IN THE SUPREME COURT OF MISSISSIPPI
No. 2010 –DP-01927

LESLIE GALLOWAY III — APPELLANT

v.

STATE OF MISSISSIPPI — APPELLEE

Appeal from the Circuit Court of Harrison County,
First Judicial District, Case No. B2401-09-00468

BRIEF OF APPELLANT

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Certificate of Interested Persons

Leslie Galloway III v. State of Mississippi
No. 2010 –DP-01927

The undersigned counsel of record certifies pursuant to Mississippi Rules of Appellate Procedure 28(a)(1) that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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This the 20th day of December, 2011

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    B. *Whether Dr. McGarry's unequivocal and bogus testimony that the victim would have resisted the penetration was unreliable and should have been excluded.*

    C. *Whether the trial court committed reversible error by permitting Dr. McGarry's unequivocal testimony, which was not helpful to the jury and which stated a legal conclusion beyond his specialized knowledge.*

    D. *Whether these errors violated Mr. Galloway's constitutional rights.*

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    B. *Whether the court committed reversible error in failing to inquire further of the jury when the court itself did not understand the jury's question.*

    C. *Whether the court committed reversible error by failing to provide a clearer and more precise definition of sexual battery in response to the jury's note.*

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30. Whether the cumulative effect of the errors in the trial mandates reversal of either the verdict of guilt or the sentence of death.

Statement of the Case

Leslie "Bo" Galloway was convicted and sentenced to death on September 23-24, 2010, in Harrison County, Mississippi, for the murder of Shakeylia "Kela" Anderson on or about December 6, 2008. C. 304-305; R.E. Tab 3.[1] He files this direct appeal challenging the legality of both his conviction and his death sentence based on the grounds set forth herein.

Statement of Facts

Mr. Galloway's capital murder conviction rested on the predicate felony of sexual battery by anal[2] penetration, but the prosecution's only evidence of anal sexual battery was unequivocal testimony of forensic pathologist Dr. Paul McGarry that Ms. Anderson had been anally penetrated by a penis without her consent. And despite Dr. McGarry's testimony, the jury sent the trial court a note asking whether murder automatically escalates sex to sexual battery – a question that the court refused to answer – which established that at least some jurors had serious doubts as to whether non-consensual sex had occurred. C. 275.

At trial, the State presented evidence that Ms. Anderson had had a consensual sexual relationship with Mr. Galloway prior to her death. R. 526; State Ex. 16 at 5. The two had communicated by phone numerous times in the previous months, including on December 5, 2008, and she left with him voluntarily sometime after 10 p.m. on December 5th. R. 422-23; 432-33; 482-85.

According to the State's evidence, there was a small, ¾ inch tear inside Ms. Anderson's anus when her body was found. R. 676, 731. Although semen was found in her vaginal cavity,

[1] "C." refers to the Clerk's record; "R." refers to the Reporter's Record; "State Ex." refers to exhibits introduced by the State at trial, with page references corresponding to the chronological page number of the document in PDF form; "SR. Jury Charge" refers to the portion of the record supplemented with the transcription of the jury instructions on June 9, 2011; "SR." refers to the supplemental record filed on July 29, 2011. "SR2." refers to the supplemental record filed on August 8, 2011. "R.E. Tab" refers to the Record Excerpt tabs.

[2] The trial court instructed the jury only on alleged anal sexual battery based on its pretrial order requiring disclosure of the State's theory of sexual battery. *See* R. 746-47.

no foreign biological material was found in her anal cavity. R. 730-31. Dr. McGarry testified that "the anus had the kind of injuries that occur with forceful penetration." R. 675. He stated: "My impression is that it was forceful penetration of the anus that caused injury to the – what is called the sphincter or the muscle ring around the anus that ordinarily is less than a fourth of an inch in diameter, stretched out to more than an inch in diameter by the penetration of the anal canal. **It's evidence of anal rape.**" R. 677 (emphasis added). He claimed that the penetration would have "cause[d] enough pain that it would be resisted. It would not be … something that a person would want to have done to them." R. 683, 678. On cross-examination, Dr. McGarry reitereated that only sexual penetration could have caused this injury. R. 683.

The defense presented the testimony of Dr. LeRoy Riddick, a retired state medical examiner and coroner for Mobile County, Alabama. R. 728. Dr. Riddick testified that the small tear could have occurred when Ms. Anderson's body was run over by a vehicle or even from straining during a large bowel movement. R. 731.

In rebuttal, to close out the culpability phase, the prosecution recalled Dr. McGarry, who rejected Dr. Riddick's testimony and insisted again that the injury represented a "classic pattern[] of penetration, forceful, resisted into the anus…. **And this is exactly what she had. She had the injury of forceful penetration by a penis of a sexual event**, not a random injury of the area between her legs." R. 739-40 (emphasis added). According to Dr. McGarry, Ms. Anderson's injuries weren't merely consistent with forceful penetration, they were, unequivocally, the result of forceful sexual penetration.

The prosecution relied heavily upon Dr. McGarry's testimony in closing argument. It reminded the jury that Dr. McGarry had described how Ms. Anderson "was brutally anally raped, **unequivocal** could come from nothing else." R. 763 (emphasis added). After defense counsel suggested in its closing that the contradiction between the two experts was "reasonable

doubt alone" as to the greater offense of capital murder, R. 775, the prosecution returned to Dr. McGarry's unequivocal conclusions in its closing rebuttal:

> Dr. McGarry told you that there was **no question** that what he viewed as a result of his autopsy came from forcible penile penetration to the anus. This was not scratches around the outside of the anus. This was a tear inside of the anus that **could only come from** forcible penile penetration. He was very clear about that. He said that the type of force that would be used in this would be resisted, and the tearing would create so much pain that the individual who received this injury would resist this type of penetration.

R. 783 (emphasis added). The prosecution added:

> Dr. McGarry came back on rebuttal. … He said that based upon the examination that he did that this injury occurred from forceful penetration. It did not occur from rolling over…. So again, he stood or he sat right there, and for the second time said there was **no question** what caused the injuries to Kela Anderson's anus, and that, ladies and gentlemen, was rape.

R. 784 (emphasis added).

The jury began deliberations at 10:26 a.m. on September 23, 2010. R. 786. Sometime before 11:45, the jury sent the court a third note,[3] which asked:

> Does murder escalate the sex automatically to sexual battery?
> Please define legal term of sexual battery
> Rape

R. 790; C. 275. Defense counsel asserted that the jury's question suggested that at least some jurors believed that sex alone, even if consensual, could become sexual battery when paired with

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[3] After 40 minutes, the court received the first note asking the following:

> 1. What was Leslie's phone #
> 2. The taped interview, was it stopped in the middle of the interview? Or was it the full interview.
> 3. What was Keela's Phone #
> 4. What was Cornelious phone #
> 5. What is confirmed that in the mixture was blood, sweat, or just DNA?

R. 786; C. 276. The court responded to the jury, "You have all of the evidence before you that can be considered. Please continue your deliberations." *Id*.

Soon thereafter, the jury sent out a second note requesting a copy of the phone records on which they could write. R. 787; C. 277. The court instructed them to "use the writing materials provided and do not write on the exhibits." *Id*.

murder, and requested that the court instruct the jury that murder does not automatically escalate sex to sexual battery:

> The fact that if he killed her and had sex with her, does that make it sex battery, seems to me what they're asking. And the answer, of course, to that question is no, it does not . . . . It seems to me we could at least make that part of it clear to them, tell them, no, it doesn't. It doesn't. That is not the case here. Otherwise they might say well, you know, we believe he murdered her, since he murdered her it has to be sex battery, therefore it must be capital murder.

R. 790-91. Though the court confessed its confusion as to the meaning of the jury's question, R. 790, it complied with the State's request to give only the "standard response" and told the jury, "You have all of the instructions of law that apply to this case. Please review those instructions and continue your deliberations." C. 275; R. 790-91.

Less than an hour later, the jury returned a verdict finding Mr. Galloway guilty of capital murder. R. 792-93; C. 278.

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The prosecution's evidence connecting Mr. Galloway to Ms. Anderson's death consisted of circumstantial evidence that he picked her up the night of December 5th in his mother's car and was the last person seen with her alive, and DNA evidence directly linking him and his mother's car to the murder.

A hunter discovered the 17-year-old's body in a rural wooded area in Harrison County on the night of December 6, 2008. R. 447. Law enforcement observed tire tracks and a burn patch near the body, undressed and burned. R. 464, 550. They secured the area for a search the next morning, which was conducted in the presence of Dr. McGarry. R. 463; 669.

The investigation led law enforcement four days later to Ms. Anderson's cousin, Dixie Brimage. Ms. Brimage informed them that she last saw Ms. Anderson on the night of December

5th through the glass screen front door of her grandmother's house meeting a "Bo" from Moss Point. R. 431-32; R. 102. She reported that Ms. Anderson and the man talked outside of a white Taurus for about five minutes before Ms. Anderson got in the car and left with him. R. 432. Ms. Brimage did not believe anyone else was in the car, but admitted she could not see clearly into its backseat. R. 442.

Ms. Brimage told the police – and the jury – that she was certain that the man who picked up Ms. Anderson had gold teeth. R. 445. Mr. Galloway does not have gold teeth. R. 442-43. Ms. Brimage was unable to positively identify Mr. Galloway from a photo line-up prior to trial. *Id*. Nearly two years later, at trial, she identified Mr. Galloway with certainty as the man who picked up Ms. Anderson on December 5, 2008. R. 432.

On December 9, 2008, law enforcement staked out Mr. Galloway's mother's home in Moss Point for several hours and pulled over her white Taurus when it left the residence. R. 537. Mr. Galloway was driving, and Cornelius Triplett was in the vehicle with him. R. 518. Mr. Galloway was immediately placed into custody and handcuffed. R. 537, 540, 518, 541. Mr. Triplett was not given an opportunity to drive the vehicle back to the residence. R. 114, 518. Law enforcement towed the Taurus to Bob's Garage in Pascagoula and left it there unattended overnight. R. 538, 544. The next day, law enforcement collected samples from the car to submit for DNA testing to the Jefferson Parish Regional Laboratory. R. 474-76, 500-509.

The DNA analyst at the lab who received, stored, and tested the samples did not testify at trial. R. 654, 659-60. Rather, an analyst who had analyzed the DNA test data did. This analyst concluded that DNA profiles obtained on the undercarriage and inside of the Taurus were consistent with Ms. Anderson's known reference DNA sample. R. 643-44. She reported that two samples inside the car contained mixtures consistent with a combination of Mr. Galloway and Ms. Anderson's reference samples. R. 648-49. She also concluded that DNA samples

found on a pair of shoes and a hat located at Mr. Galloway's mother's house produced profiles consistent with Ms. Anderson's known reference sample. R. 645-47. The shoes and hat were found in an area of the house which Mr. Galloway's mother purportedly identified as Mr. Galloway's. R. 486, 519-20.

A sperm sample from the vaginal swab contained a mixture from at least two individuals. R. 656. From the DNA profiles produced from the swab, the analyst concluded that a man named James Futch[4] was a major contributor to the sample. R. 650. Though many of Mr. Galloway's alleles were missing from the profile, the analyst claimed that she could not exclude him as a minor contributor. R. 650-51.

After taking Mr. Galloway into custody, the police interrogated him. He told them that he and Ms. Anderson had had sex on Thanksgiving, that they had talked on the phone all day on December 5, 2008, [5] and that he had picked her up that night from the neighborhood behind the Raceway in Gulfport in his mother's white Taurus. R. 477; State Ex.16 at 3-6.

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[4] Mr. Futch told the police that he was Ms. Anderson's boyfriend and insisted that the last time he had sex with her was during the week of Thanksgiving, more than a week before her autopsy. R. 607, 610. He described their relationship as exclusive. R. 610. The State's DNA analyst testified that sperm samples can only last in a vaginal tract up to 2-3 days. R. 651.

[5] Phone records indicated that Ms. Anderson contacted Mr. Galloway at 7:21 a.m. on Friday, December 5, 2008, the day she disappeared. State Ex. 6 at 21. They also spoke the night before. *Id*. They continued to communicate by phone into the evening. *Id*. at 3, 21-22. The last phone call from Mr. Galloway's phone to Ms. Anderson's phone occurred at 11:12 p.m. *Id*. at 22. However, Ms. Anderson's phone received three calls from the phone of a mutual friend, Cornelius Triplett, at 2:30 a.m. on December 6, 2008. R. 526-27.

The State also introduced evidence that Mr. Galloway and Ms. Anderson had been calling or text messaging each other for weeks leading up to her disappearance. R. 482-85, 523; State Ex. 6 at 4-22. They first connected through Mr. Triplett, who resided with Mr. Galloway and his mother at her home in Moss Point. R. 519-21; State Ex. 16 at 4. During this time, Mr. Galloway and Ms. Anderson's relationship went beyond talking on the phone: they had consensual sex at least once, on Thanksgiving Day, November 27, 2008. State Ex. 16 at 5; R. 526.

Based on this evidence, including Dr. McGarry's testimony, the jury returned a guilty verdict. C. 278. At the sentencing phase, the prosecution's evidence raised the clear implication that Mr. Galloway would be dangerous in the future. The prosecution told the jury that Mr. Galloway was a recidivist: he had been previously convicted of carjacking – and was under a period of post-release supervision when the crime was committed. R. 814. In closing argument, the State commended Ms. Brimage for "bravely" identifying Mr. Galloway, suggesting to the jury that she had reason to fear him. R. 759.

Nevertheless, the State sought to limit the defense from introducing evidence that would demonstrate Mr. Galloway's "ability to adapt to prison life in the future or his ability or his propensity or lack thereof to commit violent acts in the future," including the testimony of Dr. Beverly Smallwood, a psychologist hired by the defense, and various lay witnesses. R. 804. Despite defense counsel's objection, the court granted the State's motion, ruling that "I'm not going to prevent you from putting on any kind of testimony about his behavior while incarcerated in the past," but the defense witnesses "will be prohibited from speculating as to how he might behave in the future." R. 806-07.

Although it promised in opening statement to do so, the defense did not call Dr. Smallwood at sentencing and did not ask any of its mitigation witnesses how Mr. Galloway would conduct himself in prison if given a life sentence. R. 812, 815-40. Instead, the defense presented evidence from family members and friends that Mr. Galloway was a loving and caring father to his three children. R. 829, 831, 834, 837, 839. At the Harrison County Adult Detention Center, Mr. Galloway never gave Debra Wittle, the officer in charge of Offender Services, any trouble over the nearly two years he was incarcerated. R. 817. She described Mr. Galloway as having a quiet demeanor and never showing disrespect. R. 817. Dawn Catchings, another corrections officer at the center, interacted with Mr. Galloway almost every day for a year while

she worked on his block and interacted with him after that at court appearances. She never had any problems with him, and he never lost his temper with her. R. 819-20.

The defense had wanted to call Dr. Donald Cabana at the sentencing phase to provide the jury with information regarding "the conditions at the Mississippi Department of Corrections endured by inmates sentenced to serve life without the benefit of parole or hope of early release." C. 309; *see also* R. 799-802. This testimony would have responded to the State's arguments that imposition of a life sentence would be insufficient punishment and would not hold Mr. Galloway accountable for the capital murder, and that defense counsel's closing argument requesting a life sentence was a plea for "sympathy." R. 860. Nevertheless, the trial court ruled the testimony inadmissible. R. 803-04.

The jurors returned a death verdict. R. 872. It found that Mr. Galloway "actually killed Shakeylia Anderson" but did not make an intent finding. C. 303. The jurors requested that the court poll them by number rather than by name, establishing beyond tenable dispute that Mr. Galloway's future dangerousness was prominent in their minds. R. 870; C. 280.

Summary of Argument

Leslie Galloway's capital murder conviction and death sentence rested on the predicate felony of sexual battery by anal penetration, but the prosecution's only evidence of sexual battery was the bogus testimony of forensic pathologist Dr. Paul McGarry. Dr. McGarry testified unequivocally that a small tear inside Ms. Anderson's rectum could only have been caused by forceful penile penetration, R. 739-40, and that the penetration would have required such force that it necessarily would have been resisted. R. 675-78. This testimony lacked any basis whatsoever in science, and the trial court should have prohibited it.

Absent Dr. McGarry's junk science testimony, the jury may well have found that no anal penetration occurred. And even assuming it would have, the jury may well have found that

the anal intercourse was consensual. Under either scenario, Mr. Galloway would not have been eligible for the death penalty.

As it was, even with Dr. McGarry's testimony, at least some jurors had serious doubts about whether the alleged anal sex was non-consensual. Deep into its deliberations, the jury sent the judge a note asking whether murder automatically escalates sex to sexual battery. R. 790. Instead of complying with defense counsel's request to answer no, the trial court, at the State's urging, refused to answer the question. R. 791; C. 275.

The trial court should have cleared up the jurors' confusion about Mississippi law, and explained forthrightly that, no, murder does not automatically escalate sex to sexual battery. Absent such clarification, Mr. Galloway may well have been convicted of capital murder for conduct that is not an element of capital murder.

For these, and other errors addressed in detail below, Mr. Galloway's capital murder conviction and death sentence must be reversed.

Argument

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

To convict Mr. Galloway of capital murder, the jury had to find beyond a reasonable doubt the predicate felony of anal sexual battery. R. 418, 758, 763.[6] Dr. McGarry's testimony was the State's only evidence supporting its anal sexual battery allegation.[7] Dr. McGarry

[6] The prosecution also wanted to argue that Ms. Anderson had been vaginally raped, R. 690, 745, but the Court limited its jury charge on sexual battery to anal penetration based on its pretrial order requiring the State to disclose its theory of sexual battery. R. 746-47.

[7] The alleged sexual battery was the subject of extensive pretrial and post-trial litigation. On March 30, 2010, defense counsel filed a Motion to Require the State to Submit a Bill of Particulars Regarding the Charge against the Defendant because "the Defendant cannot determine with any certainty what act the State considers to be sexual battery…. [and] the indictment does not allege what acts the defendant allegedly committed that would constitute sexual battery." C. 62-63. *See also* R. 71. On April 19, 2010, the District Attorney sent a letter to defense counsel purportedly disclosing Dr. McGarry's opinions

improperly and without any scientific basis told the jury that Ms. Anderson's anal injury **must have** been caused by penile sexual penetration, to the exclusion of all other causes, and that the penetration was resisted, to the exclusion of consensual sex. Dr. McGarry was permitted to testify further that the tear was evidence of an "anal rape." The certainty Dr. McGarry conveyed to the jury was fictional, and constituted nothing more than junk science. Like defense counsel and the prosecution, the trial court should have immediately recognized Dr. McGarry's testimony as junk science. At most, as will be shown below, Dr. McGarry could have properly testified only that the injury was **consistent with** nonconsensual, anal penetration. The jury should never have been permitted to hear Dr. McGarry's false claims of certainty.

On direct examination, Dr. McGarry asserted that Ms. Anderson's anus had "stretching type of injuries. The rectal opening, the anus, had the kind of injuries that occur with forceful penetration, with stretching, abrasion or rubbing of the lining of the anus and a tear, so that the anus had been stretched to a point where the tissue ripped up inside the anus canal." R. 675. He also stated: "My impression is that it was forceful penetration of the anus that caused injury to the – what is called the sphincter or the muscle ring around the anus that ordinarily is less than a fourth of an inch in diameter, stretched out to more than an inch in diameter by the penetration of the anal canal**. It's evidence of anal rape**." R. 677. He testified that the penetration would "cause[] enough pain that it would be resisted. It would not be – it would not be something that a person would want to have done to them. It would be painful enough to want to stop … or

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regarding Ms. Anderson's injuries which supposedly supported the sexual battery charge. R. 71-72. The letter was not in the original record on appeal and, given its critical role in serving as notice to defense counsel of Dr. McGarry's opinions, Mr. Galloway attempted to have the record on appeal supplemented with it. *See* Motion to Supplement the Record filed in this Court, dated Aug. 2, 2011. Justice Pierce denied the request on September 8, 2011. Mr. Galloway then asked the entire Court to reconsider Justice Pierce's order. *See* Motion for Reconsideration by the Court of the Single Justice Order Denying Motion to Supplement the Record filed in this Court, dated September 10, 2011. On September 16, 2011, Justice Waller denied that request. The letter is, technically, included in the record on appeal as an exhibit to Mr. Galloway's Motions to Supplement the Record in this Court and in the circuit court, but Mr. Galloway will not rely upon it substantively or otherwise in light of these orders.

prevent it." R. 678. On cross-examination, Dr. McGarry again testified that only sexual penetration could have caused this injury. R. 683.

The defense then called Dr. LeRoy Riddick, a retired state medical examiner in Alabama and coroner for Mobile County. R. 727. Dr. Riddick testified that the tear could have occurred when Ms. Anderson's body was run over by a vehicle or even from straining during a large bowel movement. R. 731.

In rebuttal, the prosecution recalled Dr. McGarry and he insisted again that the injury represented a "classic pattern[] of penetration, forceful, resisted into the anus." R. 739. The prosecution then asked him: "Is there a contrast in the injuries that you might expect to see by forceful penile penetration versus a foreign object?" R. 739. He responded:

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

R. 739-40 (emphasis added).

This testimony was the last evidence heard by the jury in the guilt-innocence phase. R. 740. And the prosecution relied heavily on it in closing arguments. The prosecution reminded the jury that Dr. McGarry had described how Ms. Anderson "was brutally anally raped, unequivocal could come from nothing else." R. 763. After defense counsel suggested in its closing that the contradiction between the two experts was "reasonable doubt alone" as to the greater offense of capital murder, R. 775, the prosecution returned to Dr. McGarry's unequivocal conclusions in its closing rebuttal:

> Dr. McGarry told you that there was **no question** that what he viewed as a result of his autopsy came from forcible penile penetration to the anus. This was not scratches around the outside of the anus. This was a tear inside of the anus that **could only come from** forcible penile penetration. He was very clear about that. He said that the type of force that would be used in this would be resisted, and the tearing would create so much pain that the individual who received this injury would resist this type of penetration.

R. 783 (emphasis added). Later, the prosecution again reminded the jury that Dr. McGarry's testimony left no room for alternative explanations:

> [Dr. McGarry] didn't base this on looking at some pictures, ladies and gentlemen. He didn't base this upon reading a report. He based this upon going to the scene, looking at everything at the scene, and conducting an autopsy in a case. Even Dr. Riddick says that it is important to look at the body.
>
> Dr. McGarry came back on rebuttal. … He said that based upon the examination that he did that this injury occurred from forceful penetration. It did not occur from rolling over…. So again, he stood or he sat right there, and **for the second time** said there was **no question** what caused the injuries to Kela Anderson's anus, and that, ladies and gentlemen, was rape.

R. 784 (emphasis added).

Dr. McGarry's testimony that Ms. Anderson's anal injury was caused by the "**forceful penetration by a penis of a sexual event,"** that she **"would [have] resist[ed]" the penetration,** and that the tear was **"evidence of anal rape"** was the epitome of junk science. Although defense counsel failed to challenge the testimony,[8] its admission affected Mr. Galloway's substantial rights and was plain error. *Ross v. State*, 954 So. 2d 968, 988 (Miss. 2007); *see also Flowers v. State*, 773 So. 2d 309, 326 (Miss. 2000); *Simmons v. State*, 805 So. 2d 452, 468 (Miss. 2001) (citing *Pinkney v. State*, 538 So. 2d 329, 338 (Miss. 1988)); M.R.E. 103(d). Alternatively, this Court should relax the procedural bar in this capital appeal. *Pinkney*, 538 So. 2d at 338, *vacated on other grounds*, 494 U.S. 1075 (1990). Furthermore, this Court has an independent duty to review capital cases to determine "[w]hether the sentence of death was

[8] Defense counsel's utter ineffectiveness for failing to challenge Dr. McGarry's unreliable testimony will be addressed below, in Point 4.

imposed under the influence of passion, prejudice, or any other arbritary factor," MISS. CODE § 99-19-105(3)(a), and Dr. McGarry's testimony was just a factor.

Dr. McGarry's bogus testimony failed to satisfy any of the criteria for reliable expert testimony under Mississippi and federal law. *Mississippi Transp. Comm'n v. McLemore,* 863 So. 2d 31, 42 (Miss. 2003); *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993); M.R.E. 702. As demonstrated below, neither Dr. McGarry's theory and technique of determining whether an anal injury was caused by a penis to the exclusion of other instrumentalities nor his theory and technique of determining whether penetration would have been resisted (1) have been tested; (2) have been subjected to peer review and publication; (3) have a known or potential rate of error; (4) enjoy general acceptance within a "relevant scientific community." *See McLemore*, 863 So. 2d at 37 (adopting the *Daubert* factors). Furthermore, Dr. McGarry's scientifically invalid theories and techniques are not based upon sufficient facts or data, are not the product of reliable principles and methods, and were not reliably used in this case. *See* M.R.E. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999).[9] In addition, Dr. McGarry's testimony was inadmissible because it embodied a legal conclusion beyond his specialized knowledge and thus invaded the province of the jury. M.R.E. 702, 704.

Mr. Galloway does not challenge the reliability of the field of forensic pathology. He does challenge Dr. McGarry's purported ability to determine that the victim's anal injury was caused by a penis and that the anal penetration was resisted. This Court has repeatedly insisted that "[e]xpert witnesses, however qualified, may not present the jury with rank speculation." *Fowler v. State*, 566 So. 2d 1194, 1200 (Miss. 1990). As this Court explained in *Edmonds v. State*, 955 So. 2d 787, 792 (Miss. 2007), even when a witness is qualified as an expert in

[9] Dr. McGarry's opinions would also flunk the former "general acceptance" standard of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *See McLemore*, 863 So. 2d at 42 (adopting *Daubert* standard over *Frye* standard, but noting that the expert testimony at issue in the case failed both).

pathology, a court must not give him or her "carte blanche to proffer any opinion he chooses." *See also McLemore*, 863 So. 2d at 37 (a trial court must not "'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert,' as self-proclaimed accuracy by an expert is an insufficient measure of reliability") (quoting *Kumho Tire*, 526 U.S. at 157); *Goforth v. City of Ridgeland*, 603 So. 2d 323, 329 (Miss. 1992) (citing *Fowler v. State*, 566 So. 2d 1194 (Miss. 1990)) ("before a qualified expert's opinion may be received, it must rise above mere speculation"). A recent report by the National Academy of Sciences highlights the dangers of exaggerated testimony. *See* National Research Council, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 4 (2009) (finding that "imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence").

The trial court should have immediately recognized Dr. McGarry's testimony as junk science and excluded it. Because the jury was ill-equipped to recognize the unreliability of the testimony, particularly as it was cloaked in the guise of an experienced medical examiner, the trial court's failure as gatekeeper to exclude the testimony on the critical element of sexual battery was reversible error. *Edmonds*, 955 So. 2d at 792 (opinion offered by pathologist outside the scope of his expertise was inadmissible and required reversal of the defendant's conviction). And the court's error was "magnified when [the] testimony was the only evidence…to support the State's theory of the case" of capital murder. *Id.* at 792. Without the testimony, the jury may well have rejected a verdict of capital murder. Reversal is required.

