85</sup>

Explanations may not be race neutral if “the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects.”<sup>86</sup> The Fifth Circuit's decision in *Reed* is instructive. There, the Court stated:

The [United States Supreme] Court's treatment of *Miller-El's* comparative analysis also reveals several principles to guide us. First, we do not need to compare jurors that exhibit *all* of the exact same characteristics. *Id.* at 247 n. 6, 125 S.Ct. 2317. If the State asserts that it struck a black juror with a particular characteristic, and it also accepted nonblack jurors with that same characteristic, this is evidence that the asserted justification was a pretext for discrimination, even if the two jurors are dissimilar in other respects.

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<sup>85</sup> *Chamberlin v. State*, 55 So. 3d at 1051-52 (emphasis added).

<sup>86</sup> *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) (citing *Miller-El II v. Dretke*, 545 U.S. 231, 247 n.6 (2005)).

*Id.* at 241, 125 S.Ct. 2317. Second, if the State asserts that it was concerned about a particular characteristic but did not engage in meaningful voir dire examination on that subject, then the State's failure to question the juror on that topic is some evidence that the asserted reason was a pretext for discrimination. *Id.* at 246, 125 S.Ct. 2317. Third, we must consider only the State's asserted reasons for striking the black jurors and compare those reasons with its treatment of the nonblack jurors. *Id.* at 252, 125 S.Ct. 2317.<sup>87</sup>

In *Miller-El II*, the United States Supreme Court expressly rejected the dissent's assertion that the comparative jurors had to be similar in all respects except race, and in so doing held: "A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters."<sup>88</sup> Thus, this Court's holding in *Chamberlin* can only be interpreted to mean that where there are unchallenged jurors of a different race who share the characteristic given as the basis for the challenge, it is a factor to be considered in determining pretext, but it is not conclusive evidence of pretext. Otherwise, this Court's decision would be in conflict with the United States Supreme Court's decision in *Miller-El II*.<sup>89</sup>

In his initial petition, Mr. Pitchford discussed at length each of the reasons given by the prosecutor for

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<sup>87</sup> *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009) (citing *Miller-El II v. Dretke*, 545 U.S. 231 (2005)).

<sup>88</sup> *Miller-El II*, 545 U.S. at 247 n.6 (2005).

<sup>89</sup> *Miller-El II v. Dretke*, 545 U.S. 231 (2005).

challenging the individuals in question and demonstrated that each of those reasons was pretextual.<sup>90</sup> Thus, unlike *Chamberlin*, there was other evidence of pretext including the prosecutor's history of exercising peremptory challenges in a discriminatory manner.<sup>91</sup> The State's reliance on *Chamberlin* is misplaced.

The State also mischaracterizes Mr. Pitchford's arguments on this issue. Regarding Christopher Lamont Tillmon, Venire Member 31, the State asserts that he had indicated on his questionnaire that he had a brother who had been convicted of manslaughter, and thus, because *Simmons v. Thaler*<sup>92</sup> held this to be a nondiscriminatory reason for exercising a peremptory challenge, the prosecutor's reasons regarding Mr. Tillmon were not pretextual.<sup>93</sup> The State, however, fails to address the fact, as pointed out by Mr. Pitchford in his initial petition, that the prosecutor did not challenge white jurors who had family members with criminal convictions and did not inquire about the convictions on *voir dire*.<sup>94</sup> The failure of the prosecutor to ask any questions regarding the criminal convictions of one of the challenged juror's family member "undermined

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<sup>90</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 12-25).

<sup>91</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 17).

<sup>92</sup> 440 Fed.Appx. 237, (5th Cir. 2001).

<sup>93</sup> (State's Response at 25).

<sup>94</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 23-24).

the validity of that reason.”<sup>95</sup> The United States Supreme Court in *Miller-El II* found that the prosecution had accepted other venire members who had relatives with criminal histories.<sup>96</sup> In light of the prosecutor’s failure to *voir dire* and the disparity in treatment, the *Miller-El II* Court found “the prosecutor’s race-neutral reasons to be implausible, thereby supporting the defendant’s *Batson* challenge.”<sup>97</sup> The challenge exercised against Mr. Tillmon was no different, and the Court should find it was pretextual.

As to Carlos Ward, Venire Member 48, the State mischaracterizes Mr. Pitchford’s argument by stating, “Petitioner attempts to isolate one characteristic of Mr. Ward, his having a young child, which was shared by another juror to support his claim.”<sup>98</sup> The State, however, fails to mention or address that Mr. Pitchford also argued in his initial petition that:

- The prosecution accepted no less than seven white jurors who had young children;
- The prosecution accepted a white juror who had never been married and who was close to Mr. Ward’s age;
- The prosecution accepted white jurors who answered the juror questionnaire regarding their opinion on the death penalty in the same fashion as Mr. Ward;

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<sup>95</sup> *Id.* at 250 n. 8.

<sup>96</sup> *Id.*

<sup>97</sup> *Hayes*, 361 Fed. App’x. at 568 (citing *Miller-El II*, 545 U.S. at 251-52).

<sup>98</sup> (State’s Response at 25).

- The prosecution accepted 11 white jurors who shared at least one trait with Mr. Ward for which the prosecution claimed it challenged him;
- The prosecution accepted at least 6 white jurors who shared more than one trait with Mr. Ward for which the prosecution claimed it challenged him;
- The prosecution failed to provide any record support for the “numerous speeding violations” it alleged Mr. Ward had received. In fact, the prosecution failed to even disclose its alleged source for this unsupported information;
- The prosecution did not question Mr. Ward—or any of the other jurors—regarding any of the reasons cited for striking Mr. Ward during *voir dire*;
- The prosecutions reasons given for striking Mr. Ward were totally unrelated to the case; and
- Therefore all five of the indicia of pretext set out by this Court in *Lynch v. State*<sup>99</sup> are satisfied as to Mr. Ward.<sup>100</sup>

As for Linda Lee, Venire Member 30, the State simply argues that she was late and had mental problems as the police had been to her house on numerous occasions. The State fails to even so much as acknowledge, much less address, the affidavit that Ms. Lee gave stating that she does not suffer from mental problems and that the only time the police have been to her house was years ago when her

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<sup>99</sup> *Lynch v. State*, 877 So. 2d 1254, 1272 (Miss. 2004) (citing *Manning v. State*, 765 So. 2d 516, 519 (Miss.2000)).

<sup>100</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 17-20).

brothers got into a fight in the front yard.<sup>101</sup> The State also fails to address the fact that the trial found Ms. Lee had an acceptable excuse for being late because she did not have a car and she was “trying real hard to be here and fulfill her civic duty as juror.”<sup>102</sup>

The State also criticizes Alison Steiner, one of Mr. Pitchford’s trial counsel, for giving an affidavit which it mischaracterizes as attesting “to her own ineffectiveness.”<sup>103</sup> Ms. Steiner’s affidavit does nothing of the sort. All Ms. Steiner’s affidavit does is truthfully attests to the fact that she “was not exercising any type of trial strategy when [she] failed to challenge the prosecution’s reasons as pretextual at trial, or when [she] failed to suggest that pretext or the evidence of it be asserted in post-trial motions filed in Mr. Pitchford’s case.”<sup>104</sup> In fact this Court in *Wilson v State*,<sup>105</sup> expressed concern over the fact that it did not “have competing affidavits from court-appointed trial counsel or other individuals who might shed any light on this issue.”<sup>106</sup>

Moreover, as the State is well aware, in order to prevail on a claim of ineffective assistance of counsel, one must show deficient performance and prejudice.<sup>107</sup> Ms. Steiner’s affidavit simply states she

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<sup>101</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 20-23; Exhibit 4).

<sup>102</sup> (T. 318).

<sup>103</sup> (State’s Response at 23-24 n.8).

<sup>104</sup> (Exhibit 5, Affidavit of Alison Steiner).

<sup>105</sup> 21 So. 3d 572 (Miss. 2009)

<sup>106</sup> *Wilson v. State*, 21 So. 3d at 580.