A. *Dr. McGarry's unequivocal and bogus testimony that the anal tear had to be caused by a penis was unreliable and should have been excluded.*

The question for the trial court as gatekeeper was whether Dr. McGarry could reliably testify that he knew the instrument (a penis) causing Ms. Anderson's anal injury, to the exclusion of all other instruments. R. 739-740. The answer is no. As courts have recognized for at least

fifty years, physicians cannot make a positive identification of the instrumentality used to cause tissue wounds – like an anal tear - based on physical evidence alone. *Stawderman v. Commonwealth*, 108 S.E.2d 376, 380 (Va. 1959) (reversing a defendant's rape conviction based on insufficient evidence despite a physician's statement that the victim's injuries were caused by a penis and finding "it is a matter of common knowledge, notwithstanding the doctor's statement, that the injuries described could have been caused by means other than the one related); *State v. Wright*, 834 So. 2d 974, 986 (La. 2002) ("As in this case, other cases suggest that medical experts are unable to determine anything more than that vaginal and anal wounds are '**consistent with**' having been caused by a penis.") (emphasis added); *Velazquez v. Commonwealth*, 557 S.E.2d 213, 219 (Va. 2002) (reversing rape conviction because nurse's medical opinion improperly excluded all non-rape trauma as the cause of the victim's injuries); *State v. Stanley*, 312 S.E.2d 482, 489 (N.C. 1984) (physician's testimony concerning vaginal wounds admissible "limited as it was to 'the compatibility' of the size of her vagina with possible penetration" and because expert did not "opine about the exact nature or the cause of the penetration").[10]

Of course, as this Court has recognized, "a forensic pathologist may render an expert opinion at trial as to whether a particular instrument or weapon in evidence was **consistent with** particular injuries to a victim." *McGowen v. State*, 859 So. 2d 320, 334 (Miss. 2003) (emphasis added). But this is a far cry from Dr. McGarry's positive identification that Ms. Anderson's anal

[10] More generally, unconditional expert opinions in cases involving alleged sexual assaults have been repeatedly rejected as unreliable. *See Golden v. State*, 984 So. 2d 1026, 1033 (Miss. 2008) (holding that an expert may not opine as to the truthfulness of a rape claim because "the scope of permissible expert testimony under Rule 702 includes an expert's opinion that the alleged victim's characteristics **are consistent with** those of children who have been sexually abused.") (emphasis added); *United States v. Charley*, 189 F.3d 1251, 1266-67 (10th Cir. 1999) (finding medical expert's "unconditional" opinion that child was sexually abused to be unreliable); *United States v. Whitted*, 11 F.3d 782, 786 (8th Cir. 1993) (reversing because diagnosis of repeated child sexual abuse "went too far" and was plain error; expert should only be allowed "to summarize the medical evidence and express his opinion that his medical findings **were consistent with** L.'s claims of sexual abuse") (emphasis added).

tear **was** caused by a penis. *Cf*. Paul C. Giannelli, *Scientific Evidence in Civil and Criminal Cases*, 33 Ariz. St. L.J. 103, 117 (Spring 2001) ("'General acceptance' in the scientific community that an examiner may validly testify that hair evidence is `consistent with' the accused's hair is a world away from 'general acceptance' that a positive [and conclusive] identification is possible …."). Unlike Dr. McGarry, physicians in virtually all of the reported cases in this state and this country have properly refused to offer an opinion any more definite than vaginal or anal tissue wounds were "consistent with" a penis.[11]

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[11]*See, e.g.*, *Moffett v. State*, 49 So. 3d 1073, 1101-02 (Miss. 2010) (experts testified that vaginal injuries "were consistent with an injury caused by a man's fingers"); *Williams v. State*, 35 So. 3d 480, 486 (Miss. 2010) (expert testified that injuries to victim's anus, though possibly caused by a large bowel movement, were more consistent with an object being inserted into anus); *Havard v. State*, 988 So. 2d 322, 326 (Miss. 2008) (pathologist testified that that "some of [the victim's] injuries were consistent with penetration of the rectum with an object"); *Howard v. State*, 945 So. 2d 326, 333 (Miss. 2006) ("The autopsy also revealed injuries to [the victim]'s vaginal wall consistent with forced sexual intercourse."); *Foley v. State*, 914 So. 2d 677, 682 (Miss. 2005) (medical exam "revealed substantial injuries to [the victim]'s vagina and anus consistent with some sort of blunt, penetrating trauma"); *Bell v. State*, 797 So. 2d 945, 948 (Miss. 2001) (physician testified that "the victim's hymen was shredded and that there were several healing abrasions around the child's anus which were … consistent with anal penetration"); *Brewer v. State*, 725 So. 2d 106 (Miss. 1998) (pathologist's examination of the child victim's vaginal area revealed injuries "consistent with those caused by the forceful penetration of a male penis"); *State v. Ford*, 778 N.W.2d 473, 478 (Neb. 2010) ("A physician testified that he observed injuries to [the victim]'s vaginal area. The injuries were consistent with nonconsensual sex, but also could have occurred during consensual sex."); *In re E.H.*, 967 A.2d 1270, 1272 (D.C. 2009) (examiner found that laceration of victim's anus was consistent with victim's disclosure of anal penetration); *Cosio v. United States*, 927 A.2d 1106, 1112 (D.C. 2007) ("[W]hen asked whether she could 'rule out' other causes, [the State's medical expert] responded that '[t]he only thing I can say is [that] something entered into her vagina that was large enough that would cause hymenal cleaves and tears.'"); *State v. Shank*, 924 So. 2d 316, 319-20 (La. Ct. App. 2006) (A physician testified that the victim "had a small laceration of the posterior forchette, which was consistent with penile/vaginal contact. However, [the physician] admitted the laceration was non-specific for sexual abuse because it could have been caused by other means."); *State v. Mruk*, No. L-04-1213, 2006 WL 307702, at *1 (Ohio Ct. App. Feb. 10, 2006) (pediatrician testified that "victim's injuries were consistent with some type of forced penetration to the anal cavity"); *Oliver v. State*, 32 S.W.3d 300, 302 (Tex. Ct. App. 2000) (physician noticed "a wound consistent with vaginal penile penetration"); *Hale v. Molina*, No. 97-C-4559, 1999 WL 358910, at *2 (N.D. Ill. May 20, 1999) (physician testified that victim's injury "could have been caused by a penis or a finger but was not consistent with a scratch made by a stick"); *State v. Brockel*, 733 So. 2d 640, 643 (La. Ct. App. 1999) (expert in forensic pediatrics and child sexual abuse stated that "although [he] could not say exactly what penetrated J.J.'s vagina, ... the injury to her hymen was consistent with penetration by a penis"); *State v. Ware*, No. 03C01-9705CR164, 1999 WL 233592, at *7 (Tenn. Crim. App. Apr. 20, 1999) ("Dr. King stated that the injuries could have been caused by the insertion of any blunt object and testified that he could not state with certainty that an adult male penis penetrated the child"); *State v. Davis*, No. 72063, 1998 WL 57096, at *1 (Ohio Ct. App. Feb. 12, 1998) (physician unable to state to reasonable medical

This is the not the first time Dr. McGarry has ignored scientific principles and methods to make a claim of conclusive certainty about the instrumentality causing a tissue tear. In those other Mississippi cases, eminent physicians in the field of forensic pathology denounced his conclusions as scientifically unacceptable. *See Harrison v. State*, 635 So. 2d 894, 902 & n.1-2 (Miss. 1994) (describing sworn statement of Dr. Gerald Liuzza, a pathology professor at Louisiana State University at the time, attesting that "a pathologist cannot determine to a reasonable medical certainty that a given [tissue] injury could only have been caused by a human

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certainty that tissue wounds caused by penis); *State v. Self*, 719 So. 2d 100, 101 (La. Ct. App. 1998) (physician specializing in child abuse "indicated that she could not testify as to what caused the penetration" of the victim); *State v. Brown*, No. 02C01-9606-CR-00187, 1997 WL 703398, *1 (Tenn. Crim. App. Nov. 13, 1997) ("[e]xpert testimony reflected that these findings are consistent with something, such as a finger or the head of a penis, having been inserted and rubbed against the victim over a period of time"); *State v. Pierce*, 689 A.2d 1030, 1032 (R.I. 1997) (medical expert "opined to a reasonable degree of medical certainty that the size and condition of Ellen's hymenal opening were consistent with multiple instances of penetration by an object such as a penis"); *Swift v. State*, 495 S.E.2d 109, 111 (Ga. Ct. App. 1997) ("A pediatrician gave expert testimony that the child's vaginal and anus areas had been traumatized. The injuries which the child had received were consistent with a penis coming in contact with the child's anus or vagina."); *State v. Ingram*, 688 So. 2d 657, 662 (La. Ct. App. 1997) (physician's "findings were consistent with an adult male penis being violently inserted into [the victim]'s anus"); *Tuggle v. Thompson*, 57 F.3d 1356, 1360 (4th Cir. 1995) (medical examiner reports that bruises of the vagina "indicate penetration of the vaginal vault by something, a penis, a finger, an object, something"); *People v. Hobot*, 606 N.Y.S.2d 277, 283 (N.Y. App. Div. 1994) (injuries "consistent with penetration by the penis of an adult male"); *State v. Walters*, 655 So. 2d 680, 682 (La. Ct. App. 1995) (pediatrician testified that "an examination of TM's anus ... revealed medical conditions consistent with anal penetration"); *People v. Perkins*, 576 N.E.2d 355, 357 (Ill. App. Ct. 1991) (victim's "rectum was badly traumatized, lacerated, bleeding, and swollen. While [the medical expert] could not identify with any certainty the cause of the injury, he testified that it could have been caused by multiple violent intrusions"); *People v. Lopez*, 175 A.D.2d 267, 268-69 (N.Y. App. Div. 1991) (expert in child abuse testified victim's injury "was consistent with penetration by a penis and a finger"); *State v. Sago*, 591 So. 2d 1356, 1358 (La. Ct. App. 1991) (physician testified that "something" would have had to cause tissue injuries); *State v. Crockett*, 583 So. 2d 593, 594 (La. Ct. App. 1991) (physician testified that tear in victim's anal area "could have been caused by either a finger or a penis"); *State v. Butters*, 527 So. 2d 1023, 1025 (La. Ct. App. 1988) (physician testified that "her findings from the rectal examination were consistent with the repeated insertion of some object into the victim's anus"); *State v. Thrash*, 497 So. 2d 414, 416 (La. Ct. App 1986) (physician could only testify that vaginal injuries were caused "by an object"); *State v. Nunnery*, 482 So. 2d 159, 161 (La. Ct. App. 1986) (child's injuries were "consistent with the type of trauma sustained if there had been penile penetration"); *State v. Wise*, 671 P.2d 918, 919 (Ariz. Ct. App. 1983) ("A physician testified that the injuries he observed…were consistent with injuries following an attempted penetration of the vagina."); *State v. Barnes*, 296 S.E.2d 291, 292 (N.C. 1982) (medical expert testified "I don't know if the penetration was by a male organ or not.... This penetration could have been made by some object or a finger or hand or something like that."); *Nilsson v. State*, 477 S.W.2d 592, 595 (Tex. Crim. App. 1972) (wounds "could have been caused by the insertion of an adult male penis").

penis" and reversing because defendant had a right to rebut the invalid certainty of Dr. McGarry's conclusion regarding sexual assault); Testimony of Dr. LeRoy Riddick, R. 1110-12, *Holland v. State,* No. 93-DP-494 (Miss. 1997) (sworn statement of Dr. Riddick that Dr. McGarry's testimony that "only the male sex organ could have produced the[] injuries" to the hymen and vagina was speculation and outside of what a medical examiner could reliably testify to).

Dr. McGarry's testimony clearly fails the *Daubert* test, as adopted by this Court in *McLemore.* 863 So. 2d at 39. There is no testing, peer review or publication, verification, validation, known error rate, or general acceptance of Dr. McGarry's novel and unsupported assertion that a medical examiner can diagnose a penis as the instrumentality causing an anal tissue tear to the exclusion of all other instruments based only on a physical examination. Neither Dr. McGarry nor anyone else has ever conducted a study to determine whether it can be established to a reasonable scientific or medical certainty on physical evidence alone that a penis caused – and only a penis could have caused – vaginal or anal wounds, nor whether a doctor can reach a valid conclusion within a reasonable degree of medical certainty based on autopsy findings and laboratory results that a particular anal or vaginal wound was caused by a penis.[12]

An exhaustive review of the literature in the field found no article claiming that a physician can determine with reasonable medical certainty the instrument used to cause a tissue wound based on a physical examination. At least one study has documented that anal tears in

[12] For example, such a study could require a comparison of subjects wounded by a penis and subjects wounded by other instruments. The expert would then be required to determine: (1) which subjects had been wounded by a penis; and (2) which subjects had been wounded by other instruments. On information and belief, neither Dr. McGarry nor anyone else has ever performed such a study. Only if such a study had been performed, and the results validated, would Dr. McGarry's testimony be reliable knowledge, grounded in the methods and procedures of medicine, supported by appropriate validation, derived from the scientific method, and scientifically and medically valid. M.R.E. 702. *Cf. Charley,* 189 F.3d at 1267 ("The record does not disclose, for example, what data would support ruling out all causes *except* sexual abuse…or to what degree [the doctor] relied on her purely subjective views.") (emphasis in original).

children – previously believed to be clear evidence of sexual abuse – have in fact been caused by roll over injuries from vehicles.[13] There was absolutely no established, generally accepted scientific predicate for Dr. McGarry's conclusion.

Because his testimony utterly failed to satisfy the reliability requirement of expert testimony, the trial court committed reversible error by allowing Dr. McGarry to testify that the tear in the victim's anus was, unequivocally, caused by a penis.

B. *Dr. McGarry's unequivocal and bogus testimony that the victim would have resisted the penetration was unreliable and should have been excluded.*

Dr. McGarry also wildly overreached when he improperly testified to a reasonable degree of medical certainty based on physical evidence alone that Ms. Anderson's anal tear resulted from forceful penetration that must have been resisted. Dr. McGarry testified that the alleged anal penetration would "cause[] enough pain that it would be resisted." R. 678; R. 739; R. 740.

Courts allow testimony that a genital injury was **evidence of** or **consistent with** forceful, resisted penetration. *See, e.g.*, *Moffett*, 49 So. 3d at 1101-02 (experts testified that vaginal tear "was consistent with an intentional or non-accidental injury"); *Howard*, 945 So. 2d at 333 ("The autopsy also revealed injuries to [the victim]'s vaginal wall consistent with forced sexual intercourse.").[14] But again, this is a far cry from Dr. McGarry's unequivocal testimony that the

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[13] *See* S.C. Boos, et al., *Anogenital Injuries in Child Pedestrians Run Over by Low-Speed Motor Vehicles: Four Cases with Findings that Mimic Child Sexual Abuse*, 112 Pediatrics e77, e84 (July 2003), *available at* http://pediatrics.aappublications.org/content/112/1/e77.full.pdf (concluding, based on the results of the study, that "[c]hildren run over by slow-moving vehicles across their torso may have anogenital injuries identical to those sustained in acute child sexual abuse."). The study found that in every case it studied, "the anogenital findings included lacerations to the hymen or anus, much like that described with acute child sexual abuse or nonintentional impalement injury." *Id.* at e81. The authors hypothesized two theories to explain these effects, even in the absence of a pelvic fracture: (1) "high intraabdominal pressure, resulting from the passage of a tire over the chest and abdomen, causes extrusion of pelvic contents through perineal orifices, forcing distention and laceration of those orifices" and (2) "traction on the skin, caused by the tires passing over the pelvis, creates shearing forces, which also produce laceration about the anus and hymenal orifice." *Id*. at e83.

[14] *See also Ford*, 778 N.W.3d at 478 (expert testified that the injuries to the victim's vaginal area were **consistent with** both nonconsensual intercourse and consensual intercourse) (emphasis added); *State v.*

alleged penetration **must have been** resisted, to the exclusion of consensual activity. Like his conclusion that the anal tear must have been caused by a penis, this testimony fails the reliability standards of *McLemore*, *Daubert*, *Kumho*, and M.R.E. 702. In *Holland*, Dr. McGarry had also testified that the victim's injuries must have resulted from nonconsensual sexual activity. Dr. Riddick explained in the context of the *Holland* case that this testimony, too, was outside the scope of Dr. McGarry's field of expertise and went "beyond reasonable medical probability." Testimony of Dr. LeRoy Riddick, R. 1110-12, *Holland v. State*, No. 93-DP-494 (Miss. 1997).

Numerous studies have found that a medical examiner cannot determine whether sexual activity was consensual or nonconsensual on the basis of physical evidence alone. They have all found **that consensual intercourse can result in injuries to the genital area**. For instance, a recent study considered trauma to women's ano-genital area after consensual anal and vaginal sexual intercourse. Therese Zink et al., *Violence: Recognition, Management, and Prevention: Comparison of Methods for Identifying Ano-Genital Injury After Consensual Intercourse*, 39 Journal of Emergency Medicine 113 (Aug. 2008). Most revealing, anal tears were observed in all of the women who reported having consensual anal intercourse, and multiple anal tears were observed in some of the women. *Id*. at 116 (Tables 2 and 3).

Other studies have reached the same conclusion. *See, e.g.*, Sarah Anderson et al., *Genital Findings of Women After Consensual and Nonconsensual Intercourse*, 2 JOURNAL OF FORENSIC NURSING 59, 64 (Summer 2006) (after observing injuries in subjects following consensual and nonconsensual intercourse, concluding that "there is evidence to suggest that injuries can be identified on examination after both nonconsensual and consensual intercourse."); Jeffrey Jones

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Galloway, 284 S.E.2d 509 (N.C. 1981) ("Testimony that an examination revealed evidence of traumatic and forcible penetration, **consistent with** an alleged rape, is a proper expression for an expert witness…") (emphasis added). As noted above, unconditional opinions in cases involving alleged sexual assaults have been repeatedly rejected as unreliable. *See* n.10, *supra*.

et al., *Anogenital Injuries in Adolescents after Consensual Sexual Intercourse,* 10 ACADEMIC EMERGENCY MEDICINE 1378, 1383 (Mar. 2003) (after comparing injuries observed among female adolescents who had consensual sexual intercourse to those who had nonconsensual intercourse, concluding that "[c]learly, the presence of anogenital trauma ... implies nothing about consent").

Moreover, many of these studies have noted other variables which serve as predisposing factors for genital injuries after intercourse that are entirely unrelated to the question of consent. *See, e.g.*, Jones, *supra*, at 1381 (noting "first coitus, rough or hurried coitus, intoxication, variant coital positions, anatomical disproportion, mental factors (fear of discovery), postmenstrual state, and clumsiness" as factors which could influence likelihood of injury even in consensual intercourse); *id*. at 1382 (listing additional variables such as "hormonal status, lubrication, position, and assailant characteristics" and noting that these "are not fully understood in how they might influence physical trauma during sexual intercourse and therefore need to be investigated in ongoing research."); Anderson, *supra*, at 65 (noting "potential confounding variables such as prior sexual history, condom and lubrication usage, [and] rough intercourse" in considering whether injury resulted from consensual or nonconsensual intercourse).

These researchers have also observed that the scientific community lacks "empirical models … that reliably predict which ano-genital injury pattern is associated with consensual sexual intercourse and which ano-genital injury pattern is associated with non-consensual sexual intercourse." Zink, *supra*, at 117. Given their findings, the authors urged the "scientific community … to gather information about ano-genital injury prevalence following consensual sexual intercourse." *Id*. *See also* Anderson, *supra*, at 65 ("Before the knowledge base of forensic experts … can be established, rigorous scientific studies examining the numerous

potential variables following both consensual and nonconsensual intercourse must be conducted.").

Accordingly, there was absolutely no established, generally accepted scientific predicate for Dr. McGarry's conclusion, based on his physical evidence, that the victim's anal tear was the result of nonconsensual penetration.

Because his testimony utterly failed to satisfy the reliability requirement of expert testimony, the trial court committed reversible error by allowing Dr. McGarry to testify that the tear in the victim's anus must have been the result of forceful, resisted penetration.

C. The trial court committed reversible error by permitting Dr. McGarry's unequivocal testimony, which was not helpful to the jury and which stated a legal conclusion beyond his specialized knowledge.

The trial court also committed reversible error under Mississippi law by allowing Dr. McGarry to testify to the legal conclusions that the victim's anal injury was "evidence of anal rape" and was caused by "forceful penetration by a penis of a sexual event" which she "would [have] resist[ed]" because this testimony was not helpful to the jury and was beyond the specialized knowledge of a forensic pathologist. *See Hart v. State*, 637 So. 2d 1329, 1338 (Miss. 1994) ("expert opinions which are not helpful to the trier of fact and which state legal conclusions beyond the specialized knowledge of the expert" should be excluded). *See also Havard v. State*, 800 So. 2d 1193, 1199 (Miss. Ct. App. 2001) (finding admission of expert's opinion drawing on "the legal concept of negligence" even though it also was derived from the expert's field of expertise, was error, though harmless). Dr. McGarry's testimony told the jury to find that the victim had been anally raped. *See Shirley v. State*, 942 So. 2d 322, 329 (Miss. Ct. App. 2006) (expert witnesses may not "tell the jury what result to reach") (citing *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983)). The trial court should not have permitted him to do so.

Though many jurisdictions, including Mississippi with the adoption of M.R.E. 704, have abandoned a strict reading of the common law rule prohibiting testimony on an ultimate issue in the case, courts have universally continued to adhere to the rule prohibiting opinion testimony, expert or otherwise, on a question of law. *Hart*, 637 So. 2d at 1338-39.[15] *See also United States v. Izydore*, 167 F.3d 213, 218 (5th Cir. 1999) ("Under Rule 704(a), '[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' … **That rule, however, does not allow a witness to give legal conclusions.**") (quoting *Owen*, 698 F.2d at 240) (emphasis added) (citations omitted); *Velazquez*, 557 S.E.2d at 219 (reversing rape conviction because nurse's medical opinion was tantamount to testifying that the victim was raped); *Wilkerson v. State*, 686 So. 2d 1266, 1278-79 (Ala. Crim. App. 1996) (same); *Nichols v. State*, 340 S.E.2d 654, 657-58 (Ga. Ct. App. 1986) (examining physician's notation in a medical report that a rape had occurred was not admissible in evidence because it constituted a legal conclusion); *Wickam v State*, 593 So. 2d 191 (Fla. 1992) (expert not allowed to testify to legal conclusion); *McCowan v State*, 412 So. 2d 847 (Ala. Crim. App. 1982) (same); *Cartera v. Commonwealth*, 248 S.E.2d 784, 786 (Va. 1978) (same).

Dr. McGarry's testimony violated that rule, embodying the legal conclusion that the jury was charged with deciding, namely whether the predicate felony of sexual battery had occurred.

D. These errors also violated Mr. Galloway's constitutional rights.

In addition to the Mississippi law cited above, the admission of Dr. McGarry's testimony violated Mr. Galloway's rights to a fair jury trial and to due process of law. U.S. CONST.

[15] The Advisory Committee Notes accompanying Mississippi Rule of Evidence 704 also make plain that trial courts should guard against opinions which reach a legal conclusion in the case. *See also* M.R.E. 704 (Advisory Committee Comment) (courts "also [should] stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.") (citing Fed. R. Evid. 704 (Advisory Committee Notes)).

AMENDS. V, VI, XIV; MISS. CONST. art. 3, §§ 14, 26, 28. Certainly, the testimony violated Mr. Galloway's rights under the Sixth Amendment to the United States Constitution and Art. 3, §§ 26, 31 of the Mississippi Constitution to a jury determination of all legal issues untainted by that of a prosecution expert. *See also Flowers*, 773 So. 2d at 318 ("Due process requires that a criminal prosecution should be conducted according to established criminal procedures."); *Dawson v. Delaware*, 503 U.S. 159, 179 (1992) (erroneous admission of unduly prejudicial evidence renders trial fundamentally unfair, in violation of the Fourteenth Amendment); *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) (barring admission of unreliable identification evidence); *Perry v. New Hampshire*, 131 S. Ct. 2932 (2011) (certiorari granted to address whether admission of unreliable identification evidence violates Constitution even absent state action); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Sixth Amendment guarantees right to fair jury trial). His capital murder conviction must be reversed.

Additionally, because the prosecution also relied on Dr. McGarry's unreliable testimony in securing a death sentence against Mr. Galloway, his death sentence also must be reversed under the Eighth Amendment and Miss. Const. art. 3, § 28. *See* R. 868 (arguing that the "brutal rape that you heard Dr. McGarry tell you about, that the facts support, the brutal rape that he committed on Shakeylia Anderson" supports a finding of the heinous, atrocious, and cruel aggravating circumstance). *See also Mills v. Maryland*, 486 U.S. 367, 376 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.") (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)).

E. These errors were not harmless and demand reversal of Mr. Galloway's capital murder conviction.

Dr. McGarry's scientifically bogus testimony was the only evidence presented to the jury to elevate the charge of murder to capital murder. Its erroneous admission was not harmless.

Mr. Galloway and Ms. Anderson had had in the past a consensual sexual relationship, and the jury heard evidence that Ms. Anderson was sexually active with at least one other man. R. 526, 607; State Ex. 16 at 5. Even according to the State's evidence, Ms. Anderson and Mr. Galloway had communicated on the phone for months leading up to her murder, and she left with him voluntarily on the night she disappeared. R. 422-23, 432-33, 480-82; State Ex. 6 at 4-22. No semen was found in her anal cavity. R. 731. In light of this evidence, the prosecution not only had to overcome the serious obstacle of demonstrating that anal sex had occurred on the night that she disappeared, but also that it was against Ms. Anderson's consent.

Dr. McGarry's testimony was the State's only hope in obtaining a capital murder conviction (and thus a death sentence) against Mr. Galloway. As explained above and incorporated herein, recognizing its critical nature in the case, the prosecution relied heavily on Dr. McGarry's testimony throughout closing argument. *See* R. 763, 783, 784.

Though defense counsel challenged Dr. McGarry's testimony through Dr. Riddick's opinion offering other explanations for Ms. Anderson's anal injuries, the adversary process obviously did not render the errors harmless. The jury was in no position to question whether Dr. McGarry's opinions – presented to them under the cloak of a highly experienced and educated medical examiner who had been present at the scene – were reliable. That was the trial court's job as gatekeeper. *See McLemore*, 863 So. 2d at 39; *Daubert*, 509 U.S. at 597.

The severe prejudice flowing from Dr. McGarry's scientifically invalid testimony was made clear from the jury's third note in which it asked whether "murder escalate[s] the sex automatically to sexual battery" and asking the court to "define sexual battery[,] rape." R. 790; C. 275. The question strongly suggests that the issue of consent was a close one for the jury even with Dr. McGarry's unreliable testimony.

The trial court failed to ensure that Dr. McGarry's testimony met the *Daubert* or Rule 702 reliability standards. Instead, it allowed the jury to credit Dr. McGarry's scientifically invalid testimony. And in fact, to find Mr. Galloway guilty of capital murder, the jury must have credited Dr. McGarry's improper testimony. The error was not harmless.

Because Dr. McGarry's testimony was the only evidence upon which the State relied in securing a guilty verdict for capital murder against Mr. Galloway, his conviction and death sentence must be reversed. *Edmonds*, 955 So. 2d at 792; U.S. CONST. AMENDS. VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 26, 28, 31; M.R.E. 702, 704.

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

In order to convict Mr. Galloway of capital murder, the jury had to find beyond a reasonable doubt each element of sexual battery, namely that: 1) Mr. Galloway did willfully, purposely, unlawfully, and feloniously engage in the act of sexual, and specifically anal, penetration with; 2) the victim Shakeylia Anderson without her consent. C. 10, 264; R.E. Tab 1; MISS. CODE § 97-3-95(1), § 97-3-19(2)(e); *Fisher v. State*, 481 So. 2d 203, 212 (Miss. 1985). During its guilt-innocence phase deliberations the jury sent out a note asking whether murder automatically escalates sex to sexual battery and for the court to "define sexual battery[,] rape." R. 790; C. 275. Defense counsel proposed answering the first question, "no, it doesn't." R. 791. Instead, at the State's urging, the court instructed the jury that it had all of the instructions and was to continue its deliberations. R. 791; C. 275.

In receipt of a jury note establishing that at least some jurors misunderstood the law governing a critical issue regarding Mr. Galloway's guilt for capital murder, the court's response was deficient in the following ways: 1) it failed to provide a simple supplemental instruction that murder does **not** automatically escalate sex to sexual battery; 2) it failed to inquire further of the

jury's meaning; and 3) it failed to provide a supplemental instruction defining sexual battery more clearly and precisely, or at a minimum, refer the jury to the instructions on sexual battery that it had provided. These failures created a reasonable probability that the jury misapplied the elements of sexual battery and convicted Mr. Galloway of "conduct that is not crime" under the United States Constitution and is not an element of capital murder under Mississippi law. *Cf. Goodin v. State*, 977 So. 2d 338, 340-41 (Miss. 2008) (reversing a conviction for sexual battery where the jury had not been required to find lack of consent). The error violated his rights under Mississippi law and his constitutional rights to the presumption of innocence, due process of law, a fair jury trial, and a reliable sentencing determination. U.S. CONST. AMENDS. V, VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 26, 28, 31.[16] His conviction must be reversed.

Factual History. As noted in Point 1, *supra*, the only evidence offered in support of the alleged anal sexual battery was the scientifically invalid testimony of forensic pathologist Paul McGarry. The court instructed the jury on the elements of sexual battery as follows:

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[16] Defense counsel's proposed instruction preserved the error for review. *Duplantis v. State*, 708 So. 2d 1327, 1339-40 (Miss. 1998) (when the defendant proposes jury instructions which are then rejected, the proposal itself preserves the error for review). Furthermore, the court granted defense's pretrial request that all of its objections be heard under the federal and state constitutions without having to specify particular amendments. R. 13-15. The defense also filed a Trial Memorandum providing the grounds for all of its trial objections, exceptions, requests, and other applications and issues to be heard as the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. C. 129-30. Should this Court find that these requests nonetheless failed to preserve this error for review, in the alternative, the court's utterly inadequate response was plain error. *Flowers*, 773 So. 2d at 326. Or this Court should relax the procedural bar in this capital appeal. *Pinkney*, 538 So. 2d at 338. The court's response was also an arbitrary factor under which death was imposed. MISS. CODE § 99-19-105(3)(a).

Additionally, this Court has repeatedly held that a trial court has a *sua sponte* duty to ensure that the jury is properly instructed. *Kolberg v. State*, 829 So. 2d 29, 45 (Miss. 2002) ("There is no doubt that the trial court is ultimately responsible for rendering proper guidance to the jury via appropriately given jury instructions, even *sua sponte*."); *Duvall v. State*, 634 So. 2d 524, 526 (Miss. 1994) ("A circuit judge has a responsibility to see that the jury is properly instructed."). *See also Harper v. State*, 478 So. 2d 1017, 1022 (1985) (finding reversible error where the judge failed to fully instruct the jury as to the law by refusing proposed flawed instructions on a central issue in the case instead of modifying them or advising counsel as to their deficiencies). That is not to say that a trial court has a *sua sponte* obligation to provide additional instructions if it has otherwise provided the jury with proper guidance. *See Wilson v. State*, 936 So. 2d 357, 363 (Miss. 2006) ("A trial court is not required to *sua sponte* instruct the jury or suggest jury instructions in addition to what the parties tender.").

Jury Instruction No. S-2A

***

2. the defendant, LESLIE GALLOWAY, III, did willfully, unlawfully and feloniously and with or without design to effect death,
3. kill and murder Shakeylia Anderson, a human being, without authority of law,
4. while in the commission of the crime and felony of Sexual Battery, as defined by Section 97-3-95, Miss. Code of 1972, as amended, in that:
5. the said, LESLIE GALLOWAY, III, did willfully, purposely, unlawfully and feloniously engage in the act of sexual penetration,
6. without the consent of the said Shakeylia Anderson,

***

Jury Instruction No. S-3

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

Jury Instruction, No. S-4A

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

C. 262-63, 252, 264; SR. Jury Charge 6-7.

During guilt phase deliberations, the jury sent a note (its third) to the judge:

Does murder escalate the sex automatically to sexual battery?
Please define legal term of sexual battery
Rape

R. 790; C. 275. Defense counsel informed the court that the "first question troubles me a great deal. I don't know what it means." R. 790. The Court responded, "I don't either, but I just can't –." *Id*. Trial counsel then elaborated on his concern and proposed that the judge instruct the jurors that murder does not automatically escalate sex to sexual battery:

> The fact that if he killed her and had sex with her, does that make it sex battery, seems to me what they're asking. And the answer, of course, to that question is no, it does not . . . . **It seems to me we could at least make that part of it clear to them, tell them, no, it doesn't. It doesn't. That is not the case here.** Otherwise they might say well, you know, we believe he murdered her, since he murdered her it has to be sex battery, therefore it must be capital murder.

R. 790-91 (emphasis added). The State ignored the obvious implications that the jury did not understand the charged instructions, urged the court to give the "standard response," and the court agreed. R. 791. Without clarifying that murder does **not** automatically escalate sex to sexual battery, without defining the elements of sexual battery in a more precise way, or at a minimum, pointing the jury back to its instructions on sexual battery, and without even inquiring further of the question which it acknowledged it did not understand, the court merely instructed the jurors that they had all of the instructions that applied to the case and that they should continue their deliberations. C. 275.

Less than an hour later, the jury returned a verdict of guilty of capital murder. R. 793.

A. The trial court committed reversible error by failing to respond to the jury note with a simple supplemental instruction that murder does not automatically escalate sex to sexual battery.

The court was legally obliged to have answered the jury's question by explaining that murder does **not** automatically escalate sex to sexual battery. As defense counsel explained, its failure to do so created a reasonable probability that at least some jurors "might say well, you know, we believed he murdered her, since he murdered her it has to be sexual battery, therefore it must be capital murder." R. 791.

The record is clear: even with the instructions in hand, at least some jurors in this case understood that the law might well be that a murder automatically escalates sex to sexual battery regardless of consent, and the trial court did nothing to disabuse them of that incorrect understanding of the law. Instead, the court fell mute.

Accordingly, this Court can have no confidence that the jury followed the law of Mississippi in convicting Mr. Galloway of capital murder as charged. *See Arledge v. McFatter*, 605 So. 2d 781, 783 (Miss. 1992) (reversing a medical malpractice verdict where the jury, after

sending a note requesting clarification on an instruction, reached a verdict before the judge had responded and could not be presumed to have followed the instructions of the court).

Facing a deliberating jury that appears to be "at a loss as to how it should proceed," a trial judge should not "become a mute." *Wright v. State*, 512 So. 2d 679, 681 (Miss. 1987). Recognizing the particular challenges jury notes present, this Court has provided specific guidance to trial judges when confronted with them:

> Our first recommendation[17] is that the circuit judge determine whether it is necessary to give any further instruction. Unless it is necessary to give another instruction for clarity or to cover an omission, it is necessary that no further instruction be given.
> …
> The second recommendation requires the trial judge to constantly bear in mind that justice in every trial requires communication and understanding. Unless words are clearly understood, there is only a communication of sound, or worse, a distinct possibility of the receiver of the information placing a different meaning on what is spoken or written than the author meant. This is critical in any communication from the circuit judge to the jury, or between the judge and jury.

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

Here, it was clear that supplemental instructions were necessary "for clarity or to cover an omission." *Id*. The jury was "at a loss as to how to proceed" and needed guidance about the issue raised in its note. *Wright*, 512 So. 2d at 681. The jury's note revealed that at least some jurors harbored a fundamental misunderstanding of the elements of the predicate felony of sexual battery, and specifically the element of consent. Where jurors do not understand the meaning of a legal concept essential to determination of defendant's guilt, the trial court is required to correct the misunderstanding. Accordingly, the court was legally obliged to have answered the jury's note by stating that murder does **not** automatically escalate sex to sexual battery. Because in this case "[t]he possibility of a mischievous result on the whole [wa]s infinitely greater if the

[17] While the *Girton* Court described its guidelines as recommendations, this Court has since treated them as obligatory. *See Hughes v. State*, 983 So. 2d 270, 280 (Miss. 2008).

supplemental instruction [wa]s not given," *Wright*, 512 So. 2d at 681, the court's failure to provide the instruction proposed by defense counsel requires reversal. *See United States v. Stevens*, 38 F.3d 167, 169-170 (5th Cir. 1994) (reversing a conviction where the jury sent a note asking whether they could accept evidence of possession of another gun—admitted at trial for impeachment purposes—as evidence of possession, and the judge responded by stating that the jury was "to consider all of the evidence in the record," but where the defendant had not been charged with and the jury had not been instructed on possession of the other weapon). *See also United States v. Berry*, 290 Fed. Appx. 784, 790-91 (6th Cir. 2008) (quoting *Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946)) (presented with a jury note on an important legal issue, "[i]t is generally not sufficient 'for the court to rely on more general statements in its prior charge.'"); *United States v. Nunez*, 889 F.2d 1564, 1568 (6th Cir. 1989) (trial court's rereading of the instructions did not answer the jury's question on a central legal issue and required reversal); *Bollenbach*, 326 U.S. at 612-13 ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."). Reversal is required.

B. The court committed reversible error in failing to inquire further of the jury when the court itself did not understand the jury's question.

In *Girton*, this Court directed: "**a judge should make absolutely certain he understands precisely what is meant in any inquiry from the jury**. Unless he is quite certain precisely what the jury means in its inquiry, how can the judge know he is responding properly?" 446 So. 2d at 572-73 (emphasis added).[18]

Here, the judge stated explicitly that he did not understand the jury's question whether murder automatically escalated sex to sexual battery. When defense counsel told the court that

[18] Again, since *Girton*, this Court had treated its guidelines as obligatory. *See Hughes*, 983 So. 2d at 280 ("The trial judge **must** be certain that he understands precisely what is meant by the jury's inquiry.") (emphasis added) (citing *Girton*, 446 So. 2d at 573).

he did not know what the first question in the jury's note meant, the judge responded: "**I don't either**, but I just can't –." R. 790 (emphasis added).[19] Given his confusion, the trial judge had a duty to "make absolutely certain he understands precisely what [wa]s meant." *Girton*, 446 So. 2d at 573. *See also Nicolaou v. State*, 534 So. 2d 168, 175 (Miss. 1988) (the judge must understand the jury, and the jury must also understand the judge); *Wright*, 512 So. 2d at 681. Yet the judge made no such attempt. *Id*.

In the absence of an understanding of the jury's meaning, the court's failure to inquire further of the jury was error. *Cf, e.g., Pulliam v. State*, 515 So. 2d 945, 947-48 (Miss. 1987) (reversing and remanding for a new trial where the trial judge failed to inquire further and instruct when a juror indicated during polling that her verdict was not "100 percent"); *Morgan v. State*, 370 So. 2d 231, 232 (Miss. 1979) (reversing and remanding for a new trial where the trial judge failed to inquire further and instruct when a juror indicated during polling that he may have been "voting the way he did, contrary to his convictions, so as not to be unpopular with his fellow jurors"). Reversal is required.

C. The court committed reversible error by failing to provide a clearer and more precise definition of sexual battery in response to the jury's note.

The jury's note should have immediately revealed to the court that its instructions on sexual battery were deficient, or at a minimum required clarification. *See Girton*, 446 So. 2d at 572. As stated above, the jury's note revealed a fundamental misunderstanding of the elements of the predicate felony of sexual battery, and specifically the element of consent. Because the instructions were not properly understood, there was a "distinct possibility" of the jury "placing a different meaning on what is spoken or written than the author meant." *Id.* at 572-73. As shown

[19] If the trial court's response, specifically "but I just can't," indicated that the judge believed that he lacked the authority to either inquire as to the jury's meaning or provide further instruction, it clearly erred as a matter of law. *See id.* at 572-73; *Wright*, 512 So. 2d at 681; *Mickell v. State*, 735 So. 2d 1031, 1033 (Miss. 1999); Miss. URCCC 3.10.

below, this misunderstanding stemmed from imprecision and ambiguities in the court's charge. Accordingly, the court was legally obliged to provide a clearer and more precise definition of sexual battery in response to the jury's note.

The court's instructions were imprecise and ambiguous. First, Instruction S-3 provided only that "in order to sustain the crime of Sexual Battery some penetration must be proven beyond a reasonable doubt." C. 252; SR. Jury Charge 7. This instruction seemingly requires only a finding that penetration occurred to "sustain the crime of Sexual Battery." It fails to mention the second element of sexual battery, namely, that the penetration occurred without Shakeylia Anderson's consent. Particularly when combined with the imprecise Instruction S-2A as explained below, some jurors might well have failed to understand that this instruction was meant only to assist them in determining whether a penetration had occurred (in other words, that it only had to be slight) and interpreted it to mean that the only element of sexual battery that they needed to prove beyond a reasonable doubt was penetration.

Second, Instruction S-2A reasonably could be read to make lack of consent an element of murder rather than sexual battery. It provided the elements of capital murder as follows, in pertinent part:

> 2. the defendant, LESLIE GALLOWAY, III, did willfully, unlawfully and feloniously and with or without design to effect death,
> 3. kill and murder Shakeylia Anderson, a human being, without authority of law,
> 4. while in the commission of the crime and felony of Sexual Battery, as defined by Section 97-3-95, Miss. Code of 1972, as amended, in that:
> 5. the said, LESLIE GALLOWAY, III, did willfully, purposely, unlawfully and feloniously engage in the act of sexual penetration,
> 6. without the consent of the said Shakeylia Anderson,

C. 262; SR. Jury Charge 6. Thus, it failed to make clear that element (6) (i.e., "without the consent of the said Shakeylia Anderson") was meant to modify element (5) (i.e., "that said,

Leslie Galloway, III, did willfully, purposefully, unlawfully and feloniously engage in the act of sexual penetration"), and not element (3) (i.e., "kill and murder Shakeylia Anderson, a human being, without authority of law").

Had Instruction S-2A tracked the language of the statute precisely, there would have been no doubt that element (6) modified element (5). Such an instruction would have read: Mr. Galloway… "(5) did willfully, purposely, unlawfully and feloniously engage in an act of sexual penetration **with the said Shakeylia Anderson** without her consent."[20]

The jurors' misunderstanding also would have been eliminated had the court instructed the jury in conformance with Mississippi's model jury instructions, which call for separate instructions on the elements of capital felony-murder and the elements of the predicate felony, rather than a combined version as in Instruction S-2A. Specifically, the model instruction for capital felony-murder provides, in relevant part:

> 4. While _____*[defendant's name]* was engaged in the commission of the crime of _____*[rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse with any child under the age of 12, or non-consensual unnatural intercourse with mankind, or in any attempt to commit such felonies]*, **as instructed in jury instruction no. _____;**

Miss. Prac. Model Jury Instr. Crim. § 8:10: *Capital murder-Engaged in the commission of a felony* (emphasis added). The model instruction for sexual battery provides, in relevant part, that the defendant:

> 2. Engaged in sexual penetration by _____[cunnilingus, fellatio, buggery or pederasty] or _____(describe act) [any penetration of the genital or anal openings of another person's body by any part of a person's body] or _____(describe act) [insertion of any object into the genital or anal openings of another person's body];
> 3. With _____*[another person without his/her consent]*.

[20] MISS. CODE § 97-3-95(a)(1) provides:

> (1) A person is guilty of sexual battery if he or she engages in sexual penetration with:
> a. Another person without his or her consent.

Miss. Prac. Model Jury Inst. Crim. § 9.13: *Sexual battery offenses occurring after July 1, 1998*.

These instructions would have ensured that the jury did not conflate the elements of sexual battery and murder in a way that permitted them to treat "without her consent" as an element of murder rather than sexual battery. *See, e.g., Hathorne v. State*, 759 So. 2d 1127, 1134 (Miss. 1999) (no error when court gave model jury instruction).

Because the court failed to provide a supplemental instruction defining sexual battery more clearly and precisely, reversal is required.

D. The court's errors were not harmless.

In responding to the jurors' note by stating only that they had all the instructions and that they should continue deliberations, the trial court permitted the jury to convict Mr. Galloway of capital murder without requiring it to find that each element of sexual battery was proven beyond a reasonable doubt. *See Goodin v. State*, 977 So. 2d 338, 341-42 (2008) (reversing a conviction for sexual battery where the jury was not required to find lack of consent). Because it was clear that at least some jurors misunderstood the law governing a key issue in the case, the court's muteness "allowed the jury to convict [Mr. Galloway] of conduct that is not crime" under the United States Constitution and is not an element of capital murder under Mississippi law. *Id.* at 341. The court's failure requires reversal. *See Stevens*, 38 F.3d at 169-170; *Nunez*, 889 F.2d at 1570.

The court's errors were not harmless for at least three reasons.

First, even assuming an anal penetration occurred by Mr. Galloway on the night Ms. Anderson was killed, the evidence of lack of consent was weak. According to the State's own evidence, Ms. Anderson left voluntarily with Mr. Galloway the night that she disappeared, after speaking to him repeatedly on the phone. R. 422-23; 432-33. They had spoken on the phone for and texted each other for weeks prior to that night, R. 484, and had had consensual sex just days

before. R. 480-82; State Ex. 16. Moreover, Ms. Anderson had at least one other consensual sexual partner during the same time period. R. 607. Additionally, some jurors may not have credited Dr. McGarry's bogus testimony that the anal penetration was so forceful that it must have been resisted and thus without consent.

Second, the jurors had been deliberating for over an hour, with the instructions in hand, when they sent out their note questioning the relationship between murder and the consent element of sexual battery and asking the court to define sexual battery. R. 786-91. Less than an hour – and perhaps well less than an hour[21] – passed between the jury learning that the court would not provide a response to its third note and its reaching a verdict. This brief amount of time between the court's refusal to respond and the jury's verdict is a powerful indicator that the jury – unable to resolve its own question within the hour prior to its note – did not suddenly and properly resolve its confusion in less than that time. *See, e.g., Horn v. State*, 62 So. 2d 560, 560-61 (1953) (reversing conviction where jury returned verdict thirty minutes after receiving erroneous information from the bailiff). Moreover, there is little more that the jurors could have done to convey the message to the court that the instructions they had been provided did not answer their question and their need for sexual battery to be defined.

Third, this is a capital case, and the court's errors pertained directly to Mr. Galloway's statutory eligibility for capital punishment. *See Loden v. State*, 971 So. 2d 548, 562 (Miss. 2007) (when the death penalty has been imposed, "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.") (citations omitted). Responding to the jury's note in any one of the above

[21] Between 10:26 a.m. and 11:15 a.m., the jurors sent out two notes to the judge regarding the phone records, Mr. Galloway's statement, and the DNA evidence which the state contended was proof of Mr. Galloway's guilt for murder. R. 768-91. At some point after 11:47 a.m., the court received the jury's third note. R. 791. Between that time and 12:50 p.m., the court discussed its response with the parties, delivered its response to the jury, received notice that the jurors had concluded deliberations, assembled the parties, and had the jury brought to the courtroom to deliver its verdict. R. 791-92.

ways may well have meant the difference between a capital murder conviction and a murder conviction. *See Brown v. State*, 39 So. 3d 890, 900 (Miss. 2010).

Accordingly, the court's failure to 1) provide a supplemental instruction that murder does **not** automatically escalate sex to sexual battery; 2) inquire further of the jury's meaning; and 3) provide a supplemental instruction defining sexual battery more clearly and precisely created a reasonable probability that Mr. Galloway was convicted of capital murder without all jurors finding that he had non-consensual anal sex with Ms. Anderson. In other words, there a reasonable probability that Mr. Galloway was convicted of capital murder and thus became eligible for a death sentence based on "conduct that is not crime" and not an element of capital murder under Mississippi law. *Goodin*, 977 So. 2d at 340-41; *Girton*, 446 So. 2d at 572-73. The court's failure to respond adequately to the jury's question means that there is a strong probability that, on the question submitted to the jury regarding nonconsensual anal penetration, "no verdict either of acquittal or conviction was reached." *Morgan*, 370 So. 2d at 232. Thus, Mr. Galloway's capital murder conviction must be reversed.

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

The State's DNA evidence was critical to its case. It provided a critical forensic link between Mr. Galloway and the murder. But the State failed to call the analyst who performed the DNA testing. Defense counsel objected, but the trial court overruled the objection. The admission of the testimonial hearsay of the analyst who performed the DNA testing violated Mr. Galloway's rights under Mississippi law and the Confrontation Clause of the Sixth Amendment and the Mississippi Constitution. It requires reversal.

Factual background. Bonnie Dubourg, a forensic DNA analyst for the Jefferson Parish (Louisiana) Sheriff's Office Regional DNA Laboratory, was the only person from the lab called

by the State. Ms. Dubourg had not performed the DNA testing procedures, another analyst, Julie Golden, had. Ms. DuBourg's work had been limited to analyzing Ms. Golden's DNA test results. As Ms. DuBourg herself described it, "the tests were performed by Miss Julie Golden, who was also a DNA analyst.[22] She actually ran the samples, and I analyzed her data." R. 654.[23] Thus, the State admitted Ms. Golden's testimonial[24] out-of-court statements regarding

[22] Their supervisor was Connie Brown, who did not appear at trial. R. 654.

[23] Ms. Dubourg often signaled when she was relying on Ms. Golden's out-of-court statements by employing the pronoun "we," which she used repeatedly. *See* R. 631 ("That is the type test that we performed."); R. 633 (lab runs "positive negative buffer controls…. along with all of the evidence that we test"); R. 634 ("we did receive exhibits for this case"); R. 634 ("the facility we were in was a secure facility"); R. 640 ("Yes, we received shoes."); R. 641 ("We conduct what is called short tandem repeat."); R. 643 ("we did obtain a profile" with respect to State's Ex. 4; it was "consistent with the DNA profile obtained from the reference blood sample of Shakeylia Anderson"); R. 649-50 ("When we get a vaginal swab, what we do is we do what is called a differential extraction where we're trying to separate the female portion, the vaginal cells from the sperm cells. So we get what is called an epithelial cell fraction and a sperm cell fraction. We did get an epithelial cell fraction which was consistent with Shakeylia Anderson. And on the cell fraction, the DNA profile obtained from the sperm cell fraction of the vaginal swab 7512-12S was consistent with being a mixture of at least two individuals, one major contributor and one minor contributor…. Leslie Galloway … cannot be excluded as a minor contributor in this mixture. Approximately 99.99 percent of the entire population can be excluded as possible contributors of the DNA in this mixture"); R. 647-48 ("Yes, we did [receive samples]."); R. 650 ("We run our samples through what is called a genetic analyzer, and we look at peaks….").

Other times, she described Ms. Golden's work through the use of a passive voice (i.e., omitting any mention of who did the work). *See* R. 647 (partial DNA profile obtained from State's Ex. 19; it was "consistent with the DNA profile obtained from the reference sample of Shakeylia Anderson"); R. 648 (DNA profile extracted from State's Ex. 22 "was consistent with being a mixture from at least two individuals. Shakeylia Anderson and Leslie Galloway cannot be excluded as donors of the DNA in this mixture"); R. 649 ("DNA profile obtained from" State's Ex. 23 "was consistent with the DNA obtained from the reference blood sample from Leslie Galloway"); R. 643 (State's Ex. 4 was "consistent with the DNA profile obtained from the reference blood sample of Shakeylia Anderson"); R. 643 (same with respect to State's Ex. 11); R. 644 (same with respect to State's Ex. 12); R. 644 (same with respect to State's Ex. 13); R. 644-45 (same with respect to State's Ex. 14); R. at 645 (same with respect to State's Ex. 9); R. at 645-46 (same with respect to State's Ex. 8); R. at 646-47 (same with respect to State's Ex. 15); R. 653 (same with respect to State's Ex. 10).

By contrast, Ms. Dubourg took ownership of her own work by using the pronoun "I." *See, e.g.*, R. 654 ("I analyzed the data.")

[24] It cannot tenably be denied that Ms. Golden's findings with respect to her DNA testing procedures were testimonial in nature. *Cf. Bullcoming*, 131 S. Ct. at 2716-17 ("[a] document created solely for an 'evidentiary purpose' … made in aid of a police investigation, ranks as testimonial") (quoting *Melendez-Diaz*, 129 S. Ct. at 2532); *id*. at 2720 (Sotomayor, J., concurring) (question is whether "primary purpose" of statement was to "create a record for trial), citing *Michigan v. Bryant*, 562 U.S. __, 131 S.Ct. 1143, 1155 (2011)). *See also Davis v. Washington*, 547 U.S. 813, 822 (2006). The sole purpose of Ms. Golden's testing and resulting findings was to create a record for trial.

her testing and production of DNA profiles from the known and unknown samples through Ms. Dubourg's testimony.

DNA testing consists of obtaining a DNA profile or profiles, if possible, from known reference samples and unknown samples collected from locations of interest. *See infra* for a detailed description of DNA testing. **DNA analysis** occurs when the resulting DNA profiles are compared to one another and statistical probabilities are calculated. Thus, Ms. Golden, not Ms. Dubourg, performed the critical tasks of initial presumptive DNA testing,[25] DNA extraction (including the differential extraction of the DNA on the vaginal swab),[26] DNA quantitation,[27] polymerase chain reaction (PCR),[28] the separation and detection of PCR-produced STR (short

[25] The lab analyst's first task is to identify whether the collected item has biological fluid present on it at all. John M. Butler, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 39 (2d ed. 2005) (hereinafter, Butler).

[26] "A biological sample obtained from a crime scene in the form of a blood or semen stain [for example] ... contains a number of substances besides DNA." Butler, *supra*, at 42. Before the DNA from the sample can be examined, the other cellular substances must be separated from the DNA. Id. "**The extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process**." *Id.* at 42 (emphasis added). During the extraction process, it is paramount that the lab analyst "avoid further degradation of the DNA template" by preventing the sample's exposure to heat, humidity, and UV irradiation or by treating a blood sample with a preservative, like EDTA, and make attempts to remove inhibitors to the polymerase chain reaction (PCR), like hemoglobin." *Id.* at 43, 49-50.

[27] DNA quantitation is the process for determining how much DNA is in a particular sample. "Only after DNA in a sample has been isolated can its quantity and quality be reliably assessed. Determination of the amount of DNA in a sample is essential for most PCR-based assays because a narrow concentration range works best . . . . Too much DNA can result in split peaks or peaks that are off-scale for the measurement technique . . . . Too little DNA template may result in allele 'drop-out' because the PCR reaction fails to amplify the DNA properly." Butler, *supra*, at 50. "PCR amplification [discussed below] is dependent on the quantity of template DNA molecules added to the reaction. Based on the DNA quantitation results ... the extracted DNA for each sample is adjusted to a level that will work optimally in the PCR . . . ." *Id.* at 56.

[28] PCR can be thought of as a molecular copy-machine. Butler, *supra*, at 63. Using alternating temperature cycles, PCR produces copies of the particular portions of the DNA template identified for STR analysis. *Id.* **"The sensitivity of PCR necessitates constant vigilance on the part of the laboratory staff to ensure that contamination does not affect DNA typing results."** *Id.* at 79 (emphasis added). The process is "so sensitive that **it's very easy to get DNA transferred from one object to another."** R. 709 (emphasis added). **That is why known samples and unknown samples need to be processed separately to avoid contamination.** Butler, *supra*, at 80.

tandem repeat) alleles, and the production of electropherograms through electrophoresis.[29] *See generally* Ms. Dubourg's testimony; Dr. Ronald Acton's testimony; *see also* Butler, FORENSIC DNA TYPING; *id*. at 6, Figure 1.2 (overview of biology, technology, and genetics of DNA typing using short tandem repeat (STR) markers). The State failed to call Ms. Golden.[30] Instead, it had Ms. Dubourg relate to the jury Ms. Golden's test results on DNA collected from the following sources: 1) nine locations on Mr. Galloway's mother's car; 2) a pair of shoes and a hat found at Mr. Galloway's mother's house; and 3) a vaginal swab from Ms. Anderson's body. R. 633-654. The lab obtained reference samples from Ms. Anderson, Mr. Galloway, James Futch, and Garrid Worlds,[31] and Ms. Golden obtained DNA profiles from them. R. 640, 649-50. Ms. Dubourg testified that some of the DNA profiles collected from the car were consistent with the DNA profile generated from Ms. Anderson's known reference sample, and that the DNA profiles generated from the samples from the trunk release and the interior left passenger door of the car were consistent with a mixture of the DNA profiles generated from Ms. Anderson and Mr. Galloway's known samples. R. 642-45, 647-49. She testified that the probability of these samples belonging to a randomly-selected individual was one in over 100 billion. *Id.* With respect to the samples from the shoes and hat, Ms. Dubourg testified that the DNA profiles obtained from them were consistent with the DNA profile obtained from Ms. Anderson's

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[29] Once PCR amplification is complete, the lab analyst needs to follow the lab's protocols to remove the PCR enzymes that would inhibit electrophoresis, the chemical process used to separate and detect the STR alleles. The PCR amplified sample is then ready for electrophoresis. Electrophoresis, using a viscous medium and an electric field, separates DNA fragments by size. Once separated, the fragments are visualized using a sequence of dyes. Finally, software is used to plot the results of the electrophoresis, producing a chart called an electropherogram. The electropherograms are used for DNA analysis.

[30] The State was obliged to call her. "It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live." *Melendez-Diaz v. Massachusetts*, 557 U.S. 2527, 2532 n.1 (2009).

[31] James Futch testified at trial that he had a dating relationship with Ms. Anderson. R. 607. Though he could not recall the exact date, he testified that they had last had sex in the days following Thanksgiving break, but it was not in December. R. 610, 613. The significance of the sample from Garrid Worlds was never explained at trial. *See* R. 768.

reference sample. R. 645-47. The probability of these samples belonging to a randomly-selected individual, she testified, was also one in over 100 billion. *Id*. With respect to the vaginal swab, Ms. Dubourg testified that it contained sperm cells from at least two people, that DNA profiles were generated, and that she could not exclude the DNA profile generated from James Futch's known sample as being the major contributor and the DNA profile obtained from Mr. Galloway's known sample as being the minor contributor. R. 649-50. She could, however, exclude 99.99% of the entire population as possible donors to the sperm sample. R. 650-51.

The State presented this testimony by Ms. Dubourg even though there was absolutely no evidence that Ms. Dubourg had observed Ms. Golden perform the DNA test procedures or even that Ms. Dubourg had been on-site at the facility when they were performed.

Defense counsel learned that Ms. Dubourg had not performed the DNA testing only when she took the stand. Following her testimony, defense counsel immediately requested a hearing outside the presence of the jury and moved to exclude the DNA evidence on grounds that the defense was denied the opportunity to confront Ms. Golden. R. 663-64. The court denied the motion, ruling that Ms. Dubourg was a sufficient surrogate for Ms. Golden. R. 665-66. After trial, the defense raised the error again in the Motion for New Trial and Acquittal Notwithstanding the Verdict, which was also denied. R. 877-79, 892-93; C. 307-309; R.E. Tab 4.

Legal analysis. The Confrontation Clause of the Sixth Amendment prohibits the admission of testimonial out-of-court statements by a non-testifying witness, unless the witness is unavailable and the defendant had a prior opportunity to cross examine her. The State made no attempt to show Ms. Golden was unavailable, and, in any event, Mr. Galloway never had an opportunity to examine her pretrial. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 59 (2004). The trial court's failure, over objection, to exclude the DNA evidence without providing the defense an opportunity to confront the analyst who performed the DNA testing violated the

Confrontation Clause,[32] Art. 3, §§ 14, 26, 28 of the Mississippi Constitution, and the prohibition against hearsay evidence, M.R.E. 802, 803.[33] Mr. Galloway's capital murder conviction must be reversed.

Bullcoming v. New Mexico is directly on point. There, the Supreme Court held that the defendant had a right to confront the blood-alcohol analyst (named Caylor) who had used a gas chromatograph machine to test the alcohol level of his blood sample. 131 S. Ct. at 2710. *See also id*. at 2713 ("As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."). The Court reached this decision even though the State had called a surrogate blood-alcohol analyst (named Razatos) "who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." *Id*. at 2709. The Court reasoned: "surrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, i.e., the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id*. at 2715. In her concurring opinion, Justice Sotomayor explained: "It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." *Id*. at 2719, 2722 (Sotomayor, J., concurring).

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[32] This Court reviews Confrontation Clause claims *de novo*. *Smith v. State*, 986 So. 2d 290, 296 (Miss. 2008).

[33] *See Bullcoming v. New Mexico*, 564 U.S. --, 131 S. Ct. 2705, 2716 (2011); *Melendez-Diaz*, 129 S. Ct. at 2532; *Crawford v*. 41 U.S. at 54; *Goforth v. State*, 70 So. 3d 174, 187 (Miss. 2011); *McGowen v. State*, 859 So. 2d 320, 339 (Miss. 2003); *Penny v. State*, 960 So. 2d 533, 538 (2006); *Kettle v. State*, 641 So. 2d 746, 750 (Miss. 1994); *Barnette v. State*, 481 So. 2d 788, 791-92 (Miss. 1985); *Spears v. State*, 241 So. 2d 148, 149 (Miss. 1970).

As in *Bullcoming*, Ms. Dubourg was not a sufficient surrogate for Ms. Golden. Because the State did not produce Ms. Golden, defense counsel could not question her about her critical tasks of initial presumptive testing, DNA extraction (including the differential extraction of the DNA on a vaginal swab), DNA quantitation, polymerase chain reaction (PCR), the separation and detection of PCR-produced STR (short tandem repeat) alleles and the production of electropherograms through electrophoresis. As in *Bullcoming*, Ms. Dubourg's "surrogate testimony … could not convey what [Ms. Golden] knew or observed about … the particular test and testing process [she] employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." 131 S. Ct. at 2715.

Similarly, only Ms. Golden could have been examined concerning possible contamination of the samples and her vigilance in attempting to prevent it. *See* Hon. Donald E. Shelton, *Forensic Science Challenges for Trial Judges*, 18 Widener L.J. 309, 324-25 (2009) ("The overwhelming demand [for DNA testing] may be resulting in poor laboratory practices by inexperienced or overworked technicians to the degree that confidence in DNA testing results is being affected."); *State v. Bloom*, 516 N.W.2d 159, 162 (Minn. 1994) ("False positive matches do occur, as the result of sloppy laboratory procedures, the poor quality of the materials used, the quality of the DNA sample obtained from the scene, the protocols calling for a match, and human error."); National Research Council, Committee on DNA Forensic Science, THE EVALUATION OF FORENSIC DNA EVIDENCE: AN UPDATE, NATIONAL RESEARCH COUNCIL 71 (1996) ("Any procedure that uses PCR is susceptible to error caused by contamination leading to amplification of the wrong DNA. The amplification process is so efficient that a few stray molecules of contaminating DNA can be amplified along with the intended DNA."); Tania Simoncelli & Barry Steinhardt, *California's Proposition 69: A Dangerous Precedent for Criminal DNA Databases*, 33 J.L. MED. & ETHICS 279, 286-87 (2005) (widespread errors can

occur through sample handling errors); Ju-Hyun Yoo, *The Science of Identifying People by their DNA, A Powerful Tool for Solving Crimes, Including Cold Cases from the Civil Rights Era*, 22 SYRACUSE SCI. & TECH. L. REP. 53, 77 -78 (Spring 2010) ("Careless mistakes, sloppiness, or other errors that occur in [DNA] laboratory testing may result in injustice; for instance, an innocent person may be identified as the perpetrator.") (citing Dustin Hays & Sara Katsanis, *DNA, Forensics, and the Law*, Genetics and Public Policy Center (July 24, 2007)).

Ms. Dubourg admitted that although the lab does its best to control contamination, it was "not a bubble." R. 655. She did not have the knowledge to testify with certainty what actions Ms. Golden actually took in this case to reduce the possibility of contamination, and whether any problems developed and how they were dealt with. "If the samples are not handled properly in the initial stages of an investigation, then no amount of hard work in the final analytical or data interpretation steps can compensate." Butler, *supra*, at 33. Ms. Golden, the analyst who handled, stored, and tested the physical evidence, did. And the State failed to call her.

At trial, Ms. Golden's actions, the circumstances under which the DNA testing occurred, the care she took in performing her work, her vigilance, her veracity, her interest, her biases, her prejudices, her proficiencies, her capabilities, and the substance of her conversations with Investigator Michele Carbine of the Harrison County Sheriff's Department were shielded from "the crucible of cross-examination." *Crawford*, 541 U.S. at 61 (Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence …, but about how reliability can best be determined.").[34]

[34] *See also Melendez-Diaz*, 129 S. Ct. at 2536-37 (discussing the susceptibility of forensic scientists to pressure by law enforcement government agencies to make findings that favor the prosecution, and the

Ms. Dubourg's inability to provide meaningful information about these critical matters is made plain in the following exchange between Ms. Dubourg and defense counsel regarding the vaginal swab in the rape kit taken from Ms. Anderson:

> Q: You initially did this first testing on February 20th, 2009; is that correct, with the sperm fraction?
> ***
> A: **It looks like** the first day that she [Golden] started testing was March 4th, 2009, on the protocol for the swab.
> ***
> Q: Did you have anybody else [besides Mr. Galloway's reference sample] to compare it to at that time?
> A: At that time – **I think** we did not have Mr. Futch at that time.
> Q: Okay. So did you get in contact with the investigator?
> A: **I think Miss Golden did. I believe to the best of my knowledge Miss Golden did.**
> Q: Did y'all receive some more items?
> A: We received two additional reference samples.

R. 656-57 (emphasis added).

In addition, when defense counsel sought information about the lab's decision not to test the inside of the baseball hat and shoes collected at Mr. Galloway's mother's house and compare any DNA profile so generated to Mr. Galloway's or any other reference samples,[35] Ms. Dubourg again made clear her lack of personal knowledge:

> Q: All right. And what part of the hat did you test?
> A: **They** tested the bill because it was – I guess it was soiled.
> ***
> Q: Okay. But there is – I understand the bill of a baseball hat, but you have the top part and the under part, which part –
> A: It was done by Miss Golden, and she just – I have that it's a swab of the bill. **So I'm not the one who tested it, so I can't say definitely**. It just says she swabbed the bill of the cap.

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ability of confrontation at trial to get the truth out despite these pressures); *Williams v. State*, 595 So. 2d 1299, 1307 (Miss. 1992) ("Few doubt that the essence of confrontation is the right to cross-examine, that the best test of the truth of testimony is that it be cured in the crucible of cross-examination.") (citations omitted); *Davis v. State*, 970 So. 2d 164, 167 (Miss. Ct. App. 2006) ("Wide-open cross-examination of any matter bearing upon the credibility of the witness is allowed, including the possible interest, bias or prejudice of the witness.") (citations omitted).

[35] The only evidence that the baseball hat and shoes belonged to Mr. Galloway was the hearsay statement of his mother, improperly introduced through Inv. Carbine's testimony. R. 519-20. *See* Point 8, *infra.*

Q: Okay. Was the inside of the cap swabbed?
A: I do not see that it was swabbed.
Q: Okay. Could that have been done?
A: It wasn't done. I mean, it was screened by Miss Golden, and she had talked to the investigator. So **I guess** she had decided that it was more important to swab the bill of the cap.