<sup>107</sup> *Strickland v. Washington*, 466 U.S. 688 (1984).

was not exercising trial strategy at certain points. Her affidavit says nothing regarding prejudice. The same goes for the affidavit of Ray Charles Carter, which the State also criticizes for giving an affidavit which is also mischaracterized.<sup>108</sup>

Regardless, Mr. Pitchford has shown an undisputable claim of ineffective assistance of counsel for their failure to properly challenge, litigate, and preserve the record regarding the State's discriminatory use of peremptory challenges.<sup>109</sup> Mr. Pitchford is entitled to post-conviction relief on this issue, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7)(a). Alternatively, this Court should grant Mr. Pitchford an evidentiary hearing on this issue pursuant to Miss. Code Ann. § 99-39-27(7)(b).

**B. Trial Counsel Violated Mr. Pitchford's Federal and State Constitutional Rights to Effective Assistance of Counsel by Utterly Failing to Assert Terry's Incompetency to Stand Trial and Failing to Request a Competency Hearing.**

The State misapprehends Mr. Pitchford's argument on this issue. The State argues that this claim is "specious" and "disingenuous" because Mr. Carter's statement in his affidavit that he was not aware that Dr. Bailey's report found Mr. Pitchford

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<sup>108</sup> (State's Response at 23-24 n.8; 45-47).

<sup>109</sup> (See Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 26-30).

incompetent to stand trial is refuted by the record.<sup>110</sup> However, the State's argument on this issue is nothing more than surmise and rank speculation. Specifically, the State argues, "Clearly, Carter was well aware of what was in the report, as he testified that he had discussed Dr. Bailey's findings from Grenada to Jackson."<sup>111</sup>

While Mr. Carter did testify that "on the way back, I remember talking to him about his, his overall opinions,"<sup>112</sup> the State fails to point out that Dr. Bailey's report was not finished until the conclusion of the guilt phase of the trial. Mr. Carter testified at the hearing to supplement the record that Dr. Bailey "did a written report that I got that I think he faxed to a mitigation specialist that I got right before the first phase ended, I believe."<sup>113</sup> He further testified that he gave Dr. Bailey's report to the district attorney "right when the first phase ended. I found out a few minutes later he wasn't going to be here. At that point I didn't – I don't know if I paid much attention to it beyond that."<sup>114</sup>

Mr. Carter's affidavit is completely consistent with the testimony he gave at the hearing to supplement the record:

***Dr. Bailey's report was not furnished prior to trial***, and I only received it shortly before the guilt

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<sup>110</sup> (State's Response at 28-33); (Exhibit 6, Affidavit of Ray Charles Carter).

<sup>111</sup> (State's Response at 32).

<sup>112</sup> (Tr. 31).

<sup>113</sup> (Supp. T. 33).

<sup>114</sup> (Supp. T. 34).

phase of the trial was completed. As soon as I received Dr. Bailey's report, I turned a copy of it over to the District Attorney's Office prosecuting Mr. Pitchford. I found out a few minutes later that Dr. Bailey could not be present to testify at Mr. Pitchford's trial because he was under subpoena in another court in Texas. At that point, I did not pay much attention to the report because I was trying to get ready for the sentencing phase of the trial which was to begin the next morning. I do not recall if I even read the report because Dr. Bailey told me he was going to be unable to appear to testify in Mr. Pitchford's case on February 9, 2006.<sup>115</sup>

The State further fails to point out that in his affidavit, Mr. Carter specifically states:

I was unaware that Dr. Bailey's report found that Mr. Pitchford was not competent to stand trial or assist in his defense. I did not put Dr. Bailey under subpoena while he was in Mississippi evaluating Mr. Pitchford prior to trial. There was no trial strategy involved in my failing to subpoena Dr. Bailey. I simply failed to do it. There was no trial strategy involved when I failed to make a record of the in-chambers discussions regarding the unavailability of Dr. Bailey. I just did not think about making sure there was a proper record of those discussions. There was also no trial strategy involved when I did not make a proffer of what Dr. Bailey's testimony would have been had he testified or have his report entered into evidence. I simply did not think to do it. If I would have

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<sup>115</sup> (Exhibit 6, Affidavit of Ray Charles Carter; Supp. T. 34) (emphasis added).

thought about it, I certainly would have made a proffer of Dr. Bailey's testimony or had his report entered into evidence in an attempt to preserve the record for appeal.<sup>116</sup>

Contrary to the State's assertion, the assertions in Mr. Carter's affidavit are not refuted by the record.

The State also argues that this claim is "specious" because Mr. Pitchford argues that trial counsel was ineffective for not requesting a competency hearing, yet he has also argued that the trial court erred in failing to hold a competency hearing.<sup>117</sup> The State misapprehends Mr. Pitchford's argument. Clearly, as set for in Claim 1, the trial court was obligated to hold a competency hearing once it ordered an evaluation of Mr. Pitchford's competency.<sup>118</sup> However, trial counsel was also under a constitutional obligation to ensure that a competency hearing took place.

Mr. Carter was aware that once a defendant's competency was called into question, the defendant unequivocally has the right to a competency hearing, and the court *shall* make a determination of competency on the record pursuant to Rule 9.06.<sup>119</sup> In spite of this, Mr. Carter failed to ask for a competency hearing and protect Mr. Pitchford's constitutional right not to be tried while incompetent.<sup>120</sup> Defense counsel's knowledge of his client's mental health

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<sup>116</sup> (Exhibit 6, Affidavit of Ray Charles Carter).

<sup>117</sup> (State's Response at 28).

<sup>118</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 6-12).

<sup>119</sup> (Exhibit 6, Affidavit of Ray Charles Carter; URCCC 9.06).

<sup>120</sup> (Exhibit 6, Affidavit of Ray Charles Carter).

history, medication, and bizarre behavior “trigger[s] not only a duty to investigate further, but also his duty to seek a competency hearing” and failure to do either was “unreasonable.”<sup>121</sup>

Further, Mr. Carter’s decision not to pursue a competency hearing for Mr. Pitchford cannot be characterized as a strategic decision.<sup>122</sup> There can be no “tactical decision” not to pursue the issue when a defendant’s present competence is implicated.<sup>123</sup> Indeed, the United States Court of Appeals for the Fifth Circuit has held: “[i]t must be a very rare circumstance indeed where a decision not to investigate would be ‘reasonable’ after counsel has notice of the client’s history of mental problems.”<sup>124</sup>

Trial counsel’s performance was deficient, and as set forth in the initial petition, Mr. Pitchford was prejudiced by that deficient performance.<sup>125</sup>

**C. The Failure of Mr. Pitchford’s Trial Counsel to Investigate and Present Available Mitigation Evidence Deprived Mr. Pitchford of his Constitutionally-Guaranteed Right to Effective Assistance of Counsel.**

In order to avoid repetition, Mr. Pitchford relies on his previous arguments on this issue in his initial petition. The facts and evidence set forth provide a

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<sup>121</sup> *Williamson v. Ward*, 110 F.3d 1508, 1518 (10th Cir. 1997).

<sup>122</sup> (Exhibit 6, Affidavit of Ray Charles Carter).

<sup>123</sup> *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

<sup>124</sup> *Id.*

<sup>125</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 33-34).

clear picture of the inadequacy of trial counsel's performance. Despite the State's lengthy recitation of *Brown*,<sup>126</sup> a distinction can be made. In *Brown*, this Court remanded for an evidentiary hearing to determine "whether trial counsel was ineffective in failing to seek other expert assistance when the State Hospital examination produced no report and whether such inaction resulted in any prejudice to his case at sentencing."<sup>127</sup> At the evidentiary hearing and on appeal, Brown focused "his ineffectiveness argument almost exclusively on trial counsel's decision to forego presenting an expert report on Brown's psychological evaluation and testimony from the State Hospital doctors."<sup>128</sup> On appeal, Brown claimed that "his counsel was deficient by preventing this evidence from being presented as mitigation, and that he was prejudiced by such deficiency."<sup>129</sup> Unlike *Brown*, Mr. Pitchford is not claiming that trial counsel was ineffective in failing to call the doctors from the State Hospital to testify during sentencing.<sup>130</sup> Rather, Mr. Pitchford's claim is that trial counsel failed to conduct a proper mitigation investigation, and thus was constitutionally ineffective.<sup>131</sup> The State's reliance on *Brown* is misplaced.