R. 659 (emphasis added).[36] *See also* R. 660 (defense inquiring about Ms. Golden's decisions to test only the top and tongue of the shoes).[37]

Ms. Dubourg was not Ms. Golden's supervisor,[38] and the State presented no evidence that she observed Ms. Golden conduct the testing. The court's ruling that Ms. Dubourg was an acceptable surrogate for Ms. Golden's testimony concerning Ms. Golden's testing was error and denied Mr. Galloway his rights under the Mississippi Rules of Evidence and the United States and Mississippi Constitutions, including his rights to confrontation, a fair trial, effective assistance of counsel, due process and a reliable sentencing determination. *Bullcoming*, 131 S. Ct. at 2715-16; *Kettle*, 641 So. 2d at 750;[39] U.S. CONST. AMENDS. VI, VIII, XIV; MISS. CONST. 3, art. §§ 26, 28; M.R.E. 802. A new trial is required.

In addition to *Crawford* and its progeny, including *Bullcoming*, Mr. Galloway must also prevail under this Court's decision in *McGowen*, which predated *Crawford.*[40] In *McGowen*, this Court limited its holdings in *Kettle* and *Barnette* to "instances in which the testifying witness is

[36] The record suggests at least one reason to be concerned with the lab's storage and control of the baseball hat and shoes. Inv. Carbine, who had collected the shoes from Mr. Galloway's mother's house, testified that they were not in the same condition at trial as she found and secured them: the shoelaces had been removed. R. 494-95. Mr. Galloway was denied the opportunity to confront Ms. Golden with respect to the storage and control of the evidence and about why the shoelaces were missing.
[37] Additionally, had the State called Ms. Golden, defense counsel could have explored why she was no longer a DNA analyst at the Jefferson Parish Lab. *See* R. 654 (Ms. Golden "**was** a DNA analyst.") (emphasis added). *Cf. Bullcoming*, 131 S. Ct. at 2715 (defense counsel "could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted" for the non-testifying analyst witness's unpaid leave).
[38] Connie Brown, whom the State also did not call, was the supervisor of both of them. R. 654.
[39] The U.S. Supreme Court remains interested in confrontation clause violations. *See Williams v. Illinois*, 939 N.E.2d 268 (Ill. 2010), *cert. granted*, 131 S.Ct. 3090, 3090-91 (June 28, 2011) (No. 10-8505).
[40] Of course, to the extent that *McGowen* is inconsistent with *Bullcoming* and *Melendez-Diaz*, those United States Supreme Court decisions control.

so far removed from the analysis as to be essentially a records custodian for purposes of testifying at trial." 859 So. 2d at 339. In *McGowen*, the testifying witness was a supervisor at the lab and had reviewed the non-testifying witness's "work sheets to determine if she did in fact perform all the tests that could be and were supposed to be performed." *Id*. at 340. If all of the examinations were performed, the supervisor was to review whether the non-testifying witness "reach[ed] the proper or accurate conclusions in the report based on these examinations." *Id*.

Here, Ms. Dubourg was "so far removed from the [DNA testing] as to be essentially a records custodian for purposes of testifying at trial." Again, she did not have any supervisory role over Ms. Golden, Connie Brown did. R. 654. She and Ms. Golden had the very same title: DNA analyst. R. 625, 654. Ms. Dubourg did not communicate with law enforcement or make critical decisions regarding the reference samples. R. 659. She played no part in – and did not even observe – the storage of or testing procedures performed on the evidence samples. R. 654-60. Her distance from the testing is clearly demonstrated during her testimony when she was required to reference Ms. Golden's reports. *See* R. 659 ("It was done by Miss Golden, and she just – I have that it's a swab of the bill. So I'm not the one who tested it, so I can't say definitely. It [the report] just says she swabbed the bill of the cap."). In short, Mr. Galloway prevails under *McGowen*.

The State cannot prove the error harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). In determining whether a Confrontation Clause violation is harmless, this Court assumes "'the damaging potential of the cross examination were fully realized,'" and considers the importance of the improperly admitted evidence to the State's case and whether it was cumulative of other, properly admitted evidence. *Corbin v. State*, No. 2010-KA-678-SCT, 2011 WL 4389740, at *4 (Miss. Sept. 22, 2011) (reversing the defendant's murder and aggravated assault convictions because the improperly admitted out-of-court statement was

"vitally important" to State's case and "[n]o other witness provided similar testimony") (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). *See also Goforth*, 70 So. 3d at 187 (error could not be harmless when the statement the defendant was denied the opportunity to confront "was, perhaps, the most damaging evidence" against the defendant).

Here, as in *Corbin*, the unconfronted out-of-court statements were extremely important to the prosecution's case. The improperly admitted DNA test results provided powerful forensic links between Mr. Galloway and Ms. Anderson and constituted the only direct evidence connecting Mr. Galloway to the crime and suggesting that his mother's car was the murder weapon. No other evidence supplied these links or direct evidence. Further, the State emphasized the importance of the DNA evidence throughout the guilt phase. It referenced the evidence in its opening statement.[41] It was the only evidence of murder the State mentioned in defending against defense counsel's motion for a directed verdict. *See* R. 690 ("There is DNA evidence in this case sufficient to tie the defendant and the victim to the murder weapon, which is the automobile."). And it was a central focus of the State's closing arguments.[42]

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[41] *See* R. 416 ("we'll hear … how [law enforcement] recovered multiple pieces of flesh, tissue, hair, from underneath the undercarriage of the defendant's white Ford Taurus, and how they were all kept and preserved to be sent off to this lab for DNA testing."); R. 417 ("Bonnie Dubourg will testify for us how each of these items that were sent over there were tested, and how the tissue that was found in the undercarriage of the defendant's car comes back to be the victim … and the same car that was used to run over the victim that night…. She will tell us how blood spatter that was found inside the car comes back to be the blood of the victim, Kela Anderson. She will also tell us that those shoes, the defendant's own shoes which were found in his house in his room, the shoes and the hat also have the DNA of Kela Anderson on them. All items come back that show that the defendant is the one who killed Kela Anderson.").

[42] *See* R. 761 (arguing that Ms. Anderson and Mr. Galloway's blood was found in the car); R. 762 (arguing that Ms. Anderson's blood was found on Mr. Galloway's hat and shoes); *id*. ("And we heard from Bonnie Dubourg and she told us this number, this incredible number 100 billion to one. She told us that was a conservative number. The defense expert says those numbers aren't good enough for me, but they're good enough for the FBI. 100 billion to one were the odds this was Kela's blood on this hat, on these shoes, underneath the defendant's car, and in his car. She told us that the swabs from her vaginal area came back to have sperm on it, the sperm that was 99.99 percent match to two people, James Futch, who you heard from …. And who was the other person, 99.99 percent match, Leslie Galloway."); R. 782 ("you heard from the DNA expert, ladies and gentlemen, Bonnie Dubourg. She tells you that Shakeylia Anderson's remains were all – or everything that was collected underneath the vehicle that she tested –

Had the full potential of Mr. Galloway's cross examination of Ms. Golden been realized, it undoubtedly would have affected the jury's verdict. Without the DNA evidence, the State's case against Mr. Galloway would have been significantly damaged. Thus, the court's failure to grant defense counsel's motion to exclude the DNA evidence was not harmless, and requires reversal. *See Corbin*, 2011 WL 4389740, at *4; *Goforth*, 70 So.3d at 187.

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

Mr. Galloway's trial counsel was ineffective under the Sixth Amendment for failing to object to Dr. McGarry's highly prejudicial testimony that 1) the anal tear must have been caused by a human penis; and 2) the tear would have required such force as to be resisted. They were also ineffective for failing to object 3) that his testimony stated a legal conclusion beyond his specialized knowledge.[43] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (right to counsel under the Sixth Amendment violated when counsel is deficient and the deficient performance prejudices the defendant); *Ross v. State*, 954 So. 2d 968, 1003 (Miss. 2007). Defense counsel's failures to object permeated Mr. Galloway's entire trial with obvious

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that was tested at her lab and was confirmed by the defense's expert was Shakeylia Anderson's remains under this defendant's car. In that car was smear marks. You will see the smear marks right by the trunk release, where if you want to hit the trunk release a mixture of that defendant's blood and Shakeylia Anderson's blood. Told you one in 100 billion. It's a big number, ladies and gentlemen.").

[43] When based on facts fully apparent from the record, a claim of ineffective assistance of trial counsel may be raised on direct appeal by new appellate counsel. M.R.A.P. 22(b). This Court has recognized that defense counsel's failure to object could amount to ineffective assistance of counsel on appeal when "counsel's tactics are shown to be 'so ill chosen that it permeates the entire trial with obvious unfairness.'" *McGilberry v. State*, 843 So. 2d 21, 31-32 (Miss. 2003) (quoting *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995). Mr. Galloway raises such claims of ineffective assistance of counsel when fully apparent from the record. As this Court has recently noted, however, "there may be instances in which insufficient evidence exists within the record to address the claim adequately." *Gowdy v. State*, 56 So.3d 540, 543 (Miss. 2010) (quoting *Archer v. State*, 986 So. 2d 951, 955 (Miss. 2008)). "In such a case, the appropriate procedure is to deny relief, preserving the defendant's right to argue the issue through a petition for post-conviction relief." *Id.* In the event this Court does not grant him relief, Mr. Galloway respectfully reserves all such issues of ineffectiveness for post-conviction review where they may be raised after the "further development or investigation" permitted by Rule 22. This includes arguments regarding the absence of an evidentiary or argument objection raised in this brief, if this Court decides that the absence could have involved trial strategy rather than neglect.

unfairness and require reversal. *Sea v. State*, 49 So. 3d 614, 618-19 (Miss. 2010) (reversing because counsel was ineffective in failing to challenge admissibility of defendant's prior convictions); U.S. CONST. amends. VI, XIV; MISS. CONST. art. 3, § 26; M.R.A.P. 22(b).

Dr. McGarry's testimony was the prosecution's only evidence of the predicate felony of anal sexual battery. No reasonably competent defense attorney would have failed to object to Dr. McGarry's improper and unreliable testimony. Like the trial court and the prosecution, defense counsel should have known that the testimony was bogus, and embodied a legal conclusion. Furthermore, a quick search in any legal database would have revealed the abundant case law and medical literature set forth in Point 1, *supra*, and incorporated herein. A quick search (and perhaps even one or two phone calls to the Harrison County criminal defense bar) also would have revealed that Dr. McGarry had presented the very same testimony in two other Harrison County cases. In *Harrison*, another pathologist had submitted an affidavit noting "that a pathologist cannot determine to a reasonable medical certainty that a given injury could only have been caused by a human penis." *Harrison*, 635 So. 2d at 902 n.2. This Court reversed the defendant's capital murder conviction and death sentence because his defense counsel was denied the opportunity to challenge the certainty of Dr. McGarry's conclusions. *Id.* at 902. In *Holland v. State*, 705 So. 2d 307 (Miss. 1997), in which Dr. McGarry had testified at the defendant's previous trial that "only the male sex organ could have produced the[] injuries" to the hymen and vagina, Dr. Riddick – the very same expert retained by defense counsel in this case - responded in a proffer that this testimony was beyond Dr. McGarry's field of expertise and was speculation. Testimony of Dr. LeRoy Riddick, R. 1110-11, *Holland v. State*, No. 93-DP-494 (Miss. 1997).

Instead, defense counsel allowed the jury to consider Dr. McGarry's invalid testimony without objection of any kind. In closing argument, defense counsel failed to criticize Dr.

McGarry's testimony at all, and left the jury to sort out the "disagreement" between Dr. McGarry and Dr. Riddick. Defense counsel began by summarizing – indeed, unnecessarily emphasizing – Dr. McGarry's testimony that Ms. Anderson "was anally raped. Anally raped, that's what their expert said. … Anally raped." R. 773-74. Then counsel continued, making only a weak "reasonable doubt" challenge to Dr. McGarry's conclusions:

> Now, no DNA in the anus and two different opinions, and now what do you all have as jurors to go by? Well, who do you believe? They are both experts, Dr. McGarry and Dr. Riddick. There is no question about their education and experience. But the oath that y'all have taken says if there is a reasonable doubt then you have to vote not guilty. That element alone is reasonable doubt, whether there was sexual battery as Dr. McGarry says, anal rape. There is reasonable doubt there because who – what expert are you going to believe or are they both right.

R. 774-75. By acknowledging Dr. McGarry's expertise and experience, and failing to make any challenge whatsoever to the substance of his opinions, defense counsel did not give the jury any reason to reject Dr. McGarry's testimony. Counsel could have, but failed to, fortify its weak "reasonable doubt" challenge to the State's evidence of sexual battery by objecting to Dr. McGarry's unequivocal testimony under *Daubert* and the Mississippi Rules of Evidence, to ensure that his invalid scientific opinions – hugely prejudicial to the defense – would never have made it before the jury.

The reliability of Dr. McGarry's opinions should not have been left as a proper disagreement among experts for the jury to sort out. Trial counsel's failure to object to Dr. McGarry's unreliable testimony can not be said to be reasonable, when defense attorneys in the same jurisdiction strongly objected to this invalid testimony years ago in at least two cases.

Had counsel successfully limited Dr. McGarry's opinion to testimony that the injuries were "consistent with" anal penetration and "consistent with" nonconsensual intercourse, it would have seriously weakened the State's case against Mr. Galloway for capital murder.

Indeed, as evidenced by its third note, even with his unequivocal testimony at least some jurors struggled with the proof of the predicate felony of sexual battery, when they asked the court if murder automatically escalates sex to sexual battery and asked for a definition of sexual battery and rape. C. 275.

There is no plausible professional reason for counsel's omission. But for counsel's unprofessional failure, there is far more than a reasonable possibility that the jury would have convicted Mr. Galloway of the lesser charge of murder, not capital murder. Counsel's failure in this regard is all the more prejudicial in that such a verdict would have rendered Mr. Galloway ineligible for the death penalty. *See* R. 747.

Counsel's utter ineffectiveness in failing to challenge Dr. McGarry's testimony on grounds that it was unreliable and that it embodied an ultimate legal conclusion thus requires reversal of Mr. Galloway's capital conviction and death sentence. *Strickland*, 466 U.S. at 687; *Ross*, 954 So. 2d at 1003; U.S. CONST. AMENDS. VI, XIV; MISS. CONST. ART. 3, § 26.

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

A defendant has a due process right to introduce rebuttal evidence whenever his future dangerousness is "at issue." *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994); *Kelly v. South Carolina*, 534 U.S. 246, 252-53 (2002). The State need not explicitly argue future dangerousness; it is enough that an implication of future dangerousness is raised by the evidence. *See Kelly*, 534 U.S. at 252-54 (recognizing that even evidence of the crime may raise a strong implication of future dangerousness that the defendant has a right to rebut). *Cf. Bell v. State*, 725 So. 2d 836, 862-63 (Miss. 1998) (holding that "future dangerousness bears on all sentencing determinations").

Here, the State clearly raised such an implication. It presented evidence that Mr. Galloway had previously been convicted of carjacking and was under a period of post-release supervision when the crime was committed, R. 814, and that the capital murder involved pain "a million times worse than touching a hot flame," R. 674. Its four statutory aggravators also raised the implication: (1) the capital offense was committed by a person under sentence of imprisonment; (2) the defendant was previously convicted of a felony involving the use or threat of violence to another person; (3) the capital offense was especially heinous, atrocious, or cruel; and (4) the capital offense was committed when the defendant was engaged in the commission of sexual battery. C. 281-85, 304. In addition, the State questioned Deputy Catchings about whether she had seen Mr. Galloway "outside of the jail" – insinuating that Mr. Galloway's good behavior in jail might have been the result of the "consequences" of having "problems" with corrections staff. R. 820-21. Finally, in closing the State commended Ms. Brimage for "bravely" identifying Mr. Galloway, suggesting that she had reason to fear Mr. Galloway. R. 759.

Despite this clear implication of future danger, the State filed a motion to preclude Mr. Galloway from introducing evidence "with regards to his ability to adapt to prison life in the future or his ability or his propensity or lack thereof to commit violent acts in the future," including the testimony of Dr. Beverly Smallwood, a psychologist hired by the defense, and various lay witnesses.[44] R. 804; C. 225-27. Defense counsel opposed the motion, arguing that "I think certainly the jury has every right to consider his past and how he may act in the future because of that …." R. 806. The trial court granted the State's motion, ruling that "I'm not going to prevent you from putting on any kind of testimony about his behavior while

[44] The defense did not call Dr. Smallwood despite promising in opening statement that it would, and asked none of its mitigation witnesses about how Mr. Galloway would conduct himself in prison if given a life sentence.

incarcerated in the past," but the defense's witnesses "will be prohibited from speculating as to how he might behave in the future." R. 806-07; R.E. Tab 7.

The trial court's ruling left the jury with the uncontradicted impression that Mr. Galloway was a future danger. A jury note sent with the sentencing verdict and requesting that the jurors be polled by number rather than by name demonstrated that Mr. Galloway's alleged future dangerousness weighed heavily on their minds. R. 870; C. 280. Mr. Galloway had a constitutional right to present evidence regarding how he might behave in the future to rebut the impression. The trial court's exclusion of such evidence violated his rights under the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article 3, Sections 14, 26, and 28 of the Mississippi Constitution. His death sentence must be vacated.

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

At the penalty phase, the defense wanted to call Dr. Donald Cabana to provide the jury with relevant information regarding "the conditions at the Mississippi Department of Corrections endured by inmates sentenced to serve life without the benefit of parole or hope of early release." C. 309; *see also* R. 799-802. This testimony would have rebutted the State's argument that imposition of a life sentence would be insufficient punishment and would not hold Mr. Galloway accountable for the capital murder, and that defense counsel's closing argument requesting a life sentence was a plea for "sympathy."[45] Therefore, due process mandated its admission. *Simmons v. South Carolina*, 512 U.S. 154, 164 (1994). Nevertheless, the trial court excluded the

[45] *See, e.g.*, R. 857 ("And today is the day that I ask you to hold the defendant accountable for his actions because that's what this case is about."); R. 858 ("This case is about accountability for those actions and nothing else."); R. 868-69 ("Now, what the defense has been asking you to do for the last ten minutes or so is to have sympathy. It's been a passionate appeal for Leslie Galloway. Well, I want you to remember these facts when you're back there considering what the appropriate sentence is."); R. 869 ("And then I want you to ask, is that deserving of sympathy.").

testimony in violation of Mr. Galloway's constitutional rights. U.S. CONST. amends. VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 26, 28. R. 803-04; R.E. Tab 7.

The court's ruling also violated due process because prosecutors in Mississippi have a right to argue and present evidence at a capital trial regarding the "manifold pleasures" of prison life (*see Edwards*, 737 So. 2d at 299-300) and, therefore, defendants must be given the right to argue and present evidence about the harshness of that life. *Cf. Wardius v. Oregon*, 412 U.S. 470, 475 (1973). What is good for the goose is good for the gander.

Further, despite this Court's holding in *Wilcher v. State*, 697 So. 2d 1123, 1133 (Miss. 1997), Dr. Cabana's testimony met the legal definition of mitigation and, therefore, was admissible under the Eighth Amendment and Mississippi law. *See McCleskey v. Kemp*, 481 U.S. 279, 306 (1987) (capital defendant is entitled to have his jury consider "any relevant circumstance that could cause it to decline to impose the [death] penalty."); *Tennard v. Dretke*, 542 U.S. 274, 284 (2004); *Mackbee v. State*, 575 So. 2d 16, 39 (Miss. 1990) ("Mississippi allows 'evidence of mitigating circumstance of an unlimited nature.'") (citations omitted); *Davis v. State*, 512 So. 2d 1291, 1293 (Miss. 1987) (defendant is entitled to demonstrate to the jury that he will be subject to "severe punishment" as part of his right to present his mitigation case).

Additionally, Dr. Cabana's testimony was admissible under the Eighth Amendment because it would have provided the jury with accurate sentencing information, and both the United States Supreme Court and this Court have recognized that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976); *accord Mackbee v. State*, 575 So. 2d 16, 39 (Miss. 1990) (emphasizing that a capital jury needs "as much information as possible when it makes its sentencing determination"). This is especially true when the defendant seeks to correct common

misconceptions about the corrections system. *See Mackbee*, 575 So. 2d at 41 ("A state of affairs where the capital sentencing jury is allowed to wander unguided through the maze of its own misperceptions is unconscionable.") (citation omitted); *Simmons*, 512 U.S. at 169 ("It can hardly be questioned that most juries lack accurate information about the precise meaning of `life imprisonment' as defined by the States."). The trial court's rulings thus impermissibly prevented the jury from considering relevant mitigating evidence. U.S. CONST. AMENDS. VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 26, 28. Mr. Galloway must receive a new sentencing trial.

7. The prosecution engaged in misconduct that requires reversal.

Neither a defendant's conviction nor his death sentence can be based on prosecutorial misconduct. *See, e.g., Berger v. United States*, 295 U.S. 78, 84-89 (1935); *Griffin v. State*, 557 So. 2d 542, 552-53 (Miss. 1990). As demonstrated below (as well as other sections of this brief), there is an intolerable risk that Mr. Galloway's conviction and death sentence were based on significant and pervasive prosecutorial misconduct. The prosecution 1) presented and relied heavily upon Dr. McGarry's scientifically unreliable and, therefore, false and highly misleading testimony; 2) misstated the evidence, 3) vouched for a witness, 4) inflamed the passions and prejudices of the jurors, 5) deflected the jury's attention from the issues it had to decide, and 6) misstated the law.

1) Due process clause precludes prosecutors from presenting or arguing what they know or should know to be false or highly misleading evidence.[46] Here, the prosecution violated the

[46] *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment") (citations omitted); *United States v. Rivera Pedin*, 861 F.2d 1522, 1530 n.14 (11th Cir. 1988) ("the *Napue* rule applies where testimony, 'even though technically not perjurious, would surely be highly misleading to the jury....'") (*quoting Dupart v. United States*, 541 F.2d 1148, 1150 (5th Cir. 1976)); *Blakenship v. Estelle*, 545 F.2d 510, 514 (5th Cir. 1977) (granting relief when the testimony was not technically perjurious but highly misleading); *United States v. Agurs*, 427 U.S. 97, 103 (1976) (due process violation results when prosecutor knew, or should have known, that perjured testimony was presented, and testimony would have affected the outcome of the trial). *See also Miller v. Pate*, 386 U.S. 1, 4-7 (1967)

Constitution by presenting Dr. McGarry's scientifically invalid and, therefore, false and highly misleading to the jury and relying heavily upon it in closing. *See supra* at Point 1 (incorporated herein by reference).

2) This Court has held that the prosecution may not seek to bolster its case by referring to facts outside the record or by misstating the evidence.[47] Here, the prosecution repeatedly misstated the testimony of defense DNA expert Dr. Ronald Acton. *See generally* Dr. Acton's testimony, R. 693-726. First, the prosecution misrepresented that Dr. Acton had "agreed with every – all but two different exhibits that were presented by the crime lab beyond a reasonable doubt that this defendant was responsible for the murder of Kela Anderson." R. 762. Second, it twice misrepresented that Dr. Acton had agreed that it was the victim's tissue under Ms. Varghese's car. R. 762; 782-3.

The prosecution also misstated the testimony of DNA analyst Bonnie Dubourg. She testified that her lab obtained samples from shoes found at Mr. Galloway's mother's house with "possible blood **like**" substances and a hat with a "soiled" bill. R. 645, 646, 659 (emphasis

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(finding due process violation where State presented false testimony and emphasized false testimony in summation); *State v. Bass*, 465 S.E.2d 334, 338 (N.C. 1996) (reversing conviction where prosecutor misleadingly argued to the jury that the child sex victim would not have known about sexual activity but for defendant's alleged abuse, when the prosecutor was aware that "the contrary [was] true"); *Brown v. Borg*, 951 F.2d 1011, 1015 (9th Cir. 1991) (noting that prejudice to fair trial created when prosecutor "argue[s] false evidence"). *Cf. Napue*, 360 U.S. at 272 (finding due process violation where State allowed false testimony to go uncorrected); *Jenkins v. Artuz*, 294 F.3d 284, 294 (2d Cir. 2002) (condemning prosecutor's summation "falsely suggesting the absence of a deal between [witness] and the prosecution," but finding it unnecessary to resolve whether it alone warranted relief).

[47] *See Dedeaux Utility Co., Inc. v. City of Gulfport*, 63 So. 3d 514, 543 (Miss. 2011) ("[T]his Court finds that the closing argument of counsel for Gulfport was not based upon admissible evidence.") (citing, *inter alia*, *Clemons v. State*, 320 So. 2d 368, 371 (Miss. 1975) ("[W]hen counsel departs entirely from the evidence in his argument, … the trial judge should intervene to prevent an unfair argument.")); *Flowers v. State*, 842 So. 2d 531, 554 (Miss. 2003) ("Counsel cannot, however, state facts which are not in evidence, and which the court does not judicially know, in aid of his evidence.") (citation omitted); *Griffin*, 557 So. 2d at 553 (explaining that prosecutor commits error by arguing facts which "lack evidentiary support"). Where the State repeatedly misstates the testimony of a witness or witnesses, "[t]he cumulative effect . . . [may be to] deny [defendant] his right to a fair trial." *Flowers*, 842 So. 2d at 556; *see also Clemons*, 320 So. 2d at 372-73.

added). No witness stated that the shoes or hat had blood on them. Yet in closing argument, the prosecution claimed that the shoes and the hat had Shakeylia Anderson's blood on them. R. 782.

3) & 4) This Court has "condemned personal vouching of witnesses by the prosecution." *Manning v. State*, 735 So. 2d 323, 344 (Miss. 1999) (citing *Bell v. State*, 725 So. 2d 836, 852 (Miss. 1998)). Here, the prosecution improperly vouched for its witness Dixie Brimage and went outside the record when it stated, "[Dixie] bravely told us who [the victim] was talking to by that car, the defendant, Leslie Galloway." R. 759. This comment also improperly inflamed the jurors' passions and prejudices by suggesting that Dixie had reason to fear Mr. Galloway.[48]

4) & 5) During the penalty phase, the prosecution engaged in misconduct when it repeatedly asked Mr. Galloway's mitigation witnesses whether they believed that the punishment should fit the crime, R. 830, 832, 834, 838, 840, which inflamed the passions and prejudices of the jurors, deflecting their attention from the issue they were to decide. *See, e.g., Hickson*, 472 So. 2d at 384. The jury's legal obligation was to determine the appropriate penalty based on their assessment not only of the nature and circumstances of the offense but also of the character and background of the defendant. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

6) In its penalty phase summation, the prosecution told the jury that a carjacking conviction "clearly and **by law** is a conviction involving the use of threat or violence to another person" and, therefore, the jury should find the aggravating circumstance that the defendant had previously been convicted of a crime the use or threat of violence. R. 859 (emphasis added); MISS. CODE § 99-19-103(5)(b). As shown *infra* at Point 24, this argument was a misstatement of

[48] *See Hickson v. State*, 472 So. 2d 379, 384 (Miss. 1985) ("[C]onduct by the prosecuting attorneys that ... interjects appeals to bias, passion or prejudice .... Where such conduct is so substantial that the accused's right to a fair trial is substantially impaired [and]. . . . [w]here the trial judge has abused his discretion in such matters, we unhesitatingly reverse."); *Clemons v. State*, 320 So.2d 368, 371 (Miss. 1975).

the law.[49] Carjacking is not a crime of violence per se, and so carjacking is not a per se conviction meeting the aggravating circumstance. The prosecutor's misstatement rendered the sentencing phase of the trial fundamentally unfair. As the United States Supreme Court has recognized, a prior conviction for a crime involving violence could "be 'decisive' in the 'choice between a life sentence and a death sentence.'" *Johnson*, 486 U.S. at 586 (quoting *Gardner*, 430 U.S. at 359). The misstatement of the law – never corrected by the court – unconstitutionally relieved it of or at least greatly diminished its burden of proving the aggravator beyond a reasonable doubt. *Nixon v. State*, 533 So. 2d 1078, 1099 (Miss. 1987); U.S. CONST. amends. VI, VIII, XIV; MISS. CONST. art. 3, § 14. 26, 28. *See also State v. Erickson*, 227 P.3d 933, 939 (Idaho App. 2010) ("Misconduct may occur by the prosecutor diminishing or distorting the State's burden to prove the defendant's guilt beyond a reasonable doubt.").

Both individually and cumulatively, this misconduct affected Mr. Galloway's substantial rights, violated his constitutional rights, was plain error, and mandates reversal.[50]

8. Mr. Galloway was severely prejudiced by the State's injection into the trial of non-confronted hearsay statements.

The trial court improperly admitted prejudicial testimonial hearsay statements during the testimony of Inv. Carbine, Lt. Ken McClenic of the Jackson County Sheriff's Department, and DNA analyst Dubourg. Offered for the truth of the matter asserted, the statements were inadmissible hearsay. M.R.E. 801(c), 802; *Ratcliff v. State*, 308 So. 2d 225, 227-28 (Miss. 1975); *Clemons v. State*, 732 So. 2d 883, 887-88 (Miss. 1999). Moreover, because the

[49] A prosecutor's misstatement of the law requires reversal when 1) it is in fact a misstatement of the law and 2) the misstatement would render the trial fundamentally unfair. *Holland v. State*, 705 So. 2d 307, 346 (Miss. 1997).

[50] *Ross v. State*, 954 So. 2d 968, 988 (Miss. 2007); *see also Flowers v. State*, 773 So. 2d 309, 328 (Miss. 2000); *Simmons v. State*, 805 So. 2d 452, 468 (Miss. 2001) (*citing Pinkney*, 538 So. 2d at 338); M.R.E. 103(d); U.S. Const. amends. VI, VIII, XIV; Miss. Const. art. 3, §§ 14, 24, 26, 28, 31. Alternatively, it was the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. Further, it meant that Mr. Galloway's death sentence "was imposed under the influence of passion, prejudice, or any other arbritary factor." MISS. CODE § 99-19-105(3)(a).

statements were testimonial[51] and the out-of-court witnesses were not shown to be unavailable and Mr. Galloway did not have a prior opportunity to examine them, their admission violated Mr. Galloway's confrontation clause rights. *Crawford v. Washington*, 541 U.S. 36, 59 (2004); *Goforth v. State*, 70 So. 3d 174, 183 (Miss. 2011); U.S. CONST. AMENDS. VI, XIV; MISS. CONST. art. 3, § 26.

Inv. Carbine. Inv. Carbine testified that she found a pair of shoes, a hat, and a New Amsterdam gin bottle in a space she identified as Mr. Galloway's room in his mother's house. R. 486-88, 491, 492. During cross-examination, she explained that she knew the area belonged to Mr. Galloway because, when executing the search warrant on the house, his mother pointed out "his living space, the space he occupied while he was there." R. 520. She described the space as "a bathroom, with a majority – or all of Galloway's items belonged to him …." R. 520. On redirect, when asked again how she knew the space belonged to Mr. Galloway, she responded, "His mom pointed it out to us." R. 533-34. The court overruled defense counsel's hearsay objection. R. 534.

Inv. Carbine, of course, had no personal knowledge that either that the space or the items belonged to Mr. Galloway. Her testimony merely reiterated the mother's out-of-court statements. These testimonial statements were highly prejudicial. DNA samples found on the shoes and hat produced profiles consistent with Ms. Anderson's known reference sample. R. 645-46. The bottle of gin was the same brand as that found at the crime scene. R. 497-98. The defense questioned Ms. Dubourg about her lab's failure to further test the hat and shoes to identify their owner, *see* R. 659-60, and suggested to the jury that the shoes and the hat could

[51] A statement is testimonial "when it is given to the police or individuals working in connection with the police for the purpose of prosecuting the accused." *Hobgood v. State*, 926 So. 2d 847, 852 (Miss. 2006); *Crawford*, 541 U.S. at 51-52.

have belonged to Cornelius Triplett, who also lived at the house. *See* R. 770, 771. The defense also questioned the decision not to test the gin bottle for fingerprints. R. 770, 771.

In rebuttal closing argument, the State relied on Inv. Carbine's hearsay testimony to link Mr. Galloway to the crime and contradict the defense theory:

> [Inv. Carbine] went to the house and she found the area where Bo stayed, that defendant …. Went to his room. What did she find. She found the shoes, the hat, the gin bottle, some personal belongings of the defendant in the room **where that defendant's momma said he occupied. Well, it's her house. She knows who lives there.** And those were the shoes, that was the hat that had Shakeylia's remains, her blood on them in his room, nobody else's.

R. 782 (emphasis added). If unable to identify the space and items as belonging to Mr. Galloway through his mother's hearsay, the State would have been hindered in its ability to connect Mr. Galloway to Ms. Anderson's murder, and the defense theory that Mr. Triplett may have committed this crime would have been strengthened.

Inv. Carbine also identified cell phone numbers as belonging to Shakeylia Anderson and Leslie Galloway even though she had no personal knowledge that the numbers belonged to them. R. 482-83, 522. Admission of this hearsay, too, was highly prejudicial. The State sought to use the phone records of these numbers to prove that Mr. Galloway's calls to Ms. Anderson abruptly stopped the night she disappeared, which demonstrated consciousness of guilt. R. 780.

Lt. McClenic. Lt. McClenic testified that Mr. Galloway was driving his mother's white Taurus when it left her house on December 9, 2008, shortly before law enforcement arrested him. R. 537, 539. But he then admitted that he was simply reporting what his deputies told him. R. 541, 542.

This hearsay testimony was admitted for its truth and damaged the defense's case. The defense conceded that the Taurus was the murder weapon but questioned who drove the vehicle.

R. 772-73. Specifically, the defense maintained that Mr. Triplett may have been who Ms. Brimage saw in the Taurus the night Ms. Anderson disappeared. R. 767.

Ms. Dubourg. DNA analyst Dubourg testified that her lab received and tested blood samples obtained from the interior of the Taurus for DNA testing. R. 640. *See also* R. 648 ("the swab with blood"), 649 (same). There is no evidence that Ms. Dubourg conducted any serological testing herself to confirm that the substance was blood. *Cf.* R. 645 (Ms. Dubourg describing the sample obtained from a shoe that contained a "possible blood **like** substance") (emphasis added). Indeed, it is not clear that anyone conducted such testing. Still, the prosecution exploited her hearsay statements as truth in summation, claiming that the substance found in the interior of the car contained Mr. Galloway's blood and Ms. Anderson's blood. R. 782 ("You will see the smear marks right by the trunk release, where if you want to hit the trunk release a mixture of that defendant's blood and Shakeylia Anderson's blood.").

The admission of these non-confronted testimonial hearsay statements by Inv. Carbine, Lt. McClenic and Ms. Dubourg, individually and cumulatively, violated Mr. Galloway's constitutional rights, including to confrontation, to effective assistance of counsel, to due process, and to a fair trial, as well as Mississippi's ban against hearsay evidence. U.S. CONST. amends. VI, VIII, XIV; MISS. CONST. art. 3, § 14, 24, 26; M.R.E. 801(c), 802. Their erroneous admission requires reversal.[52] *Goforth*, 70 So. 3d at 188.

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

The DNA evidence found on Leslie Galloway's mother's car, which was consistent with his and Shakeylia Anderson's DNA profiles, was critical to the State's case. *See* Point 3, *supra*.

[52] To the extent these issues were not preserved (*but see supra* n.16), this Court should review them as plain error, *Flowers*, 947 So.2d at 927, M.R.E. 103(d), under a relaxed procedural bar in a capital case, *Pinkney*, 538 So.2d at 338, or as the result of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. They were also an arbitrary factor under which death was imposed. MISS. CODE § 99-19-105(3)(a).

One of the defense theories was that the DNA may have gotten on the vehicle when it was left unattended overnight at Bob's Garage in Jackson County after Mr. Galloway's arrest, as Lt. McClenic testified. *See, e.g.*, R. 544-45. Lt. McClenic also testified that he did not know whether the owner of the garage or "anyone else" went in and out while the car was stored there. R. 544. On re-direct examination, but **not** in response to a question by the State, Lt. McClenic suddenly blurted out: "The only other person who would have gone in the building is if [the owner] got any more wrecker calls that night." R. 546. When defense counsel objected "to speculation," Lt. McClenic improperly insisted, "Well, I know it to be a fact." *Id*. The trial court overruled the objection. *Id*. In so ruling, the trial court committed reversible error.

Mississippi Rule of Evidence 602 could not be clearer: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." Mississippi Rule of Evidence 701 provides in pertinent part: "If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are … rationally based on the perception of the witness…." Lt. McClenic did not have personal knowledge that "the only other person who would have gone in the building is if [the owner] got any more wrecker calls that night" nor was this opinion testimony (which in any event Lt. McClenic insisted he knew as "fact") rationally based on his perception. Accordingly, the trial court erred by overruling defense counsel's objection to the testimony. Furthermore, the case must be reversed because this adamant testimony of Lt. McClenic, a law enforcement official, was likely instrumental in the jury's verdict. *See Jones v. State*, 678 So. 2d 707, 711 (Miss. 1996) (reversing because testimony exceeding witness's knowledge likely was instrumental in jury's decision.); *Estate of Carter v. Phillips and Phillips Constr. Co. Inc.*, 860 So. 2d 332, 335-36 (Miss. Ct. App. 2003)

(same). *See also United States v. Cleaves*, 299 F.3d 564, 569 (6th Cir. 2002) (reversing because the evidence of drug amounts was speculative).

The trial court's ruling also violated Mr. Galloway's rights to due process, a fair jury trial, to confront all witnesses against him and to a reliable sentencing determination as guaranteed him by the United States and Mississippi Constitutions.[53] U.S. CONST. amends. V, VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 24, 26, 28, 31. Due process aims "to prevent fundamental unfairness in the use of evidence." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (citation and quotation marks omitted). *See also* Point 1, subsection D, *supra* (incorporated herein by reference); *Mills v. Maryland*, 486 U.S. 367, 376 (1988). Reversal is required because the State cannot prove the error harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967).

10. Unwarranted delay in scheduling the trial in this case violated Mr. Galloway's constitutional rights to a speedy trial.

Mr. Galloway was arrested on December 10, 2008. R. 82. He asserted his speedy trial rights in writing on July 10, 2009 and again on July 29, 2009. C. 13-15; 21-23. The first trial setting was not scheduled until February 8, 2010 – 424 days after his arrest date. C. 9.

Mr. Galloway asserted the violation of his speedy trial rights pretrial. R. 82-83. The trial court denied any violation, based in large part on its erroneous factual calculation regarding the relevant time period. R. 87. *See infra*. The trial court erred by failing to find a speedy trial violation under the four-part balancing test established by *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (holding that the four factors to be analyzed are: (1) length of delay; (2) reason for delay;

[53] To the extent the constitutional claims were not preserved (*but see supra*, n.16), this Court should review them as plain error, *Flowers*, 947 So. 2d at 927; MISS. R. EVID. 103(d), by relaxing the procedural bar in this capital appeal, *Pinkney*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. Additionally, the statements were an arbitrary factor under which Mr. Galloway's sentence of death was imposed. MISS. CODE § 99-19-105(3)(a).

(3); defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant). R.E. Tabs 5, 10.

The delay in scheduling Mr. Galloway's trial violated his rights under the Sixth and Fourteenth Amendments and Art. 3, § 26 of the Mississippi Constitution. *Barker*, 407 U.S. at 514; *Johnson v. State*, 68 So. 3d 1239 (Miss. 2011).

(1) Length of delay. The trial court wrongly concluded that Mr. Galloway had failed to show presumptive prejudice because the time period between the first trial setting and his arrest was shorter than eight months. R. 87. The trial court relied upon an erroneous representation by the State that the time period between Mr. Galloway's arrest and trial date was only 224 days. *Id*. In fact, as the State had conceded at the hearing, the time period between Mr. Galloway's arrest to *arraignment* was 224 days, and the time period from arraignment to first trial setting was another 200 days. R. 84. The actual time period between his arrest and the first scheduled trial date was 424 days, or about one year and two months later. *Id.*[54] This well exceeds eight months, and thus was presumptively prejudicial. *Johnson*, 68 So. 3d at 1242.

(2) Reason for the delay. The trial court further erred by ruling that the State provided a good reason for the delay by stating that it needed additional time to complete scientific testing. R. 86, 88.[55] The State failed to provide any documentation or facts of actual delays in obtaining testing results and, therefore, this Court should not accept this assertion for purposes of this claim. *See Flora v. State*, 925 So. 2d 797, 817 (Miss. 2006) ("This Court should not be expected to simply accept at face value the claims of crowded dockets, backlogged laboratory testing, and other similar logistical problems, which undeniably exist."). Further, the record suggests that

[54] The trial began on September 21, 2010. R. 155. It was continued from the February setting at the request of defense counsel, however, so the time after February 8, 2010, is not included in this analysis.
[55] The trial court also pointed to the requests by Defense for additional time for expert review of evidence. R. 88. These requests were the basis of the continuance from the February 8, 2010 date and should not be considered in the delay in setting the original trial date.

the State's discovery had been provided by the time of arraignment. The defense moved for a DNA expert to review the State's testing results in July of 2009, more than six months before the trial date. C. 42-43. The court's scheduling order of August 31, 2009, directed the defense to provide discovery to the State by November 20, 2009, but did not include a date for the State to provide discovery, suggesting that the State had already provided discovery. C. 44. The lack of an adequate explanation for the delay weighs against the State. *Flora,* 925 So. 2d at 817-18; *see also Barker,* 407 U.S. at 531 (even "neutral" explanations, like delay from crowded dockets, should weigh against the State).

(3) Assertion of Speedy Trial Rights. As stated above, Mr. Galloway asserted his speedy trial rights in writing twice and alleged a speedy trial violation at a pretrial hearing. This factor also weighs in favor of finding a violation. *Johnson,* 2011 WL 2569283, at *3.

(4) Prejudice to the Defendant. The State should bear the burden of persuasion on this factor because the defendant has established presumptive prejudice. *State v. Ferguson,* 576 So. 2d 1252, 1255 (Miss. 1991); *but see Johnson*, 2011 WL 2569283, at *4. Even if the defendant has the burden, however, he can meet it. He was detained on capital charges, the most serious and anxiety-producing, for several months before a trial date was set. In addition, the delayed trial may have affected adversely the reliability of the memory of at least one state witness. *See* R. 432, 443 (Testimony of Dixie Brimage that she could positively identify Mr. Galloway at the time of trial, two years after she allegedly observed him); R. 442-43 (testifying that she could not identify Mr. Galloway with certainty shortly after the crime from the photo line up at the police station). Moreover, as this Court has previously explained, some of the greatest risks of prejudice may be the most difficult to demonstrate. *Perry v. State,* 419 So. 2d 194, 198, 200 (Miss. 1982) (identifying the risks to the defendant, including the anxiety during extended pretrial detention and the risk of memory loss by witnesses, and then observing that "[l]oss of

memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."). *See also Moore v. Arizona*, 414 U.S. 25, 26-27 (1973) ("[P]rejudice to a defendant … is not confined to the possible prejudice to his defense . . . .").

Additionally, "it is clear that an affirmative showing of prejudice is not necessary in order to prove a denial of the constitutional right to a speedy trial." *Flores v. State*, 574 So. 2d 1314, 1323 (Miss. 1990) (*citing Trotter v. State*, 554 So. 2d 313, 318 (Miss. 1989). This factor should weigh in favor of Mr. Galloway. Reversal is required.

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

The trial court erred by denying defendant's proposed sentencing instructions 2A, 3AA, D4A, and 7A. R.E. Tab 12. The errors violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, Art. 3, §§ 14, 26, 28, and 31 of the Mississippi Constitution, and the Mississippi law detailed below. His death sentence must be vacated.

The trial court erred by denying D4A, which correctly defined what a mitigating circumstance is. C. 296; R. 848-49. The trial court's charge did not include such a definition, and there is a constitutionally intolerable risk that the jurors did not know the definition. According to the findings of the Capital Jury Project (CJP),[56] "[t]he very word 'mitigation' is foreign to most jurors – and indeed a number of the jurors who were interviewed obviously did not understand the term, at times actually confusing it with aggravation." Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1044 (2001). Moreover, "[e]ven jurors who did seem to understand the term [mitigation] often dismissed evidence that clearly should be considered

[56] The "Capital Jury Project … [is] a multidisciplinary study of capital jury decision making involving intensive interviews with hundreds of jurors from hundreds of capital trials from around the country." Steven Mulroy, *Avoiding "Death by Default": Does the Constitution Require a "Life without Parole" Alternative to the Death Penalty?*, 79 TUL. L. REV. 401, 431-32 (December 2004).

mitigating, such as childhood abuse and mental impairment, as not 'excusing' the defendant's conduct or reducing responsibility." *Id*. at 1044.[57]

The trial court also erred by denying D3AA.[58] C. 302; R. 848. The court's charge directed the jury that if it found one or more of the aggravating circumstances, "then each of you must consider whether there are mitigating circumstances which outweigh the aggravating circumstance(s)," and went on to instruct the jury that it "may" impose a death sentence if it finds that the mitigators do not outweigh the aggravators. C. 282-83. But the charge did not expressly inform the jury that it could impose a life sentence *even if* it found that the mitigating circumstances did not outweigh the aggravators. The defendant therefore requested an instruction doing so, D3AA. *See also* R. 853-55. The trial court denied it, citing this Court's decisions in *Manning v. State*, 726 So. 2d 1152 (Miss. 1998), and its progeny. R. 846, 851. However, *Manning* is readily distinguishable because there the jury was specifically instructed: "The Court instructs the jury that the prosecution carries the burden of showing not only that

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[57] *See also id.* at 1042 ("[e]ven when jurors do report a discussion of mitigating factors, their understanding of what the law defines as mitigation is extremely limited. In the relatively rare instance when mitigating evidence is mentioned, jurors either seem not to understand what they are to do with such evidence or they dismiss it out of hand as no excuse for the murder. The impression conveyed is that unless the evidence in mitigation either proves that the killing was not deliberate or furnishes an excuse for the killing, such as insanity or duress – factors that would invalidate the capital murder conviction – it does not provide adequate reason to impose a sentence other than death."); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 2 (1995) ("[T]here are disturbing indications that jurors do not adequately understand instructions on mitigation in death penalty cases."); Craig Haney, *Taking Capital Jury Seriously*, 70 IND. L.J. 1223, 1224-1225, 1229 (1995) ("Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operation of capital punishment – sometimes unclear about the fundamental import of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating), almost always confused over the meaning of the all-important capital instructions, in some instances wrong about the decision rules by which they are to reach a sentencing verdict … ."); Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUM. BEHAV. 411, 424 (1994) (mock jurors had difficulty defining aggravating and mitigating factors, particularly mitigating factors).

[58] D3AA was somewhat similar to D7A, also denied. C. 299; R. 851. However, D7A was a mercy instruction; D3AA was not. *Cf. Ross v. State*, 954 So. 2d 968, 1012 (Miss. 2007) ("This Court does not recognize a right to a mercy instruction.").

aggravating circumstances exist but also that they are sufficient enough to warrant death. If the prosecution proves the existence of an aggravating circumstance, you are free to find it insufficient to warrant death and are not required to automatically impose death." 726 So. 2d at 1198. No such instruction was given in this case.

D3AA would not have nullified the weighing process; it would have clarified what legal options were available to the jury once it was done with weighing. The sentencing statute itself, MISS. CODE § 99-19-101(2)(d), specifically permits the jurors to make the finding D3AA instructs them about, as do the United States and Mississippi Constitutions. *Graham v. Collins*, 506 U.S. 461, 468 (1993) (*relying on Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976)); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Pruett v. Thigpen*, 665 F.Supp. 1254, 1277-78 (N.D. Miss. 1986); *Manning v. State*, 726 So. 2d 1152 (Miss. 1998). It was error to deny D3AA.

In addition, the trial court incorrectly refused D2A, which would have informed the jury that under black letter Mississippi law a sentence of life in prison without parole is imposed if the jury cannot agree on sentence. MISS. CODE § 99-19-103. *See also* C. 295; R. 845. The jury was instructed that one possible verdict was, "We, the jury, are unable to agree unanimously on punishment." C. 284. Almost all jurors know that, ordinarily, a hung jury means there will be another trial, before another jury. Because the state's death penalty statute requires a different, counter-intuitive outcome, under the Eighth and Fourteenth Amendments the jurors should have been apprised of what the sentence would be if they were unable to agree. *Cf. Simmons v. South Carolina*, 512 U.S. 154, 169-70 (1994) (relying on similar misapprehensions among jurors).

Given these instructional errors, Mr. Galloway's death sentence must be vacated and the case remanded for a new penalty hearing. *Rubenstein v. State*, 941 So. 2d 735, 791 (Miss. 2006).

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

At the penalty phase, the trial court sustained the prosecution's objection to the defense's argument pointing out the weakness of its evidence of sexual battery – evidence which was relevant to two aggravating circumstances. The court also sustained the State's objection to defense counsel's argument that a sentence of life without parole would "end all of the killing in this situation." These rulings, individually and cumulatively, violated Mr. Galloway's rights under Mississippi law and under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Art. 3, §§ 14, 24, 26, and 28 of the Mississippi Constitution, including his right to closing argument, a constitutionally guaranteed, basic element of the adversary process.[59]

Residual Doubt. During penalty summation, defense counsel attempted to address the weakness of the State's evidence of anal sexual battery, asserting that Dr. McGarry had made a "quantum leap to sexual battery" from the small anal tear. R. 863. "There wasn't any other evidence of sexual battery. No sperm. No other kinds of injuries nothing. Just that, that three quarter inch cut about that long on her anus." *Id*. The prosecution objected, "the guilty phase has already been established," and the trial court sustained. R. 864.

The ruling violated Mr. Galloway's constitutional rights as enumerated above. The State argued that the sexual battery supported two aggravating circumstances: the offense was committed during a sexual battery and that it was especially heinous. *See* R. 859, 867-68. Mr. Galloway had a right to have his counsel address the weakness of the State's evidence supporting those aggravators.

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[59] *See, e.g., Herring v. New York*, 422 U.S. 853, 857-860, 862-863 (1975) (Sixth Amendment prohibits court from unreasonably restricting accused's right to argue his theory of case during closing arguments because to do so violates his right to effective assistance of counsel, to jury trial, and to present defense; "[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments .... The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."). *See also* MISS. CODE § 99-19-101(1) ("The state and the defendant and/or his counsel shall be permitted to present arguments for or against the sentence of death.").

Additionally, even if defense counsel had merely been seeking to argue residual doubt, [60] they were entitled to do so under Mississippi law and under the Sixth, Eighth and Fourteenth Amendments. *See Hansen v. State*, 592 So. 2d 114, 151 (1991) (while a defendant is not entitled to residual doubt instruction, "counsel remains free to argue to the jury any such doubt"); *Minnick v. State*, 551 So. 2d 77, 94-95 (Miss. 1988).[61]

End the Killing. Also at the penalty phase, defense counsel asked the jury to impose a life sentence because it would "end all of the killing in this situation." R. 866**.** The prosecution objected, and the court sustained. *Id*. The Alabama Court of Criminal Appeals has described a capital defendant's plea to "end the killings" as an eloquent argument for mercy. *Duren v. State*, 590 So.2d 360, 367 (Ala. Crim. App. 1990). "Clearly, it is appropriate for the defense to ask for mercy or sympathy in the sentencing phase." *King v. State*, 784 So. 2d 884, 890 (Miss. 2001). Further, because the prosecution is allowed to ask the jury to "send a message" with a death verdict, *Humphrey v. State*, 759 So. 2d 368, 374 (Miss. 2000), due process grants a defendant the right to ask the jury to end the killing by voting for life. *Cf. Wardius v. Oregon*, 412 U.S. 470, 475 (1973). This ruling also violated Mr. Galloway's constitutional rights as enumerated above.

Because the errors were not harmless, Mr. Galloway's death sentence must be vacated.

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

At a September 13, 2010, pretrial omnibus hearing, the trial court required Leslie Galloway to disclose to the prosecution "the general nature of the defense." R. 149;[62] C. 164.

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[60] The Capital Jury Project found that residual doubt "is the most powerful 'mitigating fact.'" Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998).

[61] The United States Supreme Court recently left open whether capital defendants have a constitutional right to argue residual doubt evidence at sentencing. *See Oregon v. Guzek*, 546 U.S. 517, 525-26 (2006).

[62] The pertinent exchange was as follows:

> THE COURT: All right, Mr. Rishel, look under 11A, subparagraphs 1, 2, 3, 4, 5. Do any of those pertain to this case?

Mr. Galloway was compelled to state that his defense would be "lack of special intent" and "General denial. Put prosecution to proof." R. 149; C. 164. The trial court's requirement that the defense disclose pretrial the general nature of the defense affected Mr. Galloway's substantial rights and was plain error. *Ross v. State*, 954 So. 2d 968, 988 (Miss. 2007); *see also Flowers v. State*, 773 So. 2d 309, 328 (Miss. 2000); *Simmons v. State*, 805 So. 2d 452, 468 (Miss. 2001) (*citing Pinkney v. State*, 538 So. 2d at 338); M.R.E. 103(d).[63] The trial court's action violated Mr. Galloway's rights under Miss. URCCC Rule 9.04, the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Art. 3, §§ 14, 23, 26, 27, 28, 31 of the Mississippi Constitution. Reversal is required.

Mississippi URCCC Rule 9.04 (C) governs a criminal defendant's pretrial discovery obligations.[64] Nothing in it can reasonably be construed as requiring a criminal defendant to disclose pretrial the "general nature of the defense." Therefore, the trial court violated the plain terms of the rule by requiring Mr. Galloway to make this disclosure.

Further, as URCCC Rule 9.04 (C) recognizes, a criminal defendant's disclosure obligations are "subject to constitutional limitations." Both Article 3, § 26 of the Mississippi

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MR. RISHEL: They do, your Honor. Number 2 and number 5. R. 149.

[63] Counsel's failure to object was also ineffective. *Murray*, 477 U.S. at 488.

[64] The subsection reads in pertinent part:

C. If the defendant requests discovery under this rule, the defendant shall, subject to constitutional limitations, promptly disclose to the prosecutor and permit the prosecutor to inspect, copy, test, and photograph the following information and material which corresponds to that which the defendant sought and which is in the possession, custody, or control of the defendant or the defendant's attorney, or the existence of which is known, or by the exercise of due diligence may become known, to the defendant or defendant's counsel:

1. Names and addresses of all witnesses in chief which the defendant may offer at trial, together with a copy of the contents of any statement, written, recorded or otherwise preserved of each such witness and the substance of any oral statements made by any such witness.

2. Any physical evidence and photographs which the defendant may offer in evidence;

3. Any reports, statements, or opinions of experts, which the defendant may offer in evidence.

Constitution and the Fifth Amendment to the United States Constitution guarantee criminal defendants the right against self-incrimination. The requirement that the defendant disclose the general nature of his defense pretrial clearly violates that right. Defense counsel's statements regarding the general nature of the defense is apparently admissible as an admission. *See, e.g., State v. Dault*, 578 P.2d 43, 48 (Wash. Ct. App. 1978); *Hoover v. State*, 552 So. 2d 834, 839-40 (Miss. 1984). Requiring the defendant to make this statement pretrial clearly is unconstitutional. *See Estelle v. Smith*, 451 U.S. 454, 468-69 (1981) (admission of a psychiatrist's testimony on the topic of future dangerousness, based on a defendant's pretrial statements, violated the Fifth Amendment). *But cf. Williams v. Florida*, 399 U.S. 78, 84 (1970) (application of the Florida notice-of-alibi rule did not deprive defendant of due process or a fair trial or compel him to be a witness against himself). Certainly, this is true under the Mississippi Constitution. The text of Section 26 is broader than the Fifth Amendment, guaranteeing that a criminal defendant "shall not be compelled to give evidence against himself." *Cf. Burgess v. City of Gulfport*, 814 So. 2d 149, 152-53 (Miss. 2002) (finding that Mississippi Constitution has more liberal standing requirements than United States Constitution based on differences in the texts). Requiring a criminal defendant to disclose pretrial the general nature of his defense clearly compels him to give evidence against himself. Thus, according to the plain meaning of Section 26, it is unconstitutional. *See, e.g,. Mississippi Bureau of Narcotics v. Lincoln County*, 605 So. 2d 802, 803 (Miss. 1992) ("In construing a provision of the Constitution, this Court must give plain meaning to the words of the Constitution.") (citation omitted).

Because the State cannot prove the error harmless beyond a reasonable doubt, this Court must reverse. *Chapman v. California*, 386 U.S. 18, 24 (1967).

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

In addition to testifying to testimonial hearsay statements (*see supra* Point 3), prosecution witness Bonnie Dubourg lacked the expertise to testify regarding the interpretation of DNA mixtures and provided unreliable testimony to the jury regarding the mixture in this case. Defense counsel objected to her qualification as a DNA expert, but the court allowed her testimony.[65] R. 629. This unreliable testimony was also an arbitrary factor under which Mr. Galloway's death sentence was imposed. MISS. CODE § 99-19-105(3)(a). *Qualification*. The prosecution failed to establish Ms. Dubourg's expertise in analyzing DNA mixtures, which "can present interpretative challenges." Bruce Budowle et al., *Mixture Interpretation: Defining the Relevant Features for Guidelines for the Assessment of Mixed DNA Profiles in Forensic Casework*, 54 J. FORENSIC SCI. 810, 810 (July 2009). Interpretation of DNA mixtures is so complicated that a leading DNA treatise cautions, "As recommended by Peter Gill of the Forensic Science Service, the best advice is 'Don't do mixture interpretation unless you have to.'" Butler, FORENSIC DNA TYPING, at 166. John Butler of the federal National Institute of Standards and Technology (NIST) also states that mixtures can be impossible to "interpret without extensive experience and careful training." *Id*. at 154.

Defense DNA expert Dr. Ronald Acton acknowledged these problems: "You have to try to sort of deduce what you think may be the profile associated with one subject versus another, and that's very problematic." R. 705. *See also* National Research Council, *The Evaluation of Forensic DNA Evidence* 129 (1996); National Research Council, *DNA Technology in Forensic Science* 59, 66 (1992). The NIST's website has the following quote from Peter Gill, one of the pioneers of DNA forensic work: "If you show 10 colleagues a mixture, you will probably end up

[65] To the extent the objection did not preserve any of the below claims (*but see supra* n.16), this Court should review them as plain error, *Flowers*, 947 So. 2d at 927; MISS. R. EVID. 103(d), relax the procedural bar in this capital case, *Pinkney*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488.

with 10 different answers." NIST, John M. Butler and Margaret C. Kline, Mixture Interpretation Interlaboratory Study 2005 (MIX05) (Sept. 26-28, 2005), *available at* http://www.cstl.nist.gov/biotech/strbase/interlab/MIX05/MIX05poster.pdf (quoting Peter Gill, Human Identification E-Symposium, April 14, 2005); John M. Butler, *Mixture Interpretation Issues & Insights*, Scientific Working Group on DNA Analysis Methods (SWBDAM) (Jan. 10, 2007), *available at* http://www.cstl.nist.gov/strbase/pub_pres/SWGDAM_Jan2007_Mixture Interpretation.pdf ("Different levels of experience and training plays a part in effective mixture interpretation.").

Ms. Dubourg testified that she had a Bachelor's degree in Biological Sciences, had been working as a forensic DNA analyst for approximately 8 years, regularly attended conferences, and had testified as a DNA analyst approximately 30 times before. R. 626-27. Ms. Dubourg did not discuss any training she had with regard to the challenging task of mixture interpretation. Dr. Acton testified that in the labs he worked in – those with more exacting standards and stringent accreditation procedures – Ms. Dubourg "would not be considered an expert." R. 700-01. Her background, he said, would not provide her the training to ensure that she is minimizing risk in the interpretation of results and in the testing process. R. 701. As such, the court erred in qualifying her as an expert in DNA mixture interpretation. *Mississippi Transp. Comm'n v. McLemore,* 863 So. 2d 31, 42 (Miss. 2003); *Daubert*, 509 U.S. 579; M.R.E. 702. *See also Gause v. State,* 65 So. 3d 295, 306 (Kitchens, J., specially concurring and joined by a majority of the Court) (extensive experience in testifying alone does not automatically render an expert qualified) (collecting sources).

Unreliable Testimony. Ms. Dubourg's inadequate qualifications were abundantly apparent at trial. The victim's vaginal swab contained a DNA mixture, and "not all of Mr. Galloway's alleles were present," as Ms. Dubourg had to admit. R. 650. Nevertheless, she

testified that she could not exclude him as a minor contributor to the mixture, but could exclude 99.99% of the population. R. 650. Curiously, she reached the same calculation with respect to James Futch, all of whose alleles were accounted for in the mixture. R. 650.

The trial court failed in its role as gatekeeper in admitting this unreliable testimony. *Poole v. Avara*, 908 So. 2d 716, 723 (Miss. 2005) (citing *Kumho Tire*, 526 U.S at 147), *McLemore*, 863 So. 2d at 36; M.R.E. 702. It is widely recognized by leading forensic scientists that mixture interpretation lacks general acceptance in the forensic DNA community. John M. Butler, *Mixture Interpretation, supra* (quoting Mark W. Perlin, SCIENTIFIC VALIDATION OF MIXTURE INTERPRETATION METHODS 5 (Dec. 5, 2006)) ("DNA mixture evidence currently fails the general acceptance test of both *Frye* and *Daubert*, since there are no generally accepted methods for interpreting mixed stains.").[66] Ms. Dubourg did not analyze the mixture blindly, but instead sought to "match" Mr. Galloway to the profile from the sperm sample, despite his missing alleles. Such a practice "sets the stage for target shifting." Thompson, *Painting the Target*, at 261.

As another prominent DNA commentator has explained, sometimes "mixtures may yield DNA typing information only for exclusionary purposes; they should not then be used for inclusionary/statistical assessments." Budowle, *supra*, at 815. Dr. Acton explained that this was

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[66] A leading DNA scientist has observed regarding mixture interpretations:

> In the absence of objective standards for distinguishing inclusions from exclusions, estimates of the probability of a coincidental inclusion are problematic. How can we estimate the percentage of the population who would be 'included' if the standards for inclusion are ill-defined and can be stretched one way or another by the laboratory? Estimating the size of the 'included' population under these circumstances is analogous to estimating the length of the rubber band. … Because it is unclear just how far the laboratory might stretch to 'include' a suspect, the true size of the 'included' population cannot be determined. … This problem is particularly important in … the hard cases in which there are incomplete and mixed profiles.

William C. Thompson, *Painting the Target around the Matching Profile: the Texas Sharpshooter Fallacy in Forensic DNA Interpretation*, 8 LAW, PROBABILITY, & RISK 257, 261 (Sept. 2009).

just such a case. Given that Mr. Galloway's alleles were missing, the proper procedure, he said, would have been either 1) to say that the test is no good given Mr. Galloway's missing alleles or 2) to exclude him as a contributor at all. R. 706-07, 719-20.