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<sup>126</sup> *Brown v. State*, 88 So. 3d 726 (Miss. 2012).

<sup>127</sup> *Brown v. State*, 88 So. 3d at 732.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 34-47).

<sup>131</sup> *Id.*

Mr. Pitchford has provided the court with documentation of the evidence that could have been developed and “would have been beneficial in mitigation” had trial counsel performed an adequate investigation for purposes of mitigation.<sup>132</sup> In *Johns v. State*,<sup>133</sup> the Mississippi Supreme Court spoke to the minimum standard for investigation required by counsel to satisfy the “*minimum duty*” of interviewing possible witnesses and conducting “an *independent* investigation of the facts and circumstances of the case.”<sup>134</sup> Investigations, such as these, are “of utmost importance.”<sup>135</sup> “When counsel makes choices of which witnesses to use or not to use, those choices must be based on counsel’s proper investigation.”<sup>136</sup> The Fifth Circuit Court of Appeals has echoed the importance of counsel’s duty to investigate stating, “Informed evaluation of potential defense to criminal charges and meaningful discussion with one’s client of the realities of his case are [the] cornerstones of [the] effective assistance of counsel.”<sup>137</sup>

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<sup>132</sup> *Id.* See also *Wilson v. State*, 81 So.3d 1067, 1076 (Miss. 2012) (“Counsel must conduct an adequate investigation in order to be able to present that mitigating evidence to the jury.”)

<sup>133</sup> *Johns v. State*, 926 So. 2d 188 (Miss. 2006).

<sup>134</sup> *Id.* at 196 (emphasis added). See also *Payton v. State*, 708 So. 2d 559, 561 (Miss 1998) (quoting *Ferguson v. State*, 507 So. 2d 94, 96 (Miss. 1987); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985)).

<sup>135</sup> *Payton v. State*, 897 So. 2d 921, 954 (Miss.2003).

<sup>136</sup> 926 So. 2d at 196.

<sup>137</sup> *Gaines v. Hopper*, 575 F.2d 1147, 1149-1150 (5th Cir 1978).

Failing to “investigate when the investigator does not know the relevant facts the investigation will uncover” is not reasonable.<sup>138</sup> If trial counsel has unsupported beliefs that investigation will yield nothing, it is no excuse because “counsel’s ‘beliefs’ are not a substitute for informed strategy.”<sup>139</sup> In order to determine the reasonableness of a counsel’s decision to end the investigation prematurely or not to investigate all together, that decision “must be directly assessed for reasonableness in all the circumstances . . . .”<sup>140</sup> In *Wiggins*, “counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.”<sup>141</sup> There, the Court found that a reasonable strategic choice was not possible “because the investigation supporting their choice was unreasonable.”<sup>142</sup>

Furthermore, the State attempts to fault trial counsel for not calling Dr. McMichael and Dr. Lott as witnesses.”<sup>143</sup> But again this argument fails because Mr. Pitchford’s claim is not that trial counsel was ineffective in failing to call the doctors from the State Hospital.<sup>144</sup>

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<sup>138</sup> *Ross v. State*, 954 So. 2d 968, 1006 (Miss. 2007) (quoting *Dickerson v. Bagley*, 453 F.3d 690, 696-697 (6th Cir. 2006)).

<sup>139</sup> *Marshall v. Cathel*, 428 F.3d 452, 471 (3d Cir. 2005).

<sup>140</sup> *Strickland*, 466 U.S. at 691.

<sup>141</sup> *Wiggins*, 539 U.S. at 527-28.

<sup>142</sup> *Id.* at 536.

<sup>143</sup> (State Response at 34 n. 10)

<sup>144</sup> (See Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 34-47).

### 1. Dr. Bailey

In its response, the State argues that it was legitimate strategy for trial counsel not to call Dr. Bailey, to not ask for a continuance and to use the individuals selected to testify for purposes of mitigation in lieu of calling Dr. Bailey as a witness.<sup>145</sup> The State offers nothing in support of this argument but its own speculation, confusion of the issues, and misconstrued take on the evidence.<sup>146</sup> “It takes no deep legal analysis to conclude that an attorney who never seeks out or interviews important witnesses and who fails to request vital information was not engaging in trial strategy.”<sup>147</sup>

The State confuses the argument raised on direct appeal with the claim presently before the Court. Mr. Pitchford’s direct appeal claim was directed at the trial court’s failure to grant a continuance. In the case *sub judice*, the claims presented focus on trial counsel’s failures to render constitutionally effective assistance as defined by *Strickland* and its progeny. Trial counsel *failed to perform a basic function of trial preparation: ensure that defense witnesses would be available for trial.*<sup>148</sup> “There is simply no excuse for defense counsel failing to request a subpoena for his

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<sup>145</sup> (State’s Response at 34,37; 39).

<sup>146</sup> (State’s Response at 36-41).

<sup>147</sup> *Davis v. State*, 87 So.3d 465,469 (Miss. 2012)

<sup>148</sup> *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995) (citing *Eslick v. State*, 238 Miss. 666, 119 So. 2d 355 (1960); *Bolin v. State*, 209 Miss. 866, 48 So. 2d 581 (1950); *Bone v. State*, 207 Miss. 20, 41 So. 2d 347 (1949)).

witnesses.”<sup>149</sup> Mississippi law is clear that failure to do so constitutes ineffective assistance.<sup>150</sup>

The State constantly advances arguments that are based on speculation and the State’s belief rather than on the record.<sup>151</sup> The State continuously refers to instances of Mr. Carter “speaking with Dr. Bailey regarding his findings” and “lengthy conversation with Bailey regarding his overall findings” and trial counsel’s knowledge of the contents of the report.<sup>152</sup> Contrary to the State’s assertion that Mr. Carter was aware of the contents of Dr. Bailey’s report, Mr. Carter states that he did “not recall even reading the report.”<sup>153</sup>

Further, Dr. Bailey’s report was not finished until the conclusion of the guilt phase of the trial. Mr. Carter testified at the hearing to supplement the record that Dr. Bailey “did a written report that I got that I think he faxed to a mitigation specialist that I got right before the first phase ended, I believe.”<sup>154</sup> He further testified that he gave Dr. Bailey’s report to the district attorney “right when the first phase ended. I found out a few minutes later he wasn’t going to be here. At that point I didn’t – I don’t know if I paid

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<sup>149</sup> *Triplett v. State*, 666 So. 2d at 1362.

<sup>150</sup> *Id.*

<sup>151</sup> (State’s Response at 37-39).

<sup>152</sup> *Id.*

<sup>153</sup> (Supp. T. 33-34; Exhibit 6, Affidavit of Ray Charles Carter).

<sup>154</sup> (Supp. T. 33)

much attention to it beyond that.”<sup>155</sup> The State’s argument regarding Dr. Bailey must fail.

## 2. Dr. Richard G. Dudley

The State does not address the clinical findings of Dr. Dudley but chooses instead to characterize the information obtained by Dr. Dudley as repetitive of the testimony from trial. A close examination of the facts of this case indicates that Dr. Dudley’s evaluation provides a picture of Mr. Pitchford that bears no resemblance to the one the jury heard at trial.<sup>156</sup> Dr. Dudley made findings that the jury never heard, including:

- Mr. Pitchford had made numerous suicide attempts, including one at the age of nine when he heard voices that told him to jump out of the back of a moving vehicle, took an overdose of pills at the age of sixteen, and at the age of eighteen he rammed his car into a light pole;<sup>157</sup>
- Mr. Pitchford suffers from Borderline Personality Disorder which is evidenced by his “instability of interpersonal relationships, self-image and affects with marked impulsivity.”<sup>158</sup> Associated with this disorder is self-damaging behavior, including chronic suicidality which Mr. Pitchford has exhibited. “This disorder is

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<sup>155</sup> (Supp. T. 34)

<sup>156</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 34-47); *See also Porter v. McCollum*, 130 S. Ct. 447, 449 (2009) (evidence presented at sentencing “left the jury knowing hardly anything about him other than the facts of his crimes”).

<sup>157</sup> (Exhibit 2, Affidavit of Dr. Richard G. Dudley).