Ms. Dubourg also claimed that Mr. Galloway's alleles were missing from the profile because "they're below the detection limits that we use on our instrument. … They're just flying below the radar." R. 657. Such an assertion was unreliable in that Ms. Dubourg failed to mention another obvious possibility – his alleles were absent because it was not his DNA. *See* R. 706 (Dr. Acton explaining that "if you leave some of your biological material … you don't leave [just] part of your genes").

Ms. Dubourg's unreliable conclusions regarding the DNA mixture from the sperm sample thus should have been excluded. *McLemore*, 863 So. 2d at 42; *Daubert*, 509 U.S. 579; M.R.E. 702.

These errors were not harmless. The State relied heavily on the DNA evidence in this case, and in particular on Mr. Galloway's inclusion as a minor contributor to the sperm sample to the exclusion of 99.99% of the population. *See, e.g.*, R. 762 ("sperm that was 99.99 percent match to two people, James Futch, who you heard from…. He wanted to see her killer brought to justice. And who was the other person, **99.99 percent match, Leslie Galloway**.") (emphasis added). While the trial court restricted the definition of sexual battery to require an act of nonconsensual anal penetration, the DNA evidence from the vaginal swab temporally and sexually connected Mr. Galloway to Ms. Anderson. Because some of Mr. Galloway's alleles were missing from the mixture profile, it was very possible that he should have been excluded as a match altogether. *See* R. 706-08. Instead, Ms. Dubourg's unreliable opinions, in the guise of expert testimony, left no doubt for the jury that Mr. Galloway was a minor contributor to the vaginal swab.

For these reasons, Mr. Galloway's capital murder conviction must be reversed.

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

The trial court also committed reversible error when it allowed, though Ms. Dubourg's testimony, the admission of out-of-court statistical probability assessments calculated by a software program without providing Mr. Galloway the opportunity to confront the estimates used in the software program, the program's ability to calculate statistics for a DNA mixture, or the program's ability to calculate statistics where some of the defendant's alleles are missing. As noted in Point 3, *supra*, incorporated herein, such out-of-court statements are prohibited under the confrontation clause. *See, e.g.*, *Crawford*, 541 U.S. at 59; Art. 3, §§ 14, 26, 28 of the Mississippi Constitution, and the prohibition against hearsay evidence, M.R.E. 802, 803.

Ms. Dubourg testified to probability assessments of the DNA evidence with respect to items found under the Taurus, inside the Taurus, in Ms. Anderson's vaginal swab, and on the hat and shoes from Mr. Galloway's mother's house to connect Mr. Galloway to this crime. *See* R. 643-48 (for each item of evidence, the probability estimate of a randomly selected person matching the DNA profile was over 1 in 100 billion times). Though "not all of Mr. Galloway's alleles were present" in the DNA mixture from Ms. Anderson's vaginal swab, Ms. Dubourg testified that she could not exclude him as a minor contributor to the mixture, but could exclude 99.99% of the population. R. 650. Ms. Dubourg did not perform these calculations herself. She obtained them by using a statistic software program called "pop stat" developed by the FBI that is "generally used by crime labs that have access to" the FBI's CODIS database. R. 651-2. The trial court's failure to exclude the DNA evidence without providing the defense an opportunity to confront the persons who created the "pop stat" program and the CODIS database violated the

Confrontation Clause, Art. 3, §§ 14, 26, 28 of the Mississippi Constitution, and the prohibition against hearsay evidence, M.R.E. 802, 803.[67] This error cannot be harmless. The program's statistical calculations of 1 in over 100 billion left no room for the jury to question that Mr. Galloway was a minor contributor to the vaginal swab or the "matches" that connected him to the crime. Reversal is required .[68]

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

At trial, for the first time, Dixie Brimage identified with certainty Leslie Galloway as the man who picked up her cousin Shakeylia Anderson the night of December 5, 2008. R. 432. Four days after Ms. Anderson's disappearance, Ms. Brimage described the man as having gold teeth, R. 445, but Mr. Galloway does not have gold teeth. R. 443. At that time, she was unable to positively identify him in a photo line-up.[69] R. 442-43. But at trial, nearly two years later, she did not hesitate to identify him, while still insisting that the person had gold teeth. R. 442.

The introduction of Ms. Brimage's extraordinarily suggestive and unreliable in-court identification violated Mr. Galloway's rights to a fair trial, to due process, to be free of self-incrimination, and to a reliable sentencing determination. U.S. CONST. amends. V, VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 24, 26, 28, 31; *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977); *Isom v. State*, 928 So. 2d 840, 847 (Miss. 2006).

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[67] *See Bullcoming* 131 S. Ct. at 2716; *Melendez-Diaz*, 129 S. Ct. at 2532; *Crawford v.* 41 U.S. at 54; *Goforth v. State*, 70 So. 3d at 187; *McGowen v. State*, 859 So. 2d at 339.

[68] This Court should review the court's failure as plain error, *Flowers*, 947 So. 2d at 927, M.R.E. 103(d), through a relaxation of the procedural bar in this capital appeal, *Pinkney v. State*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. Additionally, the failure was an arbitrary factor under which Mr. Galloway's sentence of death was imposed. MISS. CODE § 99-19-105(3)(a).

[69] The record contains only limited information about this lineup. Not raised by the State until redirect examination, Ms. Brimage apparently was shown a series of six photographs and picked the one of Mr. Galloway, but she could not identify him with certainty. R. 443. Given this limited information, Mr. Galloway cannot evaluate the suggestiveness, or lack thereof, of this alleged out-of-court identification.

Ms. Brimage's unreliable, suggestive, and highly damaging in-court identification was plain error.[70] *Flowers v. State*, 773 So. 2d 309, 326 (Miss. 2000); *Mickell v. State*, 735 So. 2d 1031, 1035 (Miss. 1999); MISS. R. EVID. 103(d). Further, the in-court identification was an arbitrary factor under which Mr. Galloway's death sentence was imposed. MISS. CODE § 99-19-105(3).

In reviewing whether an identification procedure violated due process, this Court first considers whether the procedure was unnecessarily or impermissibly suggestive. *York v. State*, 413 So. 2d 1372, 1383 (Miss. 1982). Ms. Brimage's in-court identification clearly meets this prong. "It is obviously suggestive to ask a witness to identify a perpetrator in the courtroom when it is clear who is the defendant." *United States v. Rogers*, 126 F.3d 655, 658 (5th Cir. 1997) (*see also* cases cited therein); *Moore v. Illinois*, 434 U.S. 220, 229 (1977) ("It is difficult to imagine a more suggestive manner [than an in-court identification].").

The Court next considers whether the procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Brathwaite*, 432 U.S. at 105 n.8. In evaluating this second prong, the Court should consider five factors: "1) the opportunity of the witness to observe the criminal at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the criminal; 4) the [witness'] level of certainty demonstrated by the witness at the confrontation; and 5) the length of time between the crime and the [identification]." *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972); *Isom*, 928 So. 2d at 848-49 (applying *Biggers* analysis to in-court identification independent of the pretrial identification). The Court must then weigh these factors "against … the corrupting effect of the suggestive identification." *Brathwaite*, 432 U.S. at 114.

[70] Defense counsel filed a motion to suppress the identification prior to trial, C. 17-, but the court never held an evidentiary hearing or ruled on the motion. *See* Point 23, *infra* (discussing counsel's ineffectiveness for its failure to call up and ask for a ruling on its motion).

This second prong is easily met here as well. Ms. Brimage's opportunity to observe the man was poor. She testified that she viewed the man for around five minutes through a glass door from a distance of 50-60 feet, sometime around 10:00 p.m. at night. R. 435-36. She could not see into the backseat of the car. R. 441-42. The man could not have seen her at the door while he was standing by his car. R. 437-38. Ms. Brimage's degree of attention is unclear from the record, and at best should be considered a neutral factor. She had never met Mr. Galloway or seen him before the alleged sighting that night. R. 438.

Further, Ms. Brimage's prior descriptions were seriously inconsistent with Mr. Galloway's appearance. Again, she insisted, both after the murder and at trial, that the man had gold teeth, R. 439, but Mr. Galloway does not have gold teeth. R. 443. Ms. Brimage was also unable to positively identify Mr. Galloway in a photo line-up shortly after the crime, which "inevitably heightens the risk that her in-court identification was induced by the suggestiveness of the setting in which it occurred." *Kennaugh v. Miller*, 289 F.3d 36, 46 (2d Cir. 2002).[71] It is no surprise that she was absolutely certain on the stand that Mr. Galloway, sitting behind the defendant's table on trial for the murder of her "best cousin," was the man who had picked up Ms. Anderson on the night she disappeared. The setting "made it all but inevitable" that she would identify Mr. Galloway. *Kennaugh*, 289 F.3d at 46 (*quoting Foster*, 394 U.S. at 443).

Finally, the two-year gap between the crime and Ms. Brimage's testimony should weigh heavily against admission of her in-court identification. *See Isom*, 928 So. 2d at 849.

These factors rendered the in-court procedure "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Brathwaite*, 432 U.S. at

[71] *See also Foster v. California*, 394 U.S. 440, 442-43 (1969) (reversing where witness was initially unsure but subsequent, suggestive lineups produced a definite identification); *Chapman v. State*, 725 So. 2d 744 (Miss. 1998) (reversing and rendering when evidence against defendant included suggestive identification by eyewitness at the police station, after eyewitness failed to identify him thrice before).

105 n.8 (*quoting Simmons v. United States*, 390 U.S. 377, 384 (1968)). Ms. Brimage's in-court identification of Mr. Galloway, "given under undeniably suggestive conditions, in a context of failed earlier confrontations," should have "raise[d] serious doubts about the reliability of her [] testimony." *Kennaugh*, 289 F.3d at 46. Further, any accuracy the factors do suggest is outweighed by the "corrupting effect of the suggestive identification." *Brathwaite*, 432 U.S. at 114. The identification should have been excluded.

As the only eyewitness in the case, Ms. Brimage's in-court identification of Mr. Galloway as the driver of the vehicle that the State's evidence suggested killed Ms. Anderson was extraordinarily prejudicial. Without it, the State would have been stuck with her inconclusive photo identification and her previous description of a man with gold teeth that could not have been Mr. Galloway – which would have supported defense counsel's theory at trial that another person may have been in the car, and that that person may have been Cornelius Triplett.[72] R. 439, 441-42, 765-67. R. 439-40, 765, 767. Her utterly unreliable and impermissibly suggestive in-court identification of Mr. Galloway requires reversal of this conviction and death sentence. *Flowers*, 773 So. 2d at 326; MISS. CODE § 99-19-105(3).

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

In addition to the risks noted in Point 2, *supra*, the court's silence in the face of the jury's third note created the reasonable probability that at least some jurors convicted Mr. Galloway for having consensual, vaginal sex with Ms. Anderson, or "conduct that is not crime." *See Goodin v. State*, 977 So. 2d 338, 340-41 (Miss. 2008) (reversing a conviction for sexual battery where the jury had not been required to find lack of consent).

[72] It also would have underscored the inconsistencies between her testimony and that of Ms. Anderson's uncle, Alan Graham, which the defense pointed out in summation. R. 765.

The jury's note asked the court whether "murder escalate[s] the sex automatically to sexual battery." R. 790; C. 275. The question posed the real likelihood that at least some of the jurors, trying to give relevance to the DNA evidence found in Ms. Anderson's vaginal cavity and the evidence of prior consensual sex between Mr. Galloway and Ms. Anderson, were asking whether vaginal penetration alone was enough to find sexual battery. The court's failure to respond adequately, as detailed in Point 2, and incorporated herein, risked that the jury did not find an essential element of the sexual battery predicate felony – nonconsensual anal penetration – but rather found that the murder automatically escalated the vaginal sex to sexual battery.

This error violated Mr. Galloway's rights to the presumption of innocence, due process of law, a fair jury trial, and a reliable sentencing determination and requires reversal of his conviction. U.S. Const. amends. V, VI, VIII, XIV; Miss. Const. art. 3 §§ 14, 26, 28, 31.

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

The State alleged that Mr. Galloway committed sexual battery by anal penetration against Ms. Anderson after he picked her up on the night of December 5, 2008, and during the commission of her murder. The sexual battery predicate felony was the factor that rendered Mr. Galloway eligible for capital murder.

The only evidence of sexual battery was the testimony of Dr. McGarry concerning injuries he observed to Ms. Anderson's anus. R. 675, 677, 678, 682, 739-40. Dr. McGarry's testimony that the injuries must have been caused by a penile penetration, to the exclusion of other instruments, and must have been nonconsensual, to the exclusion of consensual sexual activity, was bogus and should have been excluded. *See* Point 1, *supra* (incorporated herein). If Dr. McGarry had given scientifically valid testimony that the injury was **consistent with** nonconsensual, anal penetration, the evidence would have been insufficient to support a finding

of guilt beyond a reasonable doubt as to the predicate felony of anal sexual battery. *See Williams v. State*, 35 So. 3d 480, 485, 487 (Miss. 2010) (finding evidence of sexual battery insufficient when the only evidence that the child victim had been abused was the testimony of the State's expert that the child's anal injuries were "very consistent with anal penetration").[73]

Further, the State failed to adduce constitutionally sufficient evidence establishing that the alleged anal penetration must have occurred within the time Mr. Galloway was known to be around Ms. Anderson. Dr. McGarry described the tear only as "fresh" but otherwise gave no timeframe for it. R. 676. The State introduced evidence that Ms. Anderson had had a consensual sexual relationship with Mr. Galloway prior to her death, R. 526; State Ex. 16 at 5, and that she was sexually active with at least one other man. R. 607, 610. Given Ms. Anderson's history with Mr. Galloway and at least one other sexual partner, the State's evidence was insufficient to establish that the alleged penetration occurred during the commission of Ms. Anderson's murder, as required under MISS. CODE § 97-3-19(2)(e).

Moreover, the State failed to adduce constitutionally sufficient evidence that the alleged penetration was nonconsensual. According to the State's own evidence, Mr. Galloway and Ms. Anderson had communicated by phone numerous times in the previous months, including on December 5, 2008, and she left with him voluntarily the night of December 5th sometime after 10 p.m. R. 422-23; 432-33; 480-82. Again, they had had a consensual sexual relationship in the past. R. 526; State Ex. 16 at 5.

When "the facts and inferences … 'point in favor of the defendant on any element of the offense with sufficient force that reasonable men could not have found beyond a reasonable

[73] This issue was preserved in trial counsel's Motion for Judgment of Acquittal at the close of State's evidence and Motion for New Trial and for Acquittal Notwithstanding the Verdict. R. 686-89; C. 307-10. Alternatively, it is plain error, M.R.E. 103(d); *Flowers*, 947 So. 2d at 927, or should be reviewed by this Court under a relaxed procedural bar in this capital appeal, *Pinkney*, 538 So. 2d at 338, or the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488.

doubt that the defendant was guilty,'" as they do here, "the proper remedy is for the appellate court to reverse and render." *Bush v. State*, 895 So. 2d 836, 843 (Miss. 2005) (quoting *Edwards v. State*, 469 So. 2d 68, 70 (Miss. 1985)). Therefore, under the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Art. 3, §§ 14, 26, and 28 of the Mississippi Constitution, Mr. Galloway's capital conviction must be reversed and remanded, and he must be released. *See Jackson v. Virginia*, 443 U.S. 307, 314-15 (1979). In the alternative, this Court should reverse and remand for re-sentencing on the lesser-included offense of manslaughter.[74] *Shields v. State*, 722 So. 2d 584, 587 (Miss. 1998); *Wells v. State*, 305 So. 2d 333, 340 (Miss. 1974).

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

Mr. Galloway had a right under the Mississippi Rules of Evidence and the United States and Mississippi Constitutions to present evidence of prior sexual behavior of the victim in order to demonstrate that (1) any sexual behavior between him and Ms. Anderson was consensual; and/or (2) another person caused her anal injury and was the source of the DNA found in her vaginal cavity. In denying him that right, the trial court committed reversible error. R.E. Tab 6.

At a pretrial hearing on April 27, 2010, the State moved in limine to exclude any evidence of Ms. Anderson's prior sexual activity, including letters found in Ms. Anderson's school locker. R. 92-98; C. 64-70, 73-74. The letters, discovered by law enforcement, were addressed to a Demetri Lamar Brown. In them, Ms. Anderson repeatedly described Mr. Brown

[74] While this Court has stated that murder is a lesser-included offense of capital murder, *Spicer v. State*, 921 So. 2d 292, 312 n.19 (Miss. 2006), it cannot be so here. Mr. Galloway was charged with capital murder under a felony-murder theory, and thus the more serious offense of capital murder does not include all the elements of the lesser offense of simple murder. *See Friley v. State*, 879 So. 2d 1031, 1034 (Miss. 2004); *Nolan v. State*, 61 So. 3d 887, 903 (Miss. 2011). A conviction for capital murder did not require the jury to find that Mr. Galloway had "a deliberate design to effect" Ms. Anderson's death, as with simple murder. *Compare* MISS. CODE § 97-3-19(1)(a) *with* § 97-3-19(2)(e). In the sentencing phase, the jury refused to find that Mr. Galloway attempted to kill, intended that the killing take place, or contemplated that lethal force would be employed. It found only that he actually killed. C. 283-84.

as "sexy" and wrote that she "want you to go and need you and to lick my pussy and my toes!!!" C. 67-70. She closed one letter, "Demetree and Shakeylia FOR EVER. I love you." *Id*.

The court ruled that the defense could introduce evidence of sexual activity between Mr. Galloway and Ms. Anderson only if Mr. Galloway took the stand. R. 93. Regarding evidence of sexual activity between Ms. Anderson and others, the court ruled that it would not allow the defense to call witnesses to testify that they had sex with Ms. Anderson "the night before or two days before, a week before. That's not admissible." R. 96. The State's successful motions preemptively prevented the defense from offering such evidence pursuant to the procedure outlined in M.R.E. 412(c).

The court's rulings were in error. They violated M.R.E. 412(c), under which; (1) evidence of the victim's prior sexual activity with Mr. Galloway was admissible to show that any such activity on the night of her disappearance was consensual (M.R.E. 412(b)(2)(B)); and (2) evidence of her prior sexual activity with others was admissible to show that Mr. Galloway may not have been the source of the semen found in her vaginal cavity or the injury to her anus. M.R.E. 412(b)(2)(A). The court's rulings also denied Mr. Galloway his rights to due process, a fair trial, to present a defense, to compulsory process, to confrontation of witnesses, to remain silent, to effective assistance of counsel, and to a reliable sentencing determination. U.S. CONST. AMENDS. V, VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 24, 26, 28. *See also Caldwell v. State*, 6 So. 3d 1076, 1080 (Miss. 2009) (Rule 412 must not be construed so strictly so as to deny a defendant his constitutional rights) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)); *Holmes v. South Carolina*, 547 U.S. 319, 325 (2006); *Crane v. Kentucky*, 476 U.S. 683, 690-91 (1986); *Tennard v. Dretke*, 542 U.S. 274, 285 (2004).[75]

[75] Defense counsel stated that he had no objection to the State's motions in limine except as to evidence that might show the prior sexual encounters between Ms. Anderson and Mr. Galloway. R. 93. To the

Prior sexual activity with Mr. Galloway. The court's ruling that the defense could only introduce evidence of prior sexual activity between Ms. Anderson and Mr. Galloway if Mr. Galloway were to testify was reversible error. By its plain terms, M.R.E. 412(b)(2)(B) places no such requirement on the defendant's right to present such evidence. *See, e.g., Hunt v. State*, 877 So.2d 503, 511 (Miss. Ct. App. 2004) (testimony of third party regarding sexual encounter between the defendant and victim would not be precluded under Rule 412(b)). The Rule provides that evidence of prior sexual conduct between the defendant and victim is admissible to substantiate a claim that the victim voluntarily engaged in such activity with the accused. Further, the court's ruling unconstitutionally burdened Mr. Galloway's right to remain silent without an important state interest for doing so. *Mitchell v. United States*, 526 U.S. 314, 328-329 (1999).

Prior sexual activity with others. The court's ruling that Mr. Galloway could not present evidence of Ms. Anderson's prior sexual activity with others under any circumstance was also reversible error. It violated the plain terms of M.R.E. 412(b)(2)(A), served no legitimate state interest, and violated Mr. Galloway's constitutional rights. *See Holmes*, 547 U.S. at 325 (if state evidentiary rule does not serve a legitimate interest, application of the rule to exclude critical evidence violates right to present a defense).

Rule 412(b)(2)(A) provides that such evidence is admissible when "offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen, … or injury." Thus, when the prosecution alleged that Mr. Galloway caused Ms. Anderson's anal injury, he was entitled "to meet that evidence with proof of the

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extent these claims were not preserved, this Court should review them as plain error, *Flowers*, 947 So. 2d at 927; M.R.E. 103(d), under a relaxed procedural bar in this capital case, *Pinkney*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. It was also an arbitrary factor under which this death sentence was imposed. MISS. CODE § 99-19-105(3)(a).

complainant's prior sexual activity tending to show that another person might have been responsible for her condition." *Goodson v. State*, 566 So. 2d 1142, 1150 (Miss. 1990) (quoting *People v. Mikula*, 269 N.W.2d 195, 198 (Mich. Ct. App. 1978)).

Dr. McGarry gave no timeline for the tear to Ms. Anderson's anus except to say that it was "fresh." R. 676. According to the State's evidence, the DNA extracted from the sperm sample from Ms. Anderson's vaginal cavity contained a mixture of **at least** two individuals, R. 648, and sperm can remain in a vaginal tract up to 2-3 days. R. 651. Many of Mr. Galloway's alleles were missing from the mixture profile, which strongly suggested either that 1) he should be excluded from the profile because another person's DNA was a complete match; or 2) the mixture contained DNA from more than two people. *See* R. 706-08.

Evidence of sexual activity between Ms. Anderson and anyone else in the days preceding her disappearance could thus have supported the defense theory that Mr. Galloway was not the source of the victim's anal injury or the DNA in her vaginal cavity. During the cross-examination of Inv. Carbine, defense counsel asked whether she had obtained a DNA sample from Demetri Brown, the man to whom Ms. Anderson's letters were addressed. R. 530. However, because of the trial court's rulings, defense counsel did not ask about the sexually explicit letters. R. 530-31.

Additionally, the DNA lab collected reference samples from Mr. Galloway, James Futch, and Garrid Worlds. R. 640, 650. The State was allowed to present Mr. Futch's testimony, that he had recently had sex with Ms. Anderson, to explain the lab's finding that he was the major contributor to the DNA mixture in Ms. Anderson's vaginal cavity. R. 607, 650. Though Mr. Worlds' connection to this case was never revealed at trial, s*ee* R. 768, it is a logical assumption that his DNA was collected because he was either a suspect or another known sexual partner of

Ms. Anderson's. The trial court's ruling may well have prevented the defense from introducing evidence of the latter.

Defense counsel thus should have been able to rebut the prosecution's claim that Mr. Galloway had caused the tear with evidence that Ms. Anderson had been recently sexually active with other individuals. This Court has not hesitated to reverse sexual assault cases when the trial court improperly excluded evidence of the victim's prior sexual activity that may have provided an alternative explanation to the source of the semen or the victim's injury. *See Herrington v. State*, 690 So. 2d 1132, 1137 (Miss. 1997) (trial court improperly disallowed indirect evidence of victim's prior sexual activity with another that could have caused in victim's injury); *Heflin v. State*, 643 So. 2d 512, 516 (Miss. 1994) (reversible error to exclude evidence of victim's prior sexual activity with another, which was relevant to show that the defendant may not have been the cause of the injuries); *Amacker v. State*, 676 So. 2d 909, 913 (Miss. 1996) (similar).

The errors were not harmless. Ms. Anderson's prior sexual activity with Mr. Galloway and with others would have supported the defense's theories of third party guilt and/or that any sexual activity that occurred between Ms. Anderson and Mr. Galloway was consensual. Further, because the State relied on the predicate felony of sexual battery as an aggravating circumstance in the sentencing phase, evidence of Ms. Anderson's prior sexual activity could also have supported a sentence less than death for Mr. Galloway.

Mr. Galloway's conviction and death sentence must be reversed.

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

In his first police statement, Mr. Galloway explained that he had previously had sex with Ms. Anderson and that he had picked her up in his mother's car on December 5, 2008. R. 476-77; State Ex. 16. Thereafter, he invoked his right to counsel and the interrogation ended. State

Ex. 16. In his second statement, which Mr. Galloway initiated, he resumed where he had left off, explaining that he and Ms. Anderson had gone to a park on the night of the murder, where they had consensual sex. SR. 46. At the park, they were overpowered by two men with a gun, who raped and killed Ms. Anderson by setting her afire and running her over with the car. SR. 46-49.

The State introduced the first statement at trial. R. 479-80. However, it filed a pretrial motion seeking to prevent Mr. Galloway from introducing the second statement. R. 407. The trial court granted the motion, ruling that the second statement was inadmissible because it was self-serving. R. 406-08; R.E. Tab 11. As demonstrated below, the court's ruling was error as a matter of state evidentiary law and under the Constitutions of Mississippi and the United States.[76]

A. State Law Error: Under Mississippi Rule of Evidence 106, "[w]hen a writing or recorded statement or part thereof is introduced by a party," the party may not suppress "any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Mr. Galloway's second statement was admissible under Rule 106 because it (1) completed the story and (2) would have prevented the jury from being misled.[77] Further, it was not inadmissible merely because it was self-serving. Rule 106 allows admission of self-serving

[76] Defense counsel preserved the state evidence law claim when they asserted that the second statement should come in if the State "opened the door." R. 408. They preserved the constitutional claims by way of pretrial notice. C. 129-30. Alternatively, this Court should exercise its discretion to relax the procedural bar in this capital appeal because of the seriousness of this error in which the State misleadingly manipulated Mr. Galloway's own words to convict and condemn him to death. *See Pinkney*, 538 So. 2d at 338. If the Court elects to enforce a procedural bar, it should nonetheless reverse due to plain error, given the seriousness of this error and the overpowering prejudice it caused. *See Flowers*, 773 So. 2d at 326; *Mickell v. State*, 735 So. 2d 1031, 1035 (Miss. 1999). Further, because this error was an arbitrary factor under which Mr. Galloway's death sentence was imposed, the sentence must be reversed even absent preservation. MISS. CODE § 99-19-105(3)(a).

[77] *Swinney v. State*, 829 So. 2d 1225, 1235-236 (Miss. 2002) (holding that when State used inculpatory portion of a second statement made by defendant, it was error to preclude defense from asking about exculpatory declarations made in an earlier statement); *Banks v. State*, 631 So. 2d at 750 (Miss. 1994) (finding it reversible error to exclude portion of defendant's statement that "was relevant to show the full story of what happened").

statements that correct the false impression left when a party opponent uses a related statement in a misleading manner.[78]

Mr. Galloway's second statement was not a mere denial of guilt or an irrelevant self-serving declaration. Rather, it was a needed explanation of what happened *after* he picked up Ms. Anderson, which he had not explained in his first statement due to his invocation of his right to counsel. Without hearing it, the jury was obviously confused, asking in a note if Mr. Galloway's first statement was "stopped in the middle of the interview or was it the full interview?" C. 276. The second statement thus falls squarely within Rule 106's dictates and the trial court abused its discretion in granting the State's motion. *Banks*, 631 So. 2d at 750.

B. Constitutional Error: By admitting Mr. Galloway's incomplete and misleading first statement while suppressing his second statement, the trial court also denied Galloway's rights against self-incrimination and to confront all witnesses against him, compulsory process, present a defense, due process of law, a fair jury trial, and a reliable sentencing determination. *See* U.S. CONST. amends. V, VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 24, 26, 28, 31.

The court's decision gave Mr. Galloway no choice but to allow the State's arguments regarding his first statement (that the statement refuted the defense theory that someone else might have committed the crime and demonstrated that Mr. Galloway was with Ms. Anderson on December 5, 2008, and was the last person to be seen alive with her) to go uncorrected or take the stand in order to correct it, the court violated Mr. Galloway's Fifth Amendment right to remain silent at trial. *Swinney*, 829 So. 2d at 1236 (setting forth this constitutional concern).

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[78] *See, e.g.*, *Swinney*, 829 So. 2d at 1235 ("'The fact that the declarations made by the accused were self-serving does not preclude their introduction in evidence as a part of the whole statement.'") (*quoting* 29A AM.JUR.2D EVIDENCE § 759, at 122–23 (1994); *Sanders v. State*, 115 So. 2d 145, 147 (Miss. 1959) (holding that when State offers portion of defendant's statement, it is reversible error to exclude any portions "explanatory of, or connected," with it, including "any exculpatory or self-serving declarations"); *Davis v. State*, 92 So. 2d 359, 361 (Miss. 1957) (same); *Jones v. State*, 76 So. 2d 201, 203 (Miss. 1954) (same); *McIntyre v. Harris*, 41 Miss. 81 (1866) (similar).

Because Mr. Galloway's second statement was crucial and directly relevant to Inv. Carbine's testimony that Mr. Galloway had essentially admitted to being the last person with the victim while she was alive, R. 476, its suppression violated Mr. Galloway's rights to confront adverse witnesses and to compulsory process. *See Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986). The court's decision also violated Mr. Galloway's due-process right to rebut the State's case, *Simmons v. South Carolina*, 512 U.S. 154, 164-65 (1994), and to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324-325 (2006).

Additionally, because the capital murder conviction stemming from the court's error made Mr. Galloway eligible for the death penalty, *Brown v. Sanders*, 546 U.S. 212, 219 (2006), the error violated his Eighth-Amendment rights. U.S. CONST. amend. VIII, XIV. Further, the trial court's failure to follow black-letter state evidentiary law also violated Galloway's right to due process of law. U.S. CONST. amend. XIV; *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 424, 432-34 (1982) (concluding that state's failure to "comply with a statutorily mandated [state] procedure" violated due process).

The Error Was Not Harmless and Requires Reversal: Reversal is required because the State cannot prove that the errors were harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18 (1967), or that "the same result would have been reached had [the evidentiary error] not existed." *Kolberg v. State*, 829 So. 2d 29, 49 (Miss. 2002) (citation and internal quotation marks omitted). This is particularly so because the State exploited the error in at least two ways. First, Inv. testified that Mr. Galloway had essentially admitted to being the last person with the victim while she was alive. R. 476. Second, in summation, the State used Mr. Galloway's first statement to refute the defense theory that someone else might have committed the crime and as proof that Mr. Galloway was with Ms. Anderson on December 5, 2008. R. 779 ("Listen to the tape. His words, I picked her up driving my mom's car on Friday,

which was December 5th, the last night that Kela was seen alive. Those are his words…he told you that's what he did."); R. 778 ("The defendant said I picked her up. I picked her up the night she died. Listen to the tape.").

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

Mr. Galloway moved pretrial to suppress evidence obtained pursuant to an illegal search and seizure. The trial court denied the motion, violating Mr. Galloway's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Art. 3, §§ 14, 23, 26, 27, 28, 31 of the Mississippi Constitution. R.E. Tab 9. This Court must reverse.

The Facts. At the hearing on Mr. Galloway's motion to suppress evidence, Inv. Carbine testified that, immediately upon inspecting Shakeylia Anderson's body at the crime scene, law enforcement was "looking for a vehicle as a murder weapon." R. 101-102. Nancy Kurowski, an evidence and crime scene technician with the Harrison County Sheriff's Department, took tire impressions of some tire tracks at the scene. R. 550-51. Thereafter, Ms. Brimage told the police that on "Friday night at approximately 10:00 she saw Shakeylia get into a white Ford Taurus leaving from her grandmother's house with a light skinned black male that she knew to be Bo from the Moss Point area." R. 102-103. The investigation identified two individuals who went by the nickname "Bo" who lived in Moss Point and drove a white Taurus: Leslie Galloway, R. 103, and Derek Davis. R. 514-16.

Lt. McClenic with the Jackson County Sheriff's Department was the official who identified Mr. Galloway as a "Bo." R. 536. He "came up with a possible address of 6425 Shortcut Road" in Moss Point for Mr. Galloway, drove by the residence and observed a white Taurus in the driveway. R. 537. Inv. Carbine also "drove by the residence [and] obtained a car tag," and the name on the tag "[e]nded up being Leslie's mom," Ollie Varghese. R. 103-04.

Jackson County law enforcement then checked "records on Leslie Galloway, the Third, … [and] it was determined that the Moss Point Police Department had an outstanding warrant for his arrest." R. 537. The warrant was for "old fines," R. 104, a misdemeanor. R. 539. They also told Inv. Carbine that he had a suspended license. R. 109.

Lt. McClenic did not go to the door of 6425 Shortcut Road and execute the warrant. Instead, Jackson County police began "running constant surveillance" on 6425 Shortcut Road "for approximately an hour and a half." R. 537; 103. Lt. McClenic was several blocks away, "talking to Harrison County detectives." R. 540. He maintained "constant radio and phone contact" with the detectives running the surveillance. R. 540-41. Finally, the Taurus left the residence, and "was stopped a short distance from the residence." R. 537, 541. Leslie Galloway was immediately placed into custody, and handcuffed. R. 537, 540, 518, 541. Cornelius Triplett,[79] a friend of Mr. Galloway, was in the vehicle with him, but Mr. Triplett was not given an opportunity to drive the vehicle back to the residence. R. 114, 518.

Instead, Jackson County law enforcement officials did "an inventory of Galloway's vehicle prior to having it towed …." R. 104. Inv. Carbine conducted "a walk around" of the vehicle, performing a "visual inspection," including of the vehicle's undercarriage with a flashlight. R. 104-05. The State provided no evidence that this inventory search was conducted pursuant to and according to standardized police procedures. When asked whether she performed a "visual inspection" at every traffic stop, Inv. Carbine replied: "It depends on what I'm looking for. I've worked details where narcotics are hidden in particular areas under tire wells, engine compartments, gas tanks, which would be, you know, outside a normal patrol deputy's scope of interest." R. 114-15. When asked whether her inspection of the undercarriage

[79] At the pretrial hearing, Inv. Carbine mistakenly referred to Cornelius Triplett as Cornelius Treadway. R. 114.

of the vehicle was "standard operating procedure," Inv. Carbine replied: "No, sir. It depends. It can be standard operating. It just depends on what your stop is for …. There's no one particular way." R. 115. When asked whether she agreed that "[t]here's a multitude of ways you could have done this," Inv. Carbine replied, "There's lots of ways to do one, yes, sir." R. 115.

Inv. Carbine testified that when the vehicle's trunk lid was raised she saw some broken glass on the lip of the trunk. R. 473. In addition, when she "looked under the undercarriage from the passenger's side of the vehicle" she "saw something hanging, kind of flapping in the wind. I thought it might be skin or hair so I secured it, preserved it." R. 104. "I just squatted down. I had a flashlight because it was dark, and I saw it just hanging there." R. 105. Inv. Carbine secured the item because she "believe[d] that it might have some evidentiary value. We were looking for a vehicle that had caused the death of Shakeylia Anderson." R. 105. The "skin or hair" turned out to be skin, and a presumptive blood test proved positive. R. 105-106. It was sent to the crime lab for DNA testing. R. 106. At trial, the skin was introduced as State's Ex. 4. R. 472. Ms. Dubourg testified that the DNA profile obtained from the skin was "consistent with the DNA profile" of Ms. Anderson. R. 643.

The vehicle was then taken to Bob's Garage in Jackson County. R. 106 , 473. A warrant was obtained from the Jackson County Circuit Court to search the vehicle and once the warrant was executed, Inv. Carbine explained, "we took the vehicle as evidence along with other things collected during the search warrant." R. 106. The vehicle was lifted, and the undercarriage inspected. R. 474-75. One side of the undercarriage appeared to be cleaner than the other. R. 475, 566. Ms. Kurowski collected various pieces of potential evidence, including (1) possible blood above the trunk release latch (R. 560, State Ex. 22); (2) a swab of a possible blood stain on the left rear passenger door (R. 564-66, State Ex. 23); (3) a tissue-like substance taken from the left side of the undercarriage (R. 566-67, State Ex. 11); (4) a tissue-like substance taken from the

left front tire well (R. 567, State Ex. 10); (5) a tissue-like substance taken from the left of the exhaust undercarriage (R. 568, 570, State Ex. 12); (6) a stringy substance taken from the left rear tire (R. 569, State Ex. 13); and (7) a tissue-like substance taken from the right of the exhaust undercarriage (R. 569, State Ex. 14).

Ms. Dubourg testified that Ms. Anderson's DNA profile was consistent with the DNA profiles obtained from State's Ex. 11 (R. 643-44), State's Ex. 10 (R. 653), State's Ex. 12 (R. 644), State's Ex. 13 (R. 644), and State's Ex. 14 (R. 644-45). She testified that the DNA profile obtained from State's Ex. 22 "was consistent with being a mixture from at least two individuals. Shakeylia Anderson and Leslie Galloway cannot be excluded as donors of the DNA in this mixture." R. 648. She testified that the DNA profile obtained from State's Ex. 23 was consistent with Leslie Galloway's DNA profile. R. 649.

After the search in Jackson County, the vehicle was transported in an enclosed trailer to Harrison County, where another search warrant was obtained. R. 106. Other items of evidentiary value were found. R. 107. For example, tire impressions were taken from the vehicle. R. 498-500. *See* State Ex. 17. In addition, Ms. Kurowski cut out a portion of the left rear seat which had possible blood on it, introduced at trial as State's Ex. 19. R. 571-72, 593. At trial, Jimmy Perdue, a forensic scientist at the Mississippi Crime Laboratory, testified that the tread design of the Taurus' tires were "consistent with" some of the tire tracks at the crime scene. R. 619-23. Ms. Dubourg testified that Ms. Anderson's DNA profile was consistent with the DNA profile obtained from State's Ex. 19. R. 647.

At the conclusion of the suppression hearing, the trial court ruled that there was "probable cause" for Inv. Carbine to "conduct a walk around inspection of the vehicle" because "the defendant had been identified and the investigator determined that he met the description given him by the witnesses" and because "the vehicle met the description." R. 126; R.E. Tab 5.

The Law. **(i) The trial court erroneously concluded that Inv. Carbine had probable cause to search Ms. Varghese's vehicle.** Under the automobile exception to the warrant requirement, the police may conduct a warrantless search of a vehicle if there is probable cause to believe that the vehicle contains evidence of a crime. *U.S. v. Ross*, 456 U.S. 798, 823 (1982). Probable cause exists when, under the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "Probable cause means more than a bare suspicion but less than evidence that would justify condemnation." *Wagner v. State*, 624 So. 2d 60, 66 (Miss. 1993).

The mere fact that Mr. Galloway and his mother's car met the generalized descriptions given to the police did not constitute probable cause and permit Inv. Carbine to conduct a visual inspection of the vehicle. "Bo" is a common nickname, and the Ford Taurus is an extremely popular car model.[80] Thus, the trial court erred by ruling that Inv. Carbine had probable cause to search Ms. Varghese's vehicle.[81]

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[80] *See* Joseph E. Holloway, *African-American Names*, Slavery in America, http://www.slaveryinamerica.org/history/hs_es_names.htm (last visited Dec. 6, 2011) ("In African-American naming practices, every child receives a given name at birth and a nickname that generally follows the individual throughout life. Some examples of these nicknames are … Bo, Boo …."); *Bo (given name)*, Wikipedia, http://en.wikipedia.org/wiki/Bo_(given_name) (last visited Dec. 6, 2011); Behind the Name: Meaning, Origin and History of the Name Bo, http://www.behindthename.com/name/bo-1 (last visited Dec. 6, 2011); *Ford Taurus*, Wikipedia, http://en.wikipedia.org/wiki/Ford_Taurus (last visited Dec. 6, 2011).

[81] *See Conerly v. State*, 760 So. 2d 737, 741 (Miss. 2000) ("we find that the information contained within the record before us is insufficient to establish probable cause. If the sole reason for the issuance of the arrest warrant was [witness's] testimony of what her neighbors' 'thought,' then no probable cause existed to support the issuance of the warrant. Suspicion alone does not meet the constitutional standard of probable cause."); *State v. Woods*, 866 So. 2d 422, 427 (Miss. 2003) ("We find that probable cause under Article 3, § 23 of the Mississippi Constitution did not exist for the issuance of the search warrant because the information given to the Unit by the CI was not independently corroborated, because the CI was unknown to the Unit, and because no indicia of veracity or reliability was either included in the affidavit or presented orally to the issuing judge. Given this conclusion, we do not need to address the propriety of the search warrant under the Fourth Amendment to the United States Constitution."). *See also United States v. Shavers*, 524 F.2d 1094, 1096 (8th Cir. 1975) (noting limited utility of description of bank robber as black male 5'8" in community where population 50% black); *People v. Lewis*, 975 P.2d 160 (Colo. 1999) (clerks at 7-Eleven described robber as black male 6'1"-6'3" with athletic build wearing Colorado Rockies hat and black coat and pants; when officer soon thereafter found 4 black males, all

(ii) The inventory search of the vehicle immediately after Mr. Galloway was arrested was illegal. When conducting an inventory search, the police must follow standardized procedures (including whatever the established procedure is for allowing another driver at the scene to take away a vehicle driven by an arrested individual). *See Colorado v. Bertine,* 479 U.S. 367, 374 n.6, 375 (1987) ("Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria.") (citations omitted); *id*. at 376 (Blackmun, J., concurring); *Spicer v. State,* 921 So. 2d 292, 310 n. 13 (Miss. 2006) ("In order for an inventory search of an automobile to be lawful, the automobile must be lawfully in police custody, the inventory must be conducted pursuant to standard, routine police procedures, and that there must be no suggestion that the standard procedures are a pretext concealing an investigatory police motive."); *South Dakota v. Opperman*, 428 U.S. 364, 372-76 (1976).

Here, as established in the factual recitation above, the State failed to meet its burden[82] of demonstrating that the police's inventory search of Mr. Galloway's mother's car was conducted pursuant to and according to standardized procedures and criteria. *See, e.g. Florida v. Wells,* 495 U.S. 1, 4-5 (1990) (invalidating search of locked suitcase found in trunk of car during inventory search where highway patrol had no policy with regard to whether closed containers encountered during an inventory search could be opened). To take just two examples, it is entirely unclear why the police looked at the undercarriage of the vehicle as part of their "inventory" search and why they did not allow Mr. Triplett to drive the vehicle the short distance back to the mother's

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fairly tall with athletic builds and wearing dark clothing, no probable cause to arrest one of them; court stresses "description was so general as to fit three other persons in this one motel room alone"); *State v. Federici*, 425 A.2d 916, 923 (Conn. 1979) (no probable cause where "the two perpetrators were described only by sex and race" and as wearing "outer-wear-type garments."); *Commonwealth v. Sams*, 350 A.2d 788, 789 (1976) (description of assailants only as black males running on a certain street was insufficient to search juveniles one and one-half blocks away)

[82] *See, e.g., United States v. Richards*, 147 F.Supp.2d 786, 789 (E.D. Mich. 2001) ("The Government has the burden of showing that the inventory search was conducted pursuant to standardized procedures. *See United States v. Gregory*, Nos. 91-6400, 91-6431, 1992 WL 393144, at *7 (6th Cir. Dec. 22, 1992).").

residence. *Cf. United States v. Roberson*, 897 F.2d 1092, 1096 (11th Cir. 1990) (upholding an inventory search of an impounded car in a parking lot, noting that there was no one present to whom the officer could have given possession of the car).

(iii) Because the arrest of Mr. Galloway was a pretext for searching and seizing his mother's vehicle, the motion to suppress should have been granted. As this Court noted in *Graves v. State*, 708 So. 2d 858, 861 (Miss. 1997), Article 3, §23 of the Mississippi Constitution "provides greater protections" from unreasonable search and seizure than the federal constitution. *See also Scott v. State*, 266 So. 2d 567, 569–70 (Miss. 1972).

Under these precedents and under Article 3, § 23 of the Mississippi Constitution,[83] this Court should hold, as the courts of other states have done, that the police may not conduct an inventory search and seizure of a person or his property after a valid arrest when the arrest was merely a pretext for the search.[84]

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[83] The state constitutional issue was preserved. *See* C. 16, 21-22 (citing Article 3, § 23 of the Mississippi Constitution). Alternatively, it should be reviewed as plain error, *Flowers*, 947 So. 2d at 927; M.R.E. 103(d), under a relaxed procedural bar in this capital case, *Pinkney*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

[84] *See State v. Ladson*, 979 P.2d 833, 839 (Wash. 1999) (The Washington state constitution "forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires [that] we look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary."); *State v. Ochoa*, 206 P.3d 143, 146, 148, 150 (N.M. Ct. App. 2008) ("We conclude that the traffic stop of Defendant was pretextual and, departing from federal precedent, hold that pretextual stops violate the New Mexico Constitution"; "The *Whren* [*v. United States*, 517 U.S. 806 (1996),] opinion, authorizing pretextual traffic stops, has suffered widespread criticism of its legal reasoning, policy choices, and consequences"; "One of the main criticisms of *Whren* is its failure to acknowledge that because the extensive traffic code regulates all manner of driving, "[w]hether it be for failing to signal while changing lanes, driving with a headlight out, or not giving full time and attention to the operation of the vehicle, virtually the entire driving population is in violation of some regulation as soon as they get in their cars, or shortly thereafter'") (quoting *Ladson*, 979 P.2d at 842 n.10 (citations and internal quotation marks omitted) (other citations omitted)); *State v. Heath*, 929 A.2d 390, 402 (Del. Super. Ct. 2006) (the Delaware Constitution affords greater protection than the Fourth Amendment as set forth in *Whren*; court stated that its "concern is with those traffic stops demonstrated to have been made exclusively for the purpose of investigating an officer's hunch about some other offense"); *State v. Sullivan*, 74 S.W.3d 215, 221 (Ark. 2002) (under state constitution, "pretextual arrests – arrests that would not have occurred **but for** an ulterior investigative motive – are unreasonable police conduct warranting application of the exclusionary rule") (emphasis in original). *See also Fertig v. State*, 146 P.3d 492, 501 n.3 (Wyo. 2006)

In *Arkansas v. Sullivan*, 532 U.S. 769 (2001), the United States Supreme Court reached a contrary result when interpreting the Fourth Amendment. The Court reversed the holding of the Arkansas Supreme Court that the Fourth Amendment prohibits a pretextual arrest "made for the purpose of searching" a citizen's car. *See State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000). The Arkansas Supreme Court had expressed an unwillingness "to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity." *Id*. at 552. On remand from the United States Supreme Court, the Arkansas Supreme Court reiterated this unwillingness, holding that under the state constitution "pretextual arrests – arrests that would not have occurred but for an ulterior investigative motive – are unreasonable police conduct warranting application of the exclusionary rule." *Sullivan*, 74 S.W.3d at 221.

Here, as defense counsel explained below, R. 119-20, and as the facts detailed above establish, the arrest of Mr. Galloway on the warrant for old fines – which the police had previously made absolutely no attempt to execute – was nothing more than a pretext to search and seize his mother's car, and would not have occurred but for the ulterior investigative motive.

(following *Arkansas v. Sullivan*, 532 U.S. 769 (2001), with respect to traffic stops, but stating "we note a significant distinction between investigative detentions and arrests, and do not, by this opinion, intend to change what we previously stated about pretextual arrests in *Brown v. State*, 738 P.2d 1092, 1095 (Wyo. 1987)"; *Brown v. State*, 738 P.2d at 1095 ("Numerous state and federal courts have held that an arrest may not be used as a pretext to search for evidence of an unrelated crime …. A pretext search occurs when officers depart from routine procedure and engage in arrest and search activity which would not have been undertaken but for an underlying intent or motivation which, standing alone, could not supply a lawful basis for the police conduct.") (internal quotation marks and brackets omitted) (citing, *inter alia*, 2 W. LaFave, SEARCH AND SEIZURE, § 5.2(e) and § 1.4(e) at 93 (2nd ed. 1987)); *State v. Hoven*, 269 N.W. 2d 849, 851-53 (Minn. 1978) (reversing where police were investigating possible drug offenses, and instead of obtaining a search warrant based on this information, "they intended to arrest him on warrants stemming from the defendant's failure to appear in response to minor traffic violations"; they put the defendant's vehicle under surveillance, waited until the defendant got into the truck, and then pulled him over though no traffic violations occurred; "the pretextual nature of the arrest made the subsequent search of defendant's vehicle constitutionally impermissible.").

That car was the only real focus of genuine police interest. The police waited outside Mr. Galloway's residence for an hour and a half until he drove the vehicle away, and then immediately arrested him, seizing and searching the car.

The motion to suppress should have been granted, and the illegal fruits obtained pursuant to the illegal searches and seizures suppressed.

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

At the culpability phase, the prosecution introduced improper and highly prejudicial victim impact evidence through its first witness, Alan Graham. This evidence bore no relevance to the contested issue of Mr. Galloway's guilt and served only to inflame the jury.

Victim impact evidence includes descriptions of "the victim's personal characteristics." *Wells v. State*, 698 So. 2d 497, 512 (Miss. 1997); *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Mississippi law prohibits its introduction in the culpability phase unless it somehow bears on the issue of guilt. *Havard v. State*, 928 So. 2d 771, 792 (Miss. 2006). Indeed, even in the sentencing phase, Mississippi law allows victim impact evidence only under very narrow circumstances. *Id*. In addition, Mississippi law prohibits the introduction of irrelevant, highly prejudicial evidence. *See* MISS. R. EVID. 401, 403; *Kelly v. State,* 735 So. 2d 1071, 1081 (Miss. 1999). The admission of such evidence in this case, over defense objection, violated the Mississippi Rules of Evidence and Mr. Galloway's constitutional rights to a fair trial, due process of law, and a reliable

sentencing determination. R. 423.[85] *See* M.R.E. 401, 403, 602, 701, 702; U.S. CONST. amends. V, XIV; MISS. CONST. art. 3, §§ 14, 26, 28.[86]

The State called Mr. Graham because he was present at his mother's house with Ms. Anderson on the night that she disappeared, he had noticed that she was receiving phone calls from someone named "Bo," and he could estimate an approximate time that she left the house. R. 420-24. But his testimony far exceeded his account of these circumstances and instead focused on her physical appearance, the family members that she left behind, and the promising future that was taken from her.

Mr. Graham described Ms. Anderson as "beautiful, healthy, fun loving. She had dark eyebrows. She was like what we might call light skinned with a tan." R. 421. He called her "Ching" because she looked Asian when she was a baby. *Id*. He also described Ms. Anderson's family relationships, telling the jury that she was "the baby," the youngest of four siblings. *Id*. He testified that Ms. Anderson was a "senior in high school" and that she was "all excited about graduating and joining the Air Force. She had been in the ROTC." R. 423. The State asked Mr. Graham if other family members were in the Air Force, and he responded, over defense objection that the testimony was irrelevant, that "her older brother Jerry is still in the Air Force, and one of her sisters, Janice, was in the Air Force." R. 423.

This highly-inflammatory testimony, which went directly to "the victim's personal characteristics," possessed no legal relevance to the question of Mr. Galloway's guilt and served

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[85] If counsel's actions are deemed insufficient to preserve this claim (*but see supra* n.16), it should nonetheless be reviewed as plain error, *Flowers*, 947 So. 2d at 927; MISS. R. EVID. 103(d), through a relaxed procedural bar in this capital appeal, *Pinkney*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). It was also an arbitrary factor under which the death sentence was imposed. MISS. CODE § 99-19-105(3)(a).

[86] The error violated Mr. Galloway's Eighth Amendment rights because his capital murder conviction resulting from the improper admission of victim impact evidence rendered him eligible for the death penalty. *Brown v. Sanders*, 546 U.S. 212, 219 (2006).

only to inflame the jury. *Mack v. State*, 650 So. 2d 1289, 1325 (Miss. 1994). Its improper admission mandates reversal of this case.

23. Mr. Galloway was denied the effective assistance of counsel.

Mr. Galloway was entitled to the effective assistance of trial counsel. *Strickland*, 466 U.S. at 687. U.S. CONST. amends. VI, XIV; MISS. CONST. art. 3, § 26; M.R.A.P. 22(b). In capital cases, even more stringent obligations are mandated. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003). The totality of counsel's errors, including those noted in Points 4, 7, 8, 9, 13, 14, 15, 16, 18, 19, 21, 22, and 24 (incorporated here), and those described below, violated Mr. Galloway's right to counsel and requires reversal because "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." *Irby v. State*, 893 So. 2d 1042, 1049 (Miss. 2004); *Strickland*, 466 U.S. at 694; *Ross*, 954 So. 2d at 1003.

Voir Dire Ineffectiveness. "No competent defense attorney would intentionally leave someone on the jury who indicated a strong preference for the death penalty and also stated that he would require the defense to convince him that death was not appropriate even though he was aware that the burden of proof remains with the state." *Anderson v. State*, 196 S.W.3d 28, 41 (Mo. 2006) (finding counsel ineffective for failing to move to strike such a juror for cause). Yet defense counsel here ineffectively failed to challenge potential juror Mr. McCoy for cause, though he had raised his hand when asked whether he would automatically impose the death penalty upon a conviction for capital murder. R. 315-16. He clarified on individual voir dire that he meant he would automatically impose the death penalty upon conviction for capital murder if the defendant had a prior felony conviction. R. 316-19. Mr. Galloway has a prior felony conviction. *See Uttecht v. Brown*, 551 U.S. 1, 21-22 (2007) (jurors must be fairly able to consider both life and death sentences under facts of case).

Defense counsel also ineffectively failed to challenge for cause potential juror Ms. Smith, who said that if the case involved sexual assault, she would demand the death penalty, which this case allegedly did. R. 376-77. *Anderson*, 196 S.W.3d at 41.

Pretrial Ineffectiveness. Defense counsel failed to call up and/or ask for rulings on two critical pretrial motions. One, they failed to call up their motion to suppress any show-up identifications or in-court identifications of the defendant. C. 17. Defense counsel could have mounted a serious challenge to Ms. Brimage's highly suggestive in-court identification of Mr. Galloway, which severely prejudiced the defense as it identified Mr. Galloway as the last person seen with Ms. Anderson by her family on the night of her disappearance. *See* Point 16, *supra*.

Two, defense counsel failed to request a ruling on the portion of their motion to suppress Mr. Galloway's police statement challenging his waiver of his *Miranda* rights as not knowing, voluntary or intelligent. *See* R. 64-66 (court's ruling did not address the waiver of rights); R.E. Tab 8. *See, e.g., Miranda*, 384 U.S. at 476; *Tice v. Johnson*, 647 F.3d 87, 107-110 (4th Cir. 2011) (finding defense counsel ineffective for failing to invoke *Miranda* protections to suppress statement). Had defense counsel been successful in suppressing this statement, the prosecution would not have had the benefit of Mr. Galloway's admission that he picked up Ms. Anderson on the night of December 5, 2008.

Another pretrial failure occurred when defense counsel applied to fund Dr. Riddick in the presence of the State, thereby failing to take advantage of this Court's clear law stating that "the State has no role to play in the determination of the defendant's use of experts. The necessity and propriety of such assistance is a matter left entirely to the discretion of the trial court." *Manning v. State*, 726 So.2d 1152 (Miss. 1998). At the pretrial hearing, even the State acknowledged that it did not normally participate in such decisions. R. 68. Counsel's error gave the prosecution advance notice of its intent to question Dr. McGarry's testimony regarding the anal tear.

Compare McGilberry v. State, 741 So.2d 894, 917 (Miss. 1999) (finding any error in denying request to go *ex parte* harmless because defendant was statutorily required to disclose intent to present evidence of insanity prior to trial and therefore was not forced prematurely to reveal strategy).

Penalty Phase Ineffectiveness. Defense counsel promised the jury in its opening statement at the penalty phase that it would hear from Dr. Smallwood, a psychologist who met with Mr. Galloway and performed some tests on him. R. 812. But it failed to call Dr. Smallwood at all. The promise and/or the failure to deliver on it constituted ineffectiveness. *See, e.g., State v. Zimmerman*, 823 S.W.2d 220, 224 (Tenn. Crim. App. 1991) (holding "that the efforts of trial counsel were deficient, not necessarily with respect to preparation or investigation, but by the peremptory abandonment of the pre-established and reasonably sound defense strategy—providing for the testimony of the defendant, a psychologist, certain stipulated proof, and supportive witnesses....").

Defense counsel also was ineffective for failing to object to the court's sentencing instruction defining mitigation evidence as "any matter or aspect of the defendant's character or record and any other circumstance of the offense brought to you during the trial of this case **which you, the jury, deem mitigation** on behalf of the defendant." SR. Jury Charge 18 (emphasis added); C. 283; R. 841. This instruction violated the Eighth Amendment. *See Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) ("our cases have established that the sentencer … and may not refuse to consider[] any constitutionally relevant mitigating evidence.").

But for counsel's repeated unprofessional errors, there is far more than a reasonable probability of either an acquittal or a life sentence. *Strickland*, 466 U.S. at 687. Reversal is required.

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

As proof of the aggravating circumstance of a prior conviction for a crime involving "the use or threat of violence to the person," MISS. CODE § 99-19-101(5)(b), the prosecution introduced the Mississippi Department of Corrections "pen pack" regarding Mr. Galloway's prior carjacking conviction. R. 814; State Ex. 26. The only information in it suggesting the conviction involved the use or threat of violence to the person was the State's accusations in the "sterile indictment." *Williams v. State*, 684 So. 2d 1179, 1196 (Miss. 1996). The commitment and sentencing orders indicated only that he pled guilty to carjacking. State Ex. 26.

While some felonies involve violence per se,[87] the crime of carjacking does not. MISS. CODE § 97-3-117(1); *Young v. State*, No. 2010-KA-00825-COA, 2011 WL 3452117, at *6 (Miss. Ct. App. Aug. 9, 2011).[88] Therefore, the State was obliged to submit evidence of the use or threat of violence to prove the aggravator.[89]

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[87] *See Conner v. State*, 632 So. 2d 1239, 1268 (Miss. 1993) (robbery is per se a crime of violence); *Davis v. State*, 680 So. 2d 848, 851 (Miss. 1996) (aggravated assault is crime of violence); MISS. CODE § 99-15-107 (crimes of violence in determining eligibility for pretrial intervention programs include murder, aggravated assault, rape, armed robbery, manslaughter, and burglary of a dwelling house).

[88] MISS. CODE § 97-3-117(1) provides:

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

Although the crime of unarmed carjacking, for which Mr. Galloway pled guilty, "*may* qualify for a 'crime of violence,'" it can also occur when the perpetrator knowingly or recklessly takes a car "by force"[88] *or* "sudden or stealthy seizure or snatching" *or* "by putting in fear" *or* "by attempting to do so" *or* "by any other means." *See, e.g., Young v. State*, 2011 WL 3452117 at *6 ("One may argue that an accused may properly be convicted of carjacking… if he 'knowingly by sudden or stealthy seizure… or by any other means' takes a motor vehicle from another person's 'immediate actual possession' without any requirement that the prosecution prove that the accused employed violence, force, or the threat of force.").

In an analogous situation, when analyzing whether out-of-state convictions qualify as crimes of violence for purposes of this aggravating circumstance, this Court has noted that the conviction "must have been acquired under a statute which has as an element the use or threat of violence against the person, or by necessity, must involve conduct that is inherently violent or presents a serious potential risk of physical violence to another." *Holland v. State*, 587 So. 2d 848, 874 (Miss. 1991). The carjacking statute under Mississippi law has neither. Though force or violence can be a means by which a carjacking

The indictment in Mr. Galloway's pen pack was insufficient to establish that the crime involved a knowing "use or threat of violence" beyond a reasonable doubt. *But see Russell v. State*, 670 So. 2d 816, 832 (Miss. 1995) (indictment was relevant and admissible to show that the previous conviction was a crime of violence); *Nixon v. State*, 533 So. 2d 1078, 1099 (Miss. 1987) (similar). It contained only the State's accusations against Mr. Galloway, and nothing in the pen pack shows that he had pled guilty to the crime as charged in the indictment.[90] *See Simoneaux v. State*, 29 So. 3d 26, 43 (Miss. Ct. App. 2009) (Irving, J., specially concurring) (noting that indictments were not read during guilty plea hearing and thus could not be assumed to have been factual basis for plea). Consequently, "the document[s] submitted to the jury proved only the facts of conviction and confinement, nothing more." *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988). This Court has long held that "the fact that the defendant has been

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is committed, it is not always so, and carjacking does not by necessity involve conduct that is inherently violent or present a serious potential risk of violence to another.

Additionally, even if this Court were to hold that a carjacking conviction always involves violence, it should not automatically satisfy this aggravator because it has a potential recklessness *mens rea*. *Begay v. United States*, 553 U.S. 137, 145-46 (2008) (crime of violence must demonstrate defendant's propensity towards "purposeful, violent, and aggressive conduct"). In considering whether prior convictions should serve as sentence enhancements, federal courts have repeatedly rejected prior convictions, even with a use of force or violence element, when the crime carries a recklessness *mens rea*. *See United States v. Ossana*, 638 F.3d 895, 903 (8th Cir. 2011) (rejecting state conviction for aggravated assault as a crime of violence for sentence enhancement when recklessness was possible *mens rea*); *United States v. McFalls*, 592 F.3d 707, 716 (6th Cir. 2010) (expressly rejecting the argument that a crime of violence may stem from a *mens rea* of recklessness). Because Mr. Galloway could have pled guilty to carjacking under a recklessness *mens rea*, this Court should not accept the information contained in the pen pack as sufficient evidence of this aggravating circumstance as provided by MISS. CODE § 99-19-101(5)(b).

[89] *See Gillett v. State*, 56 So. 3d 469, 507 (Miss. 2010) (while escape conviction *could* involve use or threat of violence, violence was not a necessary element under the statute, and thus the State could not submit it as an aggravator by conviction alone). *See also United States v. Malloy*, 614 F.3d 852, 857 (8th Cir. 2010) (courts "cannot rely solely on the label given to a particular crime when deciding whether it qualifies as a crime of violence"); *United States v. Palomino Garcia*, 606 F.3d 1317, 1329 (11th Cir. 2010) ("Our sister circuits have…uniformly rejected the argument…that the label the state happens to attach to the crime of conviction determines whether it is a crime of violence….").

[90] Mr. Galloway's pen pack did not include a factual basis for the plea, a transcript of the plea colloquy, a written plea agreement, a judgment of conviction, or any other information suggesting that Mr. Galloway had assented to the crime as charged in the indictment when he pled guilty to carjacking.

indicted is not evidence of the facts charged in the indictment and that the indictment should not be considered as evidence of guilt." *Rainer v. State*, 438 So. 2d 290, 293 (Miss. 1983); *Lowry v. State*, 32 So. 2d 197, 199 (Miss. 1947) ("An indictment is not evidence, in a criminal prosecution…."). To the extent this Court has held that the allegations in a sterile indictment paired with a defendant's guilty plea constitutes sufficient proof of this aggravator, this holding should be overruled.