<sup>158</sup> *Id.*

among the most severe personality disorders in that it is also associated with transient paranoid ideation, as well as dissociative symptoms;”<sup>159</sup>

- Mr. Pitchford suffers from an Anxiety Disorder, not otherwise specified.<sup>160</sup> “As a result of the traumas he endured during his childhood and early adolescent years, he has been hyper-vigilant, possibly at times to the point of being paranoid, and then over-reactive to perceived mistreatment.”<sup>161</sup> Some of his symptoms are also noted in individuals with post-traumatic stress disorder;
- Mr. Pitchford suffers from Depressive Disorder.<sup>162</sup> His “severe and chronic depression has had a significant impact on how he views the world, his decision-making capacity, and in turn, his level of distress and ability to function;”<sup>163</sup> and
- Mr. Pitchford has experienced auditory hallucinations since childhood.<sup>164</sup> The voices are not the result of another psychiatric illness but the auditory hallucinations represent another symptom which is consistent with the other previously diagnosed disorders.<sup>165</sup> In

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> (Exhibit 24, Supplemental Affidavit of Dr. Richard G. Dudley).

<sup>165</sup> *Id.*

other words, Terry’s “auditory hallucinations are an indication of the severity of his other, previously diagnosed psychiatric disorders that resulted at least in part from his very difficult and often traumatic childhood.”<sup>166</sup>

This information was crucial for the jury to hear.<sup>167</sup> Moreover, the jury did not hear that Mr. Pitchford and his siblings were “taught to protect Mother’s image of a perfect mother, perfect bus driver, and perfect nursing assistant[,]” nor did they hear how Mr. Pitchford learned how to cover so that their “mother would not be investigated.”<sup>168</sup> A review of the medical records also shows a pattern of injuries when taken with the supporting testimony that show injuries consistent with abuse including a notation of a suicide attempt/overdose.<sup>169</sup>

### 3. Dr. Malcolm Spica

The State argues that trial counsel was not ineffective because he did not offer “mitigation

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<sup>166</sup> *Id.*

<sup>167</sup> *See, e.g., Sears v. Upton*, 130 S. Ct. 3259 (2010) (sentence reversed largely for counsel’s failure to discover and present evidence of parents’ abusive relationship, defendants’ history of head injuries, deficits in mental cognition and reasoning, and history of drug and alcohol abuse); *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (sentence reversed largely for counsel’s failure to discover and present evidence of history of childhood physical abuse, alcohol abuse, brain dysfunction, difficulty reading and writing, and heroic military service).

<sup>168</sup> (Exhibit 10 Affidavit of Veronica Dorsey). (See also Exhibits 8 and 9).

<sup>169</sup> (Exhibit 11 Grenada Lake Medical Center). The State only referenced one hospital admission. Mr. Pitchford requests the Court review the records in their entirety.

evidence that was not present” namely that “Dr. Bailey did not find evidence of organic brain dysfunction.”<sup>170</sup> Mr. Pitchford’s claim is that trial counsel failed to investigate and present this critical mitigation evidence. Trial counsel should recognize “red flags” indicating psychological problems and seek appropriate expert assistance.<sup>171</sup> However, trial counsel admits that he “was unaware of Mr. Pitchford’s abusive home life and drug use” because “the mitigation investigation for Mr. Pitchford was incomplete. . . .”<sup>172</sup> In *United States v. Battle*,<sup>173</sup> the Court pointed out:

Substance abuse is a well-known cause of brain damage. See John Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, *The Advocate*, August 1995, at 5 (“... early and prolonged use of drugs and alcohol, including organic solvents, can cause permanent brain damage.”). Heavy substance abuse can cause frontal cortical atrophy. See J.S. Krill, G.M. Halliday, M.D. Suoboda, and H. Cartwright, *The Cerebral Cortex is Damaged in Chronic Alcoholics*, *79 Neuroscience* 983, 983-998 (1997).<sup>174</sup>

Counsel in a death penalty case has an obligation to conduct “a thorough investigation of the

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<sup>170</sup> (State’s Response at 42).

<sup>171</sup> See, e.g., *Ferrell v. Hall*, 640 F.3d 11199 (11th Cir.2011).

<sup>172</sup> (Exhibit 6, Affidavit of Ray Charles Carter).

<sup>173</sup> *U.S. v. Battle*, 264 F.Supp. 2d 1088 (N.D. Ga. 2003).

<sup>174</sup> *Id.* at 1166.

defendant's background."<sup>175</sup> "At a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."<sup>176</sup> Clearly trial counsel's investigation did not comport with the minimum standards to develop mitigation evidence.

Dr D. Malcolm Spica, a neuropsychologist evaluated Mr. Pitchford and found:

- Mr. Pitchford "*suffers* from long-standing organic brain dysfunction" notably of the right hemisphere.<sup>177</sup> Individuals with this type of impairment have "difficulty quickly processing novel information and appreciating subtle cause-effect relationships between interdependent factors (such as people), especially under unfamiliar circumstances;"<sup>178</sup>
- Based on a reasonable degree of psychological certainty "these findings give me no confidence that Terry Pitchford would be able to make important decisions under emotional circumstances, time pressure, or when dealing with abstract concepts."<sup>179</sup>

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<sup>175</sup> *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)).

<sup>176</sup> *State v. Tokman*, 564 So.2d 1339, 1342 (Miss. 1990) (citing *Ferguson v. State*, 507 So.2d 94, 96 (Miss.1987)). *See also* *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Wilson v. State*, 81 So. 3d 1067 (Miss. 2012).

<sup>177</sup> (Exhibit 3). (Emphasis added).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

Critically, the jury never heard this information. In *Wilson v. State*,<sup>180</sup> this Court stated:

The United States Court of Appeals for the Sixth Circuit has stated that “while juries tend to distrust claims of insanity, they are more likely to react sympathetically when their attention is drawn to organic brain problems...” *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir.1995). The United States Court of Appeals for the Tenth Circuit has found that mitigating evidence of a defendant’s mental retardation, brain damage, and troubled background “is exactly the sort of evidence that garners the most sympathy from jurors.” *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir.2004).<sup>181</sup>

The State in its response also paints a false picture of Mr. Pitchford’s academic prowess by providing the Court with incomplete information.<sup>182</sup> A more complete picture of Mr. Pitchford’s academic record indicates that he failed both the second and fourth grades;<sup>183</sup> that Mr. Pitchford’s overall percentile ranks on the Iowa Test of Basic Skills for fourth grades were 43% and 52%;<sup>184</sup> fifth grade was 43%; and scores on the Terra Nova for sixth and seventh grades were 44.59% and 30% respectively.<sup>185</sup>

The State cannot hide behind the argument of trial strategy when a complete investigation was not

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<sup>180</sup> 81 So. 3d 1067 (Miss. 2012).

<sup>181</sup> *Wilson v. State*, 81 So. 3d at 1094.

<sup>182</sup> Response page 43.

<sup>183</sup> (Exhibit 18, School Records).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

performed and possible claims were never explored. Mr. Pitchford's trial counsel could not make a strategic choice regarding what evidence to put on at sentencing because the investigation was far from complete.<sup>186</sup> Mr. Pitchford's trial counsel's failure to investigate resulted in a lack of information with which to make a reasoned strategic decision. Mr. Pitchford's counsel was unaware of the abusive home life and drug use suffered by Mr. Pitchford.<sup>187</sup> Mr. Pitchford's trial counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."<sup>188</sup> Because of this failure, Mr. Pitchford's counsel fell below the prevailing professional norms. Trial counsel's failures repeatedly prejudiced Mr. Pitchford.<sup>189</sup> Consequently, Mr. Pitchford is entitled to post-conviction relief on this issue, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7)(a). Alternatively, this Court should grant Mr. Pitchford an evidentiary hearing on this issue pursuant to Miss. Code Ann. § 99-39-27(7)(b).

#### **E. Failure to Prepare for Trial**

Courts afford great latitude to trial counsel in trial preparation and deference given to their investigation strategies, yet it is essential that "a court must consider not only the quantum of evidence already known to counsel, but also whether the known

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<sup>186</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003); *Moore v. Johnson* (5th Cir. 1999); *Johns v. State*, 926 So 2d 188 (Miss. 2006).