Additionally, use of the indictment as substantive evidence contravened Mr. Galloway's rights to a fair jury trial, to due process of law, and to a reliable sentencing determination. *See* U.S. Const. amends. VI, VIII, XIV.[91]

Because the prosecution failed to introduce sufficient evidence proving this aggravating circumstance beyond a reasonable doubt, this Court must invalidate it.[92] *See* U.S. CONST. amend. VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 26, 28, 31; *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); *Taylor v. State*, 672 So. 2d 1246, 1275 (Miss. 1996); MISS. CODE § 99-19-105(3)(b). Furthermore, Mr. Galloway's death sentence must automatically be vacated.[93] In any event, the error was not harmless for the following reasons:

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[91] *See also United States v. Alston*, 611 F.3d 219, 221, 226 (4th Cir. 2010) (defendant's prior Maryland conviction for second-degree assault was improperly used as a predicate conviction supporting imposition of an enhancement under the Armed Career Criminal Act (ACCA)) because it was based upon "prosecutor's proffer of the factual basis for an *Alford* plea"); *United States v. Vidal*, 504 F.3d 1072, 1087 (9th Cir. 2007) (when record failed to establish that defendant pled guilty to the complaint as charged, only that he pled guilty to statute, prior conviction was ineligible for sentence enhancement as prior violent felony); *United States v. DeJesus–Ventura*, 565 F.3d 870, 878–79 (D.C. Cir. 2009) (similar); *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008) (similar); *Barnett v. State*, 244 S.W.3d 6, 20 (Tex. App. 2011) ("state may not inform the jury of any specific allegations contained in an enhancement paragraph of a particular defendant's indictment."); *Ring v. Arizona*, 536 U.S. 584 (2002); *Mills v. Maryland*, 486 U.S. 367, 376-77 (1988) ("In reviewing death [penalty cases], the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.") (citation omitted).

[92] This Court has an independent obligation to review the sufficiency of the evidence of this aggravating circumstance. MISS. CODE § 99-19-105(3)(b); U.S. Const. amends. VIII, XIV. Defense counsel also was ineffective for failing to challenge this aggravator on these grounds. *Murray*, 477 U.S. at 488.

[93] *See Gillett*, 56 So. 3d at 534 (Kitchens, J., dissenting) (in a capital case, "heightened scrutiny requires reversal on even one invalid aggravator, and any legislative mandate to the contrary is an unconstitutional encroachment on judicial authority.").

(1) The evidence of Mr. Galloway's carjacking conviction would not otherwise have been before the jury. *See Gillett*, 56 So. 3d at 534-35 (Lamar, J., concurring in part and dissenting in part) (citing *Brown v. Sanders*, 546 U.S. 212, 220-21 (2006)).

(2) The prosecutor relied on the aggravator in penalty closing to argue for a death sentence, asserting that it was an "easy" and "already met" finding for the jury. R. 859. Further, "[e]ven without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" *Johnson*, 486 U.S. at 586 (citation omitted).

(3) The remaining aggravating circumstances do not outweigh the mitigating circumstances. MISS. CODE § 99-19-105(3)(d); U.S. Const. amends. VIII, XIV; Miss. Const., Art. 3, § 28.

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

The court erred in submitting to the jury an unconstitutionally vague and overbroad sentencing instruction on the especially heinous, atrocious, or cruel aggravator, MISS. CODE § 99-19-101(5)(h). The constitutionality of this aggravator can only be upheld if it is applied in a limited manner. *Maynard v. Cartwright*, 486 U.S. 356, 361-65 (1988); *Brown v. State*, 798 So. 2d 481, 501 (Miss. 2001); *Clemons v. State*, 593 So.2d 1004, 1005 (Miss. 1992). It was not so applied here. Furthermore, the prosecution adduced constitutionally insufficient evidence of the aggravator. [94]

[94] Defense counsel objected to the second paragraph of the instruction. R. 842. To the extent these claims were not preserved, however, this Court should review them as plain error, *Flowers*, 947 So. 2d at 927; M.R.E. 103(d), through a relaxed procedural bar in this capital case, *Pinkney*, 538 So. 2d at 338, or as the product of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. This Court has an independent obligation to review the sufficiency of the evidence of this aggravating circumstance. MISS. CODE § 99-19-105(3)(b); U.S. Const. amends. VIII, XIV. This constitutionally invalid aggravator also was an arbitrary factor under which death was imposed. MISS. CODE § 99-19-105(3)(a).

(1) *The court's unconstitutional "limiting" instruction*. At the prosecution's request, the trial court gave the following sentencing instruction on this aggravating circumstance to the jury:

> The court instructs the jury that in considering whether the offense was especially heinous, atrocious or cruel, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with indifference to or even enjoyment of the suffering of others.
>
> An especially heinous, atrocious or cruel capital offense is one accompanied by such additional acts as to set it apart from the norm of capital murders, the conscienceless or pitiless crime which is unnecessarily tortuous [sic] to the victim.
>
> If you find from the evidence beyond a reasonable doubt that the defendant utilized a method of killing which caused serious mutilation, that there was dismemberment of the body prior to death, that the defendant inflicted physical or mental pain before death, that there was mental torture and aggravation before death, or that a lingering or tortuous [sic] death was suffered by the victim, then you may find this aggravating circumstance.

SR. Jury Charge 20-21; C. 286.

The entire first paragraph of this instruction was declared unconstitutionally vague and overbroad by the United States Supreme Court in *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam); *id.* at 2 (Marshall, J., concurring).

The first sentence of the second paragraph suffers from the same constitutional flaws. A "person of ordinary sensibility could fairly characterize almost every murder as" a conscienceless **or** pitiless crime that is **unnecessarily torturous**. *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980). Few, if any, murderers demonstrate conscience or pity when killing their victims, nor do many ensure that their victims are not unnecessarily tortured.

Further, the second sentence in the second paragraph is also unconstitutionally vague. A "person of ordinary sensibility could fairly characterize almost every murder as" involving physical pain, **or** mental pain, **or** mental torture and aggravation before death, **or** serious mutilation, **or** dismemberment of the body prior to death, **or** lingering **or** torturous death. In any event, even absent this litany of alternative, disjunctive bases for a finding of heinousness, a

person of ordinary sensibility could fairly characterize almost every murder as involving, at the very least, "physical pain," "mental pain," or "mental torture and aggravation."

Although this Court has approved this instruction, Edwards v. State, 737 So. 2d 275, 315 (Miss. 1999), Mr. Galloway respectfully submits that it violated the Eighth and Fourteenth Amendments and §§ 14 and 28 of the Mississippi Constitution. *Cartwright*, 486 U.S. at 361-65.

(2) *The prosecution's insufficient evidence of this aggravator*. The trial court should not have submitted the especially heinous, atrocious, and cruel aggravator to the jury because the prosecution failed to adduce sufficient evidence to convince a reasonable juror beyond a reasonable doubt that the method of killing utilized caused the victims "physical pain," or "mental pain," or "mental torture and aggravation," or "serious mutilation," or "dismemberment of the body," or "a lingering death," or "a torturous death." Moreover, the jury's contrary finding was against the overwhelming weight of the evidence, and no reasonable juror could have possibly found this aggravator beyond a reasonable doubt. *See West v. State*, 725 So. 2d 872, 883-84 (Miss. 1998); *Taylor v. State*, 672 So.2d 1246, 1276 (Miss. 1996); *Evans v. State*, 422 So. 2d 737, 743 (Miss. 1982).

The events surrounding Ms. Anderson's death are unclear. The jury heard no evidence as to the order of events leading to her death and no evidence that she was conscious or aware of her impending death at the time of the murder. *See Taylor*, 672 So. 2d at 1276; *id*. at 1278 (Lee, C.J., concurring). Dr. McGarry conducted the autopsy and concluded that her death was caused by injuries she suffered after being run over by a vehicle. R. 679. Dr. McGarry made no determination whether she was conscious when the vehicle ran over her. Dr. McGarry observed injuries to Ms. Anderson that preceded the vehicle rollover, including some that would have been painful (R. 670; R. 674), but, again, he did not give an opinion as to whether these injuries occurred while Ms. Anderson was conscious. He observed defensive injuries on her body (R.

673), but gave no opinion as to the length of her struggle. *See State v. Johnson*, 751 A.2d 298 (Conn. 2000) (murder in which victim was aware of his attack for a short period of time and was conscious for a short time after fatal shot was not especially heinous, atrocious, or cruel); *Burns v. State*, 609 So. 2d 600, 606 (Fla. 2002) (murder was not especially heinous, atrocious, or cruel where trooper was shot after struggle with motorist).

(3) *The errors were not harmless.* Given the invalidity of this aggravator, this Court must necessarily reverse.[95] In any event, the aggravator was the centerpiece of the State's penalty phase closing arguments. *See, e.g.*, R. 857 (prosecution describing events to support the aggravator, including a "brutal rape," "beating," and non-fatal "cuts" to the neck, "setting fire … a million [] times hotter than touching your hand to a hot stove"). In rebuttal argument – the final words to the jury from the parties in the sentencing phase – the prosecution specifically and exclusively focused on this aggravator. R. 868-70. Further, the remaining aggravating circumstances do not outweigh the mitigating circumstances. Therefore, , this Court should reverse Mr. Galloway's death sentence and remand for a new sentencing hearing. MISS. CODE § 99-19-105(3)(d); U.S. CONST. amends. VIII, XIV; MISS. CONST. art. 3, § 28.

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

Prior to voir dire, the court administered the petit juror oath, Miss. Code § 13-5-71, requiring the prospective jurors to swear that they "will well and truly try all issues and execute all writs of inquiry that may be submitted to you by the Court during the present week and true verdicts render according to the law and the evidence so help you God?" R. 159-60. Then,

[95] *See Gillett,* 56 So. 3d at 534 (Kitchens, J., dissenting) (in a capital case, "heightened scrutiny requires reversal on even one invalid aggravator, and any legislative mandate to the contrary is an unconstitutional encroachment on judicial authority.").

before general voir dire questioning by the parties, the judge asked the jurors to "commit to me now … even though you don't know what the law will be until I give it to you, do you commit to me that you will follow the law that I give you at the end of the case?" R. 335-36. Administration of the petit juror oath and requiring jurors to commit to following the law prior to voir dire created a constitutionally intolerable risk that Leslie Galloway was unable to determine whether his prospective jurors could be fair and impartial and follow the dictates of the law.

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the United States Supreme Court held that a "defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors" can fairly follow the law governing capital punishment. *Id*. at 735-36. The Court held that the voir dire in the case before it created an unacceptable risk that the defendant was not able to determine whether the prospective jurors were able to fairly follow the law, and reversed. *Id*. at 739 (citing *Turner v. Murray*, 476 U.S. 28, 36 (1986) (plurality opinion)).

The court's actions prior to voir dire posed the same constitutionally intolerable risk to Mr. Galloway. A central purpose of voir dire is to determine whether prospective jurors are able to render true verdicts in accordance with the law and evidence. However, jurors who have sworn that they will render such verdicts and have committed to doing so will be far less willing to admit during voir dire that they are unable to do so (to admit that they are unable to do so would be to admit in effect that they had sworn falsely). Accordingly, the oath administered and the commitment required of jurors to follow the law created a constitutionally intolerable risk that Mr. Galloway was denied his constitutional right to ascertain whether the jurors in his case could be fair and impartial and follow the law. As in *Morgan*, under the Sixth, Eighth and Fourteenth Amendments, this case must be reversed and remanded for a new penalty trial.

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

Pursuant to MISS. CODE § 13-5-1, the jury venire in this case was limited to qualified electors of Harrison County or resident freeholders for more than one year. *See* R. 156-57.

These limitations violated potential jurors' rights under the equal protection and due process clauses of the U.S. Constitution to be free of discrimination on the basis of property ownership as well as their fundamental right to serve on juries.[96]

U.S. CONST. AMENDS. V, XIV; MISS. CONST. art. 3, §§ 14 & 26. Because jury service is a fundamental right, Mississippi must show that its property ownership requirement is narrowly tailored to serve a compelling state interest. *Powers v. Ohio*, 499 U.S. 400 (1991) (implying that jury service is a fundamental right). It clearly cannot do so and, therefore, the requirement is unconstitutional.

Additionally, Mississippi's property ownership requirement is unconstitutional because it is not rationally related to any legitimate governmental interest and amounts to invidious discrimination. *See Quinn v. Millsap*, 491 U.S. 95, 106-07 (1989) (Missouri requirement that only owners of real property can serve on government boards violated equal protection clause because not rationally related to any legitimate governmental interest); *Turner v. Fouche*, 396 U.S. 346, 361-64 (1970) (similar). Further, exclusion from jury service on basis of financial status, which directly determines if one can own property, is constitutionally impermissible. *See Carmical v. Craven*, 547 F.2d 1380, 1382 (9th Cir. 1977).

Moreover, Mr. Galloway had a constitutional right to a fair and impartial jury drawn from a fair-cross-section of the community, which was denied him by the State's limitations on the jury venire. *See* U.S. CONST. AMENDS. VI, XIV; MISS. CONST. art. 3, § 31. *See also Taylor v. Louisiana*, 419 U.S. 522, 528-31 (1975). "To establish a prima facie violation of the fair cross

[96] A criminal defendant has standing to raise equal protection claims of third parties who were excluded from jury service. *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

section requirement: the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." *United States v. Williams*, 264 F.3d 561, 568 (5th Cir. 2001) (*citing Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Here, the excluded groups are distinctive groups in the community— new non-elector freeholders and all non-elector residents who do not own property. In addition, the exclusion of these groups means that their representation in jury venires is not fair and reasonable in relation to the number of such persons in the community. In Harrison County, 34.7%, or approximately 64, 935, of the residents do not own property and therefore are not eligible for jury duty if not electors.[97] Finally, the underrepresentation of these groups is due to their systematic exclusion as required by MISS. CODE § 13-5-1.

Further, the statute's one-year residency requirement for non-elector freeholders makes it a durational residence law, and because the requirement does not further any compelling state interest it violates the fundamental right to travel as guaranteed by the equal protection clause. *See Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972) (holding that state laws requiring a would-be voter to have been a resident for a year in state and three months in county do not further any compelling state interest and violate equal protection, and that requiring only 30 days of residence would be ample for the state to complete whatever administrative tasks may be needed). Mr. Galloway's conviction and death sentence must be reversed.

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

[97] *See* U.S. Census Bureau, Quick Facts, Harrison County, MS, *available at* http://quickfacts.census.gov/qfd/states/28/28047.html (last visited Sept. 1, 2011).

Defense counsel filed a number of pretrial motions challenging the constitutionality of Mississippi's capital punishment statute. *See* C. 25-29, 30-33, 34-36, 39-40. In denying them, R. 11, 12, 13, R.E. Tab 5, the trial court violated Mr. Galloway's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Art. 3, §§ 14, 23, 26, 27, 28, 31 of the Mississippi Constitution. Reversal is required for the following reasons:

First, the jury in Mr. Galloway's case made no specific intent finding whatsoever, and it is constitutionally impermissible to execute a defendant without a finding of specific intent to commit a crime. The Supreme Court has stated, "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting H. Hart, PUNISHMENT AND RESPONSIBILITY 162 (1968)). "American criminal law has long considered a defendant's intention –and therefore his moral guilt – to be critical to 'the degree of [his] criminal culpability.'" *Enmund*, 782 U.S. at 800 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).[98]

In its sentencing verdict, the jury found only that Mr. Galloway actually killed; it declined to find that he attempted to kill, intended that the killing take place, or contemplated that lethal force would be employed. C. 283-84. Further, in its guilty verdict, the jury found only that Mr. Galloway killed with or without design to effect death. C. 262. In addition, the jury found that the predicate felony was sexual battery as defined by Section 97-3-95, which is not a specific intent crime. *Jones v. State*, 936 So. 2d 993, 999 (Miss. Ct. App. 2006). Thus, Mr. Galloway cannot be executed consistent with the United States Constitution and the Mississippi Constitution.

[98] *See also Tison v. Arizona*, 481 U.S. 137, 156 (1987); *Kennedy v. Louisiana*, 554 U.S. 407, 437-38 (2008); Edward Coke, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 107 (London, Printed by M. Flesher for W. Lee & D. Pakeman 1644) ("Actus non facit reum, nisi mens sit rea" (a harmful act without a blameworthy mental state is not punishable)).

Second, by treating the nature of Mr. Galloway's *mens rea* as a threshold aggravating issue, *see* MISS. CODE § 99-19-101(5)(d), Mississippi's capital punishment statute put beyond the effective reach of the sentencing jury the mitigating fact that Mr. Galloway did not kill, attempt to kill, or intend that a killing take place, which violated the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Mississippi Constitution. The U.S. Supreme Court has held that a capital sentencer must be able to consider as a mitigating circumstance the character of the defendant's *mens rea*.[99] It also has held that capital punishment statutes may not put mitigating evidence "beyond the effective reach of the sentencer." *Johnson v. Texas*, 509 U.S. 350, 362 (1993) (quoting *Graham v. Collins*, 506 U.S. 461, 475 (1993)).

Third, under Mississippi's capital punishment scheme, persons convicted of killing a human being with "deliberate design" or by committing "an act eminently dangerous to others and evincing a depraved heart" are guilty only of simple murder and are ineligible for the death penalty (*see* MISS. CODE § 97-3-19(1)) unless an aggravating factor applies in their cases. *See* MISS. CODE § 97-3-19(2).[100] However, persons such as Mr. Galloway convicted of felony murder *simpliciter* automatically are guilty of capital murder and eligible for the death penalty (*see, e.g., Jones v. State*, 381 So. 2d 983, 989 (Miss. 1980)), if the predicate felony was, *inter alia*, sexual battery. *See* MISS. CODE § 97-3-19(2)(e). Furthermore, the predicate felony of sexual battery is a statutory aggravating circumstance that juries are instructed to weigh against mitigating circumstances in determining whether the defendant receives a death sentence, and the jury did so in this case. *See* MISS. CODE §

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[99] *See Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (vacating death sentence because Ohio statute did not permit the sentencing authority to take into account "[t]he absence of direct proof that the defendant intended to cause the death of the victim"); *see also id*. at 613, 615-616 (Blackmun, J., concurring).

[100] MISS. CODE § 97-3-19(2)(e) reads in pertinent part:

> (2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson, robbery, sexual battery, unnatural intercourse … with mankind, or in any attempt to commit such felonies;

99-19-101(5)(d).[101] *See also* C. 303. The scheme, therefore, violates the Eighth Amendment to the United States Constitution and Section 28 of the Mississippi Constitution in the following two ways. *But see Holland v. State*, 705 So. 2d 307 (Miss. 1997) (plurality opinion).

One, it does not furnish a principled means of distinguishing defendants eligible for the death penalty. The Supreme Court has held that the death penalty may be imposed constitutionally only if the sentencing body's "discretion [is] suitably directed and limited" so as to avoid arbitrary and capricious executions. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). In Mississippi, this limiting function is achieved through aggravating circumstances. As the Court has stated, "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (aggravators must "**reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder**") (emphasis added). *See also Godfrey*, 446 U.S. at 427-29.

As applied to felony murderers, Mississippi's capital punishment statute does not satisfy these commands. It cannot be tenably denied that there is no rational or historical basis for treating simple felony murderers as **more culpable** than premeditated murderers for purposes of capital punishment.[102] *See Tennessee v. Middlebrooks*, 840 S.W.2d 317, 345 (Tenn. 1992); *State v.*

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[101] MISS. CODE § 99-19-101(5)(d) reads in pertinent part:

> (5) Aggravating circumstances shall be limited to the following:
>
> (d) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any ... sexual battery….

[102] Those few states which treat simple felony murder and intentional murder as equivalent apparently justify their decision by inferring malice aforethought from the intentional commission of the felony. "The felony-murder rule was an effort to create felony liability for accidental killings caused during the course of an attempted felony." *Enmund*, 458 U.S. at 816 n.28 (O'Connor, J., dissenting) (citing ALI, Model Penal Code § 210.2 Comment, n.74 (Off. Draft and Revised Comments 1980)). "Over time, malice aforethought came to be inferred from the mere act of killing in a variety of circumstances," including the commission of a felony. *Tison*, 481 U.S. at 156.

Cherry, 257 S.E.2d 551, 567 (N.C. 1979) ("highly incongruous" to treat simple felony murderer as more culpable than simple intentional murderer).

Two, Mississippi's capital punishment scheme, as applied to felony murderers, violates the Eighth and Fourteenth Amendments because it does not furnish a principled means of distinguishing defendants who receive the death penalty. Before a jury may consider imposing a death sentence under Mississippi law, the jury must determine that mitigating circumstances do not outweigh aggravating circumstances. MISS. CODE § 99-19-101(3). Again, one such aggravator is the predicate sexual battery. The United States Supreme Court has held that even the fact of intentional murder does not furnish a principled means of distinguishing murderers, and has specifically held that a State may not treat "every unjustified, intentional taking of human life" as an aggravating circumstance. *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988). *See also Godfrey*, 446 U.S. at 433. If that is so, clearly a finding of felony murder does not.

Fourth, the sexual battery in this case was used both to make the murder death-eligible and as a means of narrowing the class of murders. Such dual use violates the longstanding constitutional precept that a death penalty can be imposed constitutionally only if the sentencing body's "discretion [is] suitably directed and limited" so as to avoid arbitrary and capricious executions. *Gregg*, 428 U.S. at 187. *See also Engberg v. Meyer*, 820 P.2d 70, 91-92 (Wyo. 1991) (impermissible to use underlying felony as aggravating circumstance when already used to elevate crime to capital murder). *But see Loden v. State*, 971 So. 2d 548, 569 (Miss. 2007) (rejecting this claim). Where as in Mississippi state law does not narrow the class of death eligible offenders sufficiently in its definition of capital murder, then under the Constitution no element of the offense may be used to perform the narrowing function, and, therefore, Mississippi cannot serve treat the predicate sexual battery as an aggravating circumstance. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *Poland v. Arizona*, 476 U.S. 147, 156 (1986);

Zant, 462 U.S. at 878; *United States v. McVeigh*, 944 F.Supp. 1478, 1489-90 (D. Colo. 1996) (striking duplicative aggravators as they only serve to skew the weighing process in favor of death).

Because the jury in Mr. Galloway's case unconstitutionally weighed the sexual battery as an aggravating circumstance, *see* C. 303, his death sentence must be reversed under the harmless error test set forth by the Supreme Court in *Brown v. Sanders*, 546 U.S. 212, 220-21 (2006). According to *Brown*, the State is required to prove beyond a reasonable doubt that "one of the other sentencing factors enable[d] the sentencer to give aggravating weight to the same facts and circumstances" as the invalid aggravator. *Id*. at 220. Here, the State cannot prove beyond a reasonable doubt that another aggravating circumstance would have enabled the jury to give aggravating weight to the sexual battery. Mr. Galloway's death sentence must be reversed.

Fifth, the death sentence in this case is wanton, freakish, excessive, and disproportionate and, therefore, violates MISS. CODE § 99-19-105(3)(c) and (5) and the Eighth Amendment.[103] To affirm a death sentence, the Court must conclude "after a review of the cases coming before this Court, and comparing them to the present case, [that] the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other." *Nixon v. State*, 533 So. 2d 1078, 1102 (Miss. 1987). Proportionality review takes into consideration both the crime and the defendant. *Id*. It provides a measure of confidence that the "penalty is neither wanton, freakish, excessive, nor disproportionate," *Gray v. State*, 472 So. 2d 409, 423 (Miss. 1985), and that it is limited as the Eighth Amendment requires to those "worst of the worst" offenders who commit "a

[103] The decision in *Pulley v. Harris*, 465 U.S. 37 (1984), does not obviate the constitutional need for appellate review of this death sentence. The Court rejected the argument that the Eighth Amendment contains an "invariable rule in every case" that an appellate court compare the death sentence in the case before it with the penalties imposed in similar cases. *Id*. at 43-44. Here, Mr. Galloway seeks only a determination whether *his* death sentence is disproportionate and/or the product of passion, prejudice, or other arbitrary factors.

narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quotation omitted).

Here, the offense for which the defendant was convicted was, though tragic, simply not within that "narrow category of the most serious crimes" that the Eighth Amendment contemplates punishing with the ultimate penalty. And given that the jury in Galloway's case made no specific intent finding whatsoever, there is no way that he can be considered someone whose "extreme culpability" makes him "the most deserving of execution." *Id.*

Sixth, Mississippi's death penalty scheme is being applied in a discriminatory and irrational manner in violation of the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment and corresponding provisions of the Mississippi Constitution. In the entire history of Mississippi's death penalty, only one white person has ever been executed for a crime against a black person and no white woman has ever been executed; in Mississippi's modern death penalty era, no female of any race has been executed.[104] The death penalty in the United States and Mississippi has been and is being imposed discriminatorily against defendants convicted of killing whites, against defendants convicted of killing white women, against males, and against poor people.[105]

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[104] *See* Death Penalty Information Center, *Executions Database, available at* http://www.deathpenaltyinfo.org/executions (search by state) (last visited December 13, 2011); *Executions in the U.S. 1608-2002, the ESPY File, available at* http://www.deathpenaltyinfo.org/documents/ESPYstate.pdf (last visited December 13, 2011); Michael L. Radelet, *Executions of Whites for Crimes Against Blacks: Exceptions to the Rule?*, 30 SOC. Q. 529, 537-41 (1989) (describing all white-on-black cases that have resulted in an execution).

[105] *See, e.g.*, David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1742-45 (1998) (citing, *inter alia*, Richard Berk & Joseph Lowery, Factors Affecting Death Penalty Decisions in Mississippi (June 1985) (unpublished manuscript)); Lindsey S. Vann, *History Repeats Itself: The Post*-Furman *Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1270 (2011) ("Racial disparity continues to plague the death penalty's imposition, indicating a return to arbitrariness. The majority of studies show the race of the victim or defendant is likely to influence charging decisions and ultimately who receives the death penalty. As of 2009, over forty-three percent of all executions since *Furman* were carried out on minorities. The death penalty is still predominantly imposed on men and the

Because Mississippi's death penalty scheme is unconstitutional as applied in this case and on its face, Mr. Galloway's death sentence must be vacated.

29. Prosecutors' unfettered, standardless, and unreviewable discretion violates equal protection, due process, and the Eighth Amendment.

Mississippi lacks statewide standards governing the discretion of local prosecutors to seek or decline to seek the execution of death-eligible defendants. *See* MISS. CODE §§ 97-3-19, 99-19-101, (pertinent portions of capital sentencing statute, none of which include such standards). As a result, the decision whether to seek the death penalty turns completely on the personal policies of the local prosecutor.[106] Thus, Mr. Galloway's death sentence violates his constitutional rights to equal protection, due process, and to a reliable sentencing determination. *See* U.S. CONST. amends. V, VI, VIII, XIV; MISS. CONST. art. 3, §§ 14, 24, 26, 28.

Equal protection. "[U]niform" and "specific" vote-counting standards are required to prevent the arbitrary and disparate treatment of similarly situated people whose fundamental right to vote is at stake. *Bush v. Gore*, 531 U.S. 98,102, 106 (2000). Because Mississippi's death penalty system concerns a right more fundamental than the right to vote – the right to life, s*ee Furman v. Georgia*, 408 U.S. 238, 359 (1972) (Marshall, J., concurring) – its system must satisfy the equal protection principles enunciated in *Bush* and must value the lives of all citizens equally. Just as a "State may not, by [] arbitrary and disparate treatment, value one person's vote over that of another," *Bush*, 531 U.S. at 104-05, a state may not, by arbitrary and disparate treatment, value one person's life over that of another.[107] As established above, Mississippi fails

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ill-educated. At year-end 2009, over ninety-eight percent of condemned death row inmates were males and only nine percent had more than a twelfth grade education.") (footnotes and citations omitted).

[106] *See, e.g.*, Editorial, *Hinds DA: Budget Shouldn't Dictate Law*, CLARION-LEDGER (Jackson, MS), Oct. 27, 2009 (Hinds County District Attorney's decision to seek death penalty is based on "budget issues and other factors").

[107] Since *Bush*, commentators have recognized that its logic prohibits standardless prosecutorial discretion to seek death against statutorily eligible defendants. *See, e.g.*, Laurence Benner, et. al, *Criminal Justice in*

this test. Its law does not even provide an "abstract proposition" or a "starting principle," *Bush*, 531 U.S. at 106, as to how local prosecutors should make these life-and-death decisions, and it is clear that similarly-situated defendants have not been treated equally across Mississippi. *See* Point 28, *supra*.

Due process. In determining the scope of due process protections, three factors must be balanced: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The discretion granted to Mississippi prosecutors violates Appellant's right to due process under this test. The interest at stake – the right to life – is the most fundamental of all. The lack of standards increases the risk of an erroneous deprivation by failing to ensure that the death penalty is applied to those individuals "who act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Atkins v. Virginia*, 536 U.S. 304, 306 (2002). Statewide standards would reduce the risk of arbitrary application and could be adopted with relative ease. Additionally, the state's interest in granting prosecutors this unbridled discretion is minimal at best. Therefore, the standardless prosecutorial discretion to seek the execution of death-eligible defendants in Mississippi violates due process.

Cruel and unusual punishment. Capital sentencers' decisions must be guided by standards to narrow and guide their discretion. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 195 (1976). However, because a prosecutor's "**decision whether or not to seek capital punishment**

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the Supreme Court: An Analysis of United States Supreme Court Criminal and Habeas Corpus Decisions (October 2, 2000 - September 30, 2001), 38 Cal. W. L. Rev. 87, 90-94 (Fall 2001).

is no less important than the jury's, . . . [his or her] 'discretion must [also] be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *DeGarmo v. Alabama*, 474 U.S. 973, 974-975 (1985) (Brennan, J., dissenting from denial of cert.) (emphasis added) (quoting *Gregg*, 428 U.S. at 189). In *Gregg*, Justice White stated that, "[a]bsent facts to the contrary," he would not assume that prosecutors would "exercise [their] power in a standardless fashion." *Id.*, 428 U.S. at 225 (White, J., concurring). Justice White asserted that "defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong." *Id.* However, it is clear that geography, more than the nature of the offense or the State's proof, is the most indicative factor that a prosecutor will seek the death penalty. *See* Richard Willing & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at A1 ("differences in murder rates or population do not explain all the county-by-county disparities. Instead, the willingness of the local prosecutor to seek the death penalty seems to play by far the most significant role in determining who will eventually be sentenced to death").

Because of the lack of standards governing this use, the death penalty continues to be imposed in an arbitrary, freakish, and discriminatory manner in violation of the Constitution. This Court should reverse.

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

Even if a single error does not require reversal, Mr. Galloway is entitled to reversal due to the cumulative effect of the errors. This Court has long adhered to the cumulative error doctrine, particularly in capital cases. *Flowers*, 947 So.2d at 940 (Cobb, P. J. concurring). Under it, even if a single error is insufficient to require reversal, the cumulative effect of them can. *Walker v. State*, 913 So. 2d 198, 216 (Miss. 2005), *Jenkins v. State*, 607 So. 2d 1171, 1183 (Miss. 1992), *Griffin v. State*, 557 So. 2d 542, 553 (Miss. 1990). As the above errors, incorporated here, make

clear, even if there are doubts about the harm of any one error in isolation, the cumulative error doctrine requires reversal. *Griffin*, 557 So. 2d at 553.

Conclusion

For the above reasons, individually and cumulatively, Mr. Galloway respectfully requests that this Court reverse his conviction and death sentence as illegally obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the Mississippi law set forth herein, and order the appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, postage pre-paid, by United States Mail, a true and correct copy of the above Brief and of the Record Excerpts associated with it to:

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THIS the 20th day of December, 2011.

_____
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