<sup>187</sup> (Exhibit 6, Affidavit of Ray Charles Carter).

<sup>188</sup> *Wiggins*, 539 U.S. at 526.

<sup>189</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 36-43).

evidence would lead a reasonable attorney to investigate further.”<sup>190</sup> With regard to premature abandonment of an investigation, the *Wiggins* Court stated, “Even assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision . . . Rather, a reviewing court must consider the reasonableness of the investigation said to support the strategy.”<sup>191</sup> Furthermore, this Court has found that “failure to adequately investigate the facts of the case . . . and interview and subpoena witnesses on behalf of the defendant is deficient performance.”<sup>192</sup>

These requirements are not insurmountable norms; counsel is “not required to pursue every path until it bears fruit or until all conceivable hope withers.”<sup>193</sup> But “strategic decisions made without an adequate investigation into the facts and law controlling plausible theories are reasonable only to the extent that reasonable professional judgment supports counsel’s limitation on the investigation.”<sup>194</sup>

In order to make a fully informed decision regarding trial strategy, a thorough investigation must be completed so that counsel may make sound decisions about what should and should not be

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<sup>190</sup> *Wiggins*, 539 U.S. at 527.

<sup>191</sup> *Id.* at 527.

<sup>192</sup> *Payton v. State*, 897 So. 2d 921, 954 (Miss.2003).

<sup>193</sup> *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980).

<sup>194</sup> *Moore v Johnson*, 194 F.3d 586, 616 (5th Cir. 1999) (citing *Strickland*, 446 U.S. at 690-691).

presented.<sup>195</sup> Mr. Carter states in his affidavit that he was not prepared for the mitigation phase of the trial. Specifically, Mr. Carter stated that “the mitigation investigation for Mr. Pitchford was incomplete, and I did not feel like the mitigation investigation that had been done was as thorough as it should have been.”<sup>196</sup> Thus, the investigation into the sentencing phase of Mr. Pitchford’s trial was far from complete.

In his initial petition Mr. Pitchford cited to numerous instances of prejudice that he suffered as a result of his trial counsel’s deficient performance.<sup>197</sup> The jury never heard evidence to properly explain the mitigating nature of his drug and alcohol dependence, which this Court has previously recognized “can be mitigating in a capital case.”<sup>198</sup> In *Wilson* this Court also recognized, “The United States Supreme Court has pointed out the mitigating nature of drug abuse by a capital defendant.”<sup>199</sup> Counsel’s performance in

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<sup>195</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003); *Moore v. Johnson* (5th Cir. 1999); *Johns v. State*, 926 So. 2d 188 (Miss. 2006).

<sup>196</sup> (Exhibit 6, Affidavit of Ray Charles Carter).

<sup>197</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 16-43).

<sup>198</sup> *Wilson v. State*, 81 So. 3d 1067, 1094 (Miss. 2012) (citing *Wilcher v. State*, 863 So.2d 776, 803 (Miss.2003); *Bell v. State*, 360 So.2d 1206, 1212 (Miss.1978)).

<sup>199</sup> *Id.* (citing *Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 1786, 173 L.E.2d 701 (2009)). *See also* *Sears v. Upton*, 130 S. Ct. 3259 (2010) (sentence reversed largely for counsel’s failure to discover and present evidence of parents’ abusive relationship, defendants’ history of head injuries, deficits in mental cognition and reasoning, and history of drug and alcohol abuse); *Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) (sentence reversed largely for counsel’s failure to discover and present evidence of history

preparing for trial was clearly deficient, and Mr. Pitchford suffered prejudice as a result of counsel's deficient performance. Consequently, Mr. Pitchford is entitled to post-conviction relief on this issue, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7)(a). Alternatively, this Court should grant Mr. Pitchford an evidentiary hearing on this issue pursuant to Miss. Code Ann. § 99-39-27(7)(b).

**V. MR PITCHFORD WAS DENIED A FAIR TRIAL BY A JUROR THAT CONCEALED MATERIAL FACTS THAT DEMONSTRATE BIAS DURING VOIR DIRE.**

The State argues that this claim is procedurally barred because it was not raised at trial or on direct appeal and is also barred pursuant to Rule 606(b) of the Mississippi Rules of Evidence. The State is wrong. First, the authority which the State cites in support of its position, *Powers v. State*,<sup>200</sup> is distinguishable. In *Powers*, the Court found that the juror in question stated during voir dire "that he was an acquaintance or the victim, Elizabeth Lafferty."<sup>201</sup> Consequently, the Court found that the issue could have been raised on direct appeal and "Powers cannot now claim surprise or any other prejudice to his defense."<sup>202</sup> Here, the claim made by Mr. Pitchford is that the juror *failed* to disclose that she knew the

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of childhood physical abuse, alcohol abuse, brain dysfunction, difficulty reading and writing, and heroic military service).

<sup>200</sup> 945 So. 2d 386, 397 (Miss. 2006).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

nephew of the victim, his daughter, someone married to a member of the victim's family, a prosecution witness, and that she had contact with the victim's family during jury selection.<sup>203</sup> Thus, this issue could not have been raised at trial or on direct appeal because it was not discovered until Mr. Pitchford's post-conviction proceedings began.<sup>204</sup>

Second, M.R.E. 606(b) is inapplicable to the present case. Rule 606(b) states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

In other words, a juror is not allowed to impeach his or her own verdict.<sup>205</sup> Here, the affidavits

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<sup>203</sup> (Supplement to Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 9-15).

<sup>204</sup> (See Exhibit 12, Affidavit of Tracy Krause).

<sup>205</sup> *Merchant v. Forest Family Practice Clinic, P.A.*, 67 So. 3d 747 (Miss. 2011).

presented in support of this claim are not offered to impeach the juror's verdict, but is offered to show that she failed to truthfully answer questions during voir dire which is entirely proper and not prohibited by Rule 606(b).<sup>206</sup> In *Merchant*, this Court specifically found Lopez's affidavit and subsequent testimony offered un rebutted evidence that Lowden "failed to truthfully answer questions during voir dire[,]" which implicated an "outside influence' contemplated by Rule 606(b)."<sup>207</sup>

As discussed thoroughly in Mr. Pitchford's petition, the information the juror failed to respond to during voir dire was relevant to voir dire examination, was unambiguous, and she had substantial knowledge of the information sought to be elicited.<sup>208,209</sup> Thus, the juror's failure to truthfully

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<sup>206</sup> *Merchant v. Forest Family Practice Clinic, P.A.*, 67 So. 3d 747, 756 (Miss. 2011); *Payton v. State*, 897 So. 2d 921, 954 (Miss. 2003).

<sup>207</sup> *Merchant v. Forest Family Practice Clinic, P.A.*, 67 So. 3d at 756.

<sup>208</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 9-10).

<sup>209</sup> The State argues that the affidavit of Ms. Krause is hearsay and should not be considered by the Court pursuant to Miss. Code Ann. § 99-39-9(1)(e). However, the State fails to point out Miss. Code Ann. § 99-39-9(1)(e) provides that "[t]he affidavits of other persons . . . may be excused upon a showing . . . of good cause when they cannot be obtained. This showing shall state what the prisoner has done to attempt to obtain the affidavits . . . which he requests the court excuse." *see also Ross v. State*, 802 So. 2d 171, 173 (Miss. App. 2001); *Guyton v. State*, 766 So. 2d 33, 38 (Miss. App. 2000). Under these circumstances, petitioner's failure to secure the affidavit from an uncooperative witness

respond to the questions during voir dire meet standards established by the United States Supreme Court as discussed by this Court in *Odom v. State*.<sup>210</sup> Also, as shown in Mr. Pitchford's petition, the information withheld by the juror was substantial information which would have provided a valid basis for a challenge for cause had a full and complete response been given.<sup>211</sup>

This Court has held that "where a party shows that a juror withheld substantial information or misrepresented material facts, and where a full and complete response would have provided a valid basis for challenge for cause, the trial court must grant a new trial, and, failing that, we must reverse on appeal. We presume prejudice."<sup>212</sup> Accordingly, Mr. Pitchford is entitled to post-conviction relief, vacation of his conviction, and remand for a new trial pursuant to Miss. Code Ann. § 99-39-27(7)(a). Alternatively, the Court should grant Mr. Pitchford leave to proceed in the trial court with his petition for post-conviction relief on this issue pursuant to Miss. Code Ann. § 99-39-27(7)(b).

### **Conclusion**

Sufficient facts exist from the face of the petition, exhibits, and prior record to enable the Court to grant relief on this issue without the necessity of a

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should satisfy the good cause requirement of Miss. Code § 99-39-9(1)(e). See *Lewis v. State*, 776 So. 2d 679, 682 (Miss. 2000).

<sup>210</sup> 355 So.2d 1381 (Miss.1978).

<sup>211</sup> (Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief at 10-11; 15).

<sup>212</sup> *Myers v. State*, 565 So. 2d 554, 558 (Miss. 1990).

remand.<sup>213</sup> Therefore, the Court should vacate the sentence of death and remand for a new sentencing hearing. Alternatively, the Court should remand this case to the trial court for an evidentiary hearing on this issues raised in this petition.<sup>214</sup>

**WHEREFORE**, the Court should find that Mr. Pitchford is entitled to post-conviction relief and that his sentence of death should be reversed and vacated, or alternatively, the Court should remand this case for an evidentiary hearing on the issues raised in this petition.

Respectfully Submitted:  
TERRY PITCHFORD, Petitioner

By: /s \_\_\_\_\_

Louwlynn Vanzetta Williams,  
MSB #99712  
Attorney for Petitioner

Of Counsel:  
Glenn S. Swartzfager (MSB# 9535)  
Louwlynn Vanzetta Williams (MSB# 99712)  
Office of Capital Post-Conviction Counsel

239 North Lamar Street, Suite 404  
Jackson, Mississippi 39201  
Telephone: (601) 359-5733  
Facsimile: (601) 359-5050

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<sup>213</sup> Miss. Code Ann. § 99-39-27(7)(a); *See also Ballenger v. State*, 761 So. 2d 214 (Miss. 2010).

<sup>214</sup> Miss. Code Ann. § 99-39-27(7)(b).

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**CERTIFICATE OF SERVICE**

I, Louwlynn Vanzetta Williams, the undersigned attorney for the Petitioner, do hereby certify that I have on this day mailed postage fully pre-paid a true and correct copy of the foregoing **Reply to State's Response to Application for Post-Conviction Relief and Supplement/Amendment to Application for Post-Conviction Relief** to the following:

Honorable Jason Davis  
Special Assistant Attorney General  
Post Office Box 220  
Jackson, Mississippi 39205-0220

This the 6th day of July, 2012

/s \_\_\_\_\_  
Louwlynn Vanzetta Williams  
Certifying Attorney

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**APPENDIX E**

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2010-DR-01032-SCT**

[Filed Feb. 14, 2013]

***TERRY PITCHFORD***

***v.***

***STATE OF MISSISSIPPI***

**ORDER**

This matter is before the Court en banc on the Motion for Leave to Proceed in the Trial Court with a Petition for Post-Conviction Relief and the Supplement to the Motion filed by Terry Pitchford. Also before the Court is the Response filed by the State of Mississippi and the Reply to the State's Response filed by Terry Pitchford. Pitchford was convicted of capital murder and sentenced to execution by lethal injection in February, 2006. This Court affirmed. *Pitchford v. State*, 45 So. 3d 216 (Miss. 2010).

In this Motion, Pitchford raises the following claims: 1) that his constitutional rights were violated because he was not afforded a mandated competency hearing; 2) that his constitutional right to a fair trial was violated by the State's racial discrimination during voir dire; 3) that he was deprived of effective assistance of counsel in the guilt and sentencing phases of his trial; and, 4) that he was denied a fair trial by a juror who concealed material facts that demonstrate bias. Pitchford also asserts that these errors were cumulative, entitling him to relief. After

due consideration, the Court finds that issues 2., 3., and 4., lack sufficient merit to warrant a hearing.

As to issue 1., the record indicates that the trial judge ordered that Pitchford be evaluated for competency to stand trial, and that an evaluation took place at the Mississippi State Hospital. Pitchford alleges that his counsel appeared before the trial court to argue several pending motions including defendant's motion for a continuance; and that – based upon a written report from the Mississippi State Hospital – the trial judge decided he was competent to stand trial. Pitchford further alleges that his counsel had no prior notice that his competency to stand trial would be adjudicated that day. The State does not dispute these allegations, and this Court finds no evidence in the record before us that notice was provided to the Defendant that his competency to stand trial would be adjudicated on the day of the hearing on pending motions.

This Court has held that, when a trial judge has ordered that a defendant be evaluated for competency to stand trial, Rule 9.06 of the *Uniform Rules of Circuit and County Court Practice* requires the trial judge to conduct a competency hearing. A Defendant is entitled to reasonable prior notice of the hearing at which competency to stand trial will be decided, so that the defendant will have the opportunity to subpoena witnesses and produce additional information for consideration by the trial judge.

IT IS THEREFORE ORDERED that Pitchford's Motion for Leave to Proceed in the Trial Court with his claim that he was entitled to a hearing on his competency to stand trial, is granted.

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IT IS FURTHER ORDERED that the remaining claims in the Motion and the Supplement to the Motion filed by Terry Pitchford are hereby denied.

IT IS FURTHER ORDERED that this matter is remanded to the Circuit Court of Grenada County, Mississippi, and that court shall hold a hearing on whether Terry Pitchford was competent to stand trial. Counsel for Pitchford shall proceed with this matter, in the trial court, within 30 days of the date of this order.

SO ORDERED, this the 7th day of February, 2013.

/s

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JESS H. DICKINSON,  
PRESIDING JUSTICE  
FOR THE COURT

TO GRANT IN PART AND DENY IN PART:  
WALLER, C.J., DICKINSON, P.J.,  
KITCHENS, CHANDLER AND PIERCE, JJ.

TO DENY: RANDOLPH, P.J., AND LAMAR, J.

NOT PARTICIPATING: KING AND COLEMAN, JJ.

**APPENDIX F**

IN THE CIRCUIT COURT OF GRENADA COUNTY  
STATE OF MISSISSIPPI  
No. 2005-009-CR

[Filed June 6, 2005]

STATE OF MISSISSIPPI, Plaintiff

v.

TERRY PITCHFORD, Defendant

**MOTION TO DISCOVER INFORMATION**  
**REGARDING VENIRE MEMBERS**

COMES NOW, the defendant, by counsel, and moves this Court, pursuant to *Miss. Code Ann. § 99-15-17*, *Miss. Unif. Cir. Ct. R. 9.04*, the Mississippi Constitution, and the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution to order disclosure to the defense of information regarding the venire members in this case. As grounds for this motion, the defendant states the following:

1. The defense anticipates that the prosecution will obtain information from law enforcement personnel regarding potential jurors in this case. This information will consist of observations made and opinions formed during law enforcement activities and from law enforcement and court records including but not limited to computer files. It is expected that this information will be utilized by the prosecution in selecting the jury; therefore the defense seeks access to this information.

2. The defendant has the right to information the prosecution has on venire members where that information impacts his federal constitutional right to a fair and impartial trial, his state constitutional right to a fair and impartial trial and his rights under Uniform Rule 9.04. Williams v. Netherland, 181 F.Supp.2d 604, 614-18 (E.D. Va. 2002); See also United States v. Collins, 972 F.2d 1385, 1398 (5<sup>th</sup> Cir. 1999); United States v. Kyle, 469 F.2d 547, 550 (D.C. Cir. 1972) cert. denied 409 U.S. 1117 (1973); People v. Pearson, 581 N.E.2d 293, 296 (Ill. 1991) cert. denied 112 S.Ct. 3015 (1992); People v. Stinson, 227 N.W.2d 303, 310-11 (Mich. Ct. App. 1975).

3. Certainly, the prosecution has the duty to turn over evidence favorable to the defense that is in the hands of law enforcement. In Freeman v. Georgia, 599 F.2d 65 (5<sup>th</sup> Cir. 1979), the Court held that the actions or inactions of one governmental actor must be imputed to “the State”:

The duty of disclosure is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state’s failure is not on that account excused.

Id. at 70 (quoting Barbee v. Warden, 331 F.2d 842 (4<sup>th</sup> Cir. 1964)); accord Schneider v. Estelle, 552 F.2d 593 (5<sup>th</sup> Cir. 1971); Smith v. Florida, 410 F.2d 1349, 1351 (5<sup>th</sup> Cir. 1969); Royal v. Dutton, 392 F.2d 544 (5<sup>th</sup> Cir. 1968); Jackson v. Wainwright, 390 F.2d 288, 296 (5<sup>th</sup> Cir. 1968).

4. If denied access to the information the district attorney has on potential jurors, the defense would be unable to intelligently exercise peremptory

challenges. See Knox v. Collins, 928 F.2d 657, 661 (5th Cir. 1991).

5. Moreover, this information is crucial to the Court's task of making on-the-record factual determinations of the merits of the prosecution's strikes. See Hatten v. State, 628 So.2d 294, 298 (Miss. 1993); United States v. Wilson, 853 F.2d 606 (8th Cir. 1988).

WHEREFORE the defense moves this Court to order the prosecution and law enforcement personnel to provide the defense with all information pertaining to potential jurors.

Respectfully submitted,

/s \_\_\_\_\_

Ray Charles Carter

Ray Charles Carter, MS Bar 8924  
Office of Capital Defense Counsel  
P. O. Box 2901  
Jackson, MS 39207  
(601) 576-2316

**CERTIFICATE OF SERVICE**

I do hereby certify that I have mailed a true and correct copy of the foregoing Motion to the Honorable Clyde Hill, Grenada County Assistant District Attorney, P.O. Box 1262, Grenada, MS 38902

This the 2nd day of June, 2005.

/s \_\_\_\_\_

Ray Charles Carter

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**APPENDIX G**

IN THE CIRCUIT COURT OF GRENADA COUNTY  
STATE OF MISSISSIPPI  
No. 2005-009-CR

[Filed Sept. 30, 2005]

STATE OF MISSISSIPPI, Plaintiff

v.

TERRY PITCHFORD, Defendant

**MOTION FOR JURY QUESTIONNAIRE**

COMES NOW, the defendant, by counsel, and moves this Court pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Art. 3 §§ 14, 26, 28 and 31 of the Mississippi Constitution of 1890, to order the use of a jury questionnaire to shorten voir dire and assist both parties in jury selection. In support of his motion, the defendant states as follows:

1. If the defendant is to receive a fair trial, it is vital that the information available to the prosecution and the defense concerning potential jurors be accurate and thorough. See, e.g., Coleman v. Kemp, 778 F.2d 1487, 1542 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986) (voir dire procedures inadequate to uncover prejudice); Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985) (jury selection procedures must be adequate to unearth prejudice, failure to expose potential prejudice of jurors requires reversal of conviction); Melson v. Dickson, 63 Ga. 682, 686 (Ga. 1879) (“an impartial jury is the cornerstone of the fairness of trial by jury.”).

2. Moreover, because of the exceptional and irrevocable nature of the death penalty, the Supreme Court has held that every precaution is constitutionally required to ensure the fairness and reliability of decisions regarding both guilt and punishment in a capital trial. Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (O'Connor, J., concurring) (observing that "extraordinary measures" are required in a capital trial that are not required in other criminal cases). In Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), the Court held that the trial court's refusal to allow certain voir dire questions required reversal as to the death sentence even though it did not require that the conviction be set aside.

3. From the "constitutional standard of fairness [which] requires that a state defendant have a panel of impartial, indifferent jurors," Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589 (1975), flows the conclusion that a full and fair voir dire process must be allowed in a criminal case. Indeed, defense counsel are "permitt[ed] a broad range of questions in examination of prospective jurors." Henderson v. State, 251 Ga. 398, 306 S.E.2d 645, 647 (1983) (quoting, Bethay v. State, 235 Ga. 371, 377, 219 S.E.2d 743 (Ga. 1975)). Mississippi follows this practice. See e.g., Balfour v. State, 598 So.2d 731 (Miss. 1992).

4. The areas listed below are merely illustrative of those areas into which questioning by counsel must be allowed. See, e.g., Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986) (error to prevent questioning regarding possible racial bias); Legare v. State, 256 Ga. 302, 348 S.E.2d 881 (1986) (same); Chavez v. United States, 258 F.2d 816, 819

(10th Cir. 1958) (questioning concerning credibility of law enforcement officers); King v. Jones, 824 F.2d 324, 326 (4th Cir. 1987) (same); Henderson v. State, 306 S.E.2d at 648-649 (whether prospective jurors are related to former or current law enforcement employees, and stating that questions must be allowed if they relate to the “type or nature of the suit being tried”); State v. Ball, 685 P.2d 1055 (Utah 1984) (questions about jurors’ experiences with drugs and alcohol); Cowan v. State, 156 Ga.App. 650, 275 S.E.2d 665 (Ga. App. 1980) (questions relating to jurors’ membership or participation in various organizations).

5. Attached to this motion is a proposed juror questionnaire that will elicit background information which may be relevant to challenges for cause as well as the intelligent and informed exercise of peremptory challenges. This questionnaire is similar or identical to one that has been used to good effect in several other capital trials in this and other districts. The questionnaire will provide the parties and the Court with responses that may alert them to possible relationships, associations or experiences which may be a source of bias or prejudice. It will also provide information which is necessary for the intelligent use of peremptory strikes. The questionnaire will also save substantial time in voir dire.

7. The defendant moves that the questionnaires be served at the same time as the summons, and that jurors be directed to complete the questionnaires within five days and return them in postage-paid envelopes addressed to the clerk of the court. It will take moments, and substantially assist with the process of jury selection.

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WHEREFORE, the defendant requests that this Court enter an order requiring that juror questionnaires be sent out with summonses to the venire persons; that prospective jurors be provided with postage-paid envelopes addressed to the clerk of the court and directed to complete the forms and return them to the Court within five days; that the clerk be directed to make copies of all questionnaires and provide them at the same time to counsel for the State and for Mr. Perry and such other relief as may be appropriate and warranted to protect his rights.

Respectfully submitted,

/s \_\_\_\_\_

Ray Charles Carter

Ray Charles Carter, MS Bar 8924  
Office of Capital Defense Counsel  
P. O. Box 2901  
Jackson, MS 39207  
(601) 576-2316

**CERTIFICATE OF SERVICE**

I do hereby certify that I have mailed a true and correct copy of the foregoing Motion to the Honorable Doug Evans, Grenada County District Attorney, P.O. Box 1262, Grenada, MS 38902.

This the 29th day of September, 2005.

/s \_\_\_\_\_

Ray Charles Carter

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**IMPORTANT JUROR QUESTIONNAIRE:** The enclosed form **MUST** be completed and returned within five (5) days of your receiving it.

Dear Potential Juror:

Your name has been drawn to serve as a potential juror. In the jury selection process the lawyers must ask many questions of prospective jurors in order that a fair jury may be selected. This process sometimes lasts a long time. To save time for you and the Court, I have enclosed a questionnaire for you to fill out in advance and a return-addressed stamped envelop for you to return the form.

It is necessary that these questions be answered and forms returned within five (5) days. The questionnaire must be signed by you. Jury service is a serious responsibility and you will be answering these questions under penalty of perjury to the best of your ability and as fully as possible.

You should not talk to anyone about anything pertaining to your jury duty from this point until the completion of your service.

Thank you for your cooperation.

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Circuit Judge

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Juror Information Questionnaire

1. Your Full Name: \_\_\_\_\_
2. Present Address: \_\_\_\_\_
3. Telephone Number: Home ( ) \_\_\_\_\_  
Work ( ) \_\_\_\_\_
4. Place of Birth: \_\_\_\_\_
5. Age: \_\_\_\_\_ Gender: \_\_\_\_\_ Race: \_\_\_\_\_
6. Have you lived at any other addresses in the last five years? YES: \_\_\_\_ NO: \_\_\_\_  
If yes, what addresses?  
(a) \_\_\_\_\_  
(b) \_\_\_\_\_
7. Please state your highest level of education completed: \_\_\_\_\_  
Degrees or diplomas which you hold: \_\_\_\_\_  
List schools attended and locations: \_\_\_\_\_  
\_\_\_\_\_
8. Who is your employer: \_\_\_\_\_  
How long have you worked for this employer: \_\_\_\_\_
9. What is your position, and what are your duties in that position?  
\_\_\_\_\_

10. Who else have you worked for in the past five years?

(a) \_\_\_\_\_

(b) \_\_\_\_\_

11. Have you ever been in the military?

\_\_\_\_\_

If yes, what branch? \_\_\_\_\_

12. Have you or any family member or close personal friend ever worked as a volunteer or employee in a law enforcement agency, prosecutor's office, prison, jail, correctional institution or mental health facility on the local, state, or federal level? \_\_\_\_\_

If yes, please state who, when and where: \_\_\_\_\_

\_\_\_\_\_

13. Have you or any family members or close personal friends worked for a donated time or money to organizations supporting crime victims or preventing crime? \_\_\_\_\_

If yes, who, what organizations and when? \_\_\_\_\_

\_\_\_\_\_

14. Have you ever appeared as a witness before a Grand Jury? YES: \_\_\_\_\_ NO: \_\_\_\_\_

When and where: \_\_\_\_\_

15. Have you ever appeared as a witness in a criminal prosecution? YES: \_\_\_\_\_ NO: \_\_\_\_\_

When and where: \_\_\_\_\_

Were you a witness for the State? \_\_\_\_\_ or for the defendant? \_\_\_\_\_

16. Have you ever served on a Grand Jury before? YES: \_\_\_\_\_ NO: \_\_\_\_\_

17. Have you ever served on a Trial Jury before? YES: \_\_\_\_\_ NO: \_\_\_\_\_

Have you served as a juror on a Civil case? \_\_\_\_\_

When and where: \_\_\_\_\_

Did the jury reach a verdict? YES: \_\_\_\_\_ NO: \_\_\_\_\_

If not, please explain: \_\_\_\_\_

Have you served as a juror on a Criminal case? \_\_\_\_\_

When and where: \_\_\_\_\_

What was the charge? \_\_\_\_\_

Did the jury reach a verdict? YES: \_\_\_\_\_ NO: \_\_\_\_\_

If not, please explain: \_\_\_\_\_

18. Have you ever been a party to a legal action? YES: \_\_\_\_\_ NO: \_\_\_\_\_

Was it Civil? \_\_\_\_\_ or Criminal? \_\_\_\_\_

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If it was Civil, were you the Plaintiff?  
\_\_\_\_\_ or the Defendant? \_\_\_\_\_

If it was Civil, was the verdict in your favor?  
\_\_\_\_\_

If it was Criminal, what were the charges  
involved? \_\_\_\_\_

Were you the one who filed charges?  
\_\_\_\_\_

Or were charges filed against you?  
\_\_\_\_\_

What was the result? \_\_\_\_\_

19. Has any member of your family or any close friend ever been charged with a criminal offense other than traffic offenses? YES: \_\_\_\_\_ NO: \_\_\_\_\_

If yes, please state your relationship to that person, the charges involved and the outcome.

\_\_\_\_\_  
\_\_\_\_\_

20. Has any member of your family or any close friend ever been arrested for a criminal offense other than traffic offenses, but not charged? YES: \_\_\_\_\_ NO: \_\_\_\_\_

If yes, please state your relationship to that person and the charges involved.

\_\_\_\_\_

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21. Have you \_\_\_\_\_, any member of your family \_\_\_\_\_, or a close friend \_\_\_\_\_ ever been the victim of a violent crime?  
What was the crime? \_\_\_\_\_  
Was anyone arrested \_\_\_\_\_ and/or convicted \_\_\_\_\_ in connection with that crime?
22. What is your political party preference? \_\_\_\_\_  
Religious affiliation \_\_\_\_\_
23. Please list the organizations to which you belong (Social, Fraternal, Service, Charitable, etc.)  
\_\_\_\_\_  
\_\_\_\_\_
24. What newspapers do you read? \_\_\_\_\_  
What magazines? \_\_\_\_\_  
What is your favorite t.v. show? \_\_\_\_\_
25. Do you regularly watch the local news? \_\_\_\_\_; national news? \_\_\_\_\_
26. Thinking about the neighborhood where you live, are the people you usually run into:  
All White \_\_\_\_\_ All Black \_\_\_\_\_ Mix of white and black residents \_\_\_\_\_
27. What is your marital status? Married \_\_\_\_\_  
Divorced \_\_\_\_\_ Widowed \_\_\_\_\_ Never married \_\_\_\_\_

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If married or widowed, how many years are/were you married? \_\_\_\_\_

What is/was your spouse's occupation? \_\_\_\_\_

Highest grade spouse completed in school \_\_\_\_\_

Spouse's Political Party Preference \_\_\_\_\_

Spouse's Religious Affiliation \_\_\_\_\_

28. How many children do you have? \_\_\_\_\_

List their ages, gender and occupation if applicable:

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29. What do you think about the death penalty?

(Please circle the letter that most accurately represents your opinion. You may provide more information on the lines below.)

- A. Strongly Favor
- B. Generally Favor
- C. No Opinion
- D. Generally Against
- E. Strongly Against

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30. Is there any other information you believe might be important for the Court or for the lawyers to know about you as a potential juror?

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Juror please sign full name here

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Date signed

**APPENDIX H**

IN THE CIRCUIT COURT OF  
GRENADA COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

V.

NO.: 2005-009-CR

TERRY PITCHFORD

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TRANSCRIPT OF THE PRETRIAL AND TRIAL  
PROCEEDINGS HAD AND DONE IN THE ABOVE  
STYLED AND NUMBERED CAUSE, BEFORE HIS  
HONOR, JUDGE JOSEPH H. LOPER, JR.,  
CIRCUIT COURT JUDGE, FIFTH CIRCUIT  
COURT DISTRICT OF THE STATE OF  
MISSISSIPPI, AND A JURY OF TWELVE MEN  
AND WOMEN, DULY IMPANELED, ON  
FEBRUARY 6, 7, 8 AND 9, 2006.

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\* \* \*

[pp.4:15-6:10]

\* \* \*

(PROCEEDINGS RESUMED IN OPEN COURT.  
MR. PHILLIPS, MR. CARTER, MR. BAUM AND  
THE DEFENDANT WERE PRESENT.  
PROCEEDINGS CONTINUED AS FOLLOWS: )

THE COURT: The Court has before it a  
motion for a jury questionnaire that has been filed by  
the defendant seeking to have this questionnaire  
included with the summons for jury service, and the  
Court has reviewed the questions.

And Mr. Phillips, what is the State's position on it?

MR. PHILLIPS: I think they are satisfactory, Your Honor.

THE COURT: I'll allow this jury information questionnaire to be included with the summons.

And Mr. Carter, I have read the letter that you would like to have included. And I -- you know, I find that letter to be fine, but I am going to modify it in little respects in that I'm -- because this is a sequestered jury, for the convenience of the jury and I think it makes a more -- well, I think a sequestered jury that is a happy jury is one that we all want, because they will be the only ones that cannot leave and go where they please at night, except for the defendant, of course.

So I am going to also advise them in the letter that they will be sequestered if they are selected so they can go ahead and prepare and bring clothes in anticipation that they would have to stay if they are selected for the duration of the trial. And I also include in that letter that they are not bring to any cell phones or anything like that. Do you have any objection with that?

MR. CARTER: No, sir. No objection.

THE COURT: I think that's -- oh, yeah. You indicated that you might want to go on record about change of venue or something like that.

MR. CARTER: Yes, sir. We just wanted to put in the record that we talked to Mr. Pitchford about whether he wanted a change of venue. And after some discussion he said he didn't want one, and that it was

perfectly all right with him if we try the case here in Grenada.

Is that what you said, Mr. Pitchford?

THE DEFENDANT: Yeah.

THE COURT: Were you saying yes? I couldn't hear you.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. That's fine. And if y'all want -- you know, I've got several weeks of court up here. If there are other motions that need to be brought before the time of trial, if y'all just work with each other on getting a date and getting with me on it we will certainly set up hearings on whatever else we need to do. Okay.

(THE PROCEEDINGS ON JANUARY 9, 2006, WERE CONCLUDED.